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Chairman: Mr. Kawamura (Vice-Chairman) . . . . . (Japan)

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In the absence of Mr. Mochochoko (Lesotho), Mr. Kawamura (Japan), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Montesino** (Spain), referring to the topic of reservations to treaties, said that the very comprehensive and accurate work carried out should help States to resolve practical issues that had not been sufficiently covered by the Vienna Conventions on the Law of Treaties. His delegation commended the preparatory work done and hoped that future sessions would consider the validity of reservations and objections, which was a pressing concern in State practice.

2. In connection with the Special Rapporteur's fourth report (A/CN.4/491 and Add.1-6), he said he endorsed the correction accepted by the Rapporteur excluding statements of non-recognition from the concept of a "reservation". As had been clarified in the guidelines already adopted and in the Vienna Conventions, it was clear that the legal regime for reservations, and in particular objections, could not be applied to reservations relating to non-recognition. Guideline 1.3 had been provisionally adopted by the Commission on first reading, despite the lack of consensus on whether that type of reservation was appropriate to an act that purported to exclude or modify the legal effect of certain provisions of a treaty.

3. His delegation agreed with the definition of conditional interpretative declarations contained in guideline 1.2.1, on the understanding that the distinction between such declarations and reservations related only to the definition. As far as effects were concerned, conditional interpretative declarations should be governed by a legal regime similar to that governing reservations, which would include both the *ratione temporis* limitation and the possibility of formulating objections.

4. In relation to guideline 1.5.1, he said his delegation shared the view that a unilateral statement by which a State party to a bilateral treaty purported to obtain a modification of that treaty could not be considered a reservation. The title of the guideline should therefore be modified so as to be in keeping with the guideline's content.

5. In connection with the Commission's discussion of unilateral acts of States, his delegation was also somewhat baffled by the view that considering unilateral acts to be "autonomous" would reduce the topic's scope too much. It would be appropriate to apply that term to unilateral acts based on either treaty or customary law. There was a need for greater knowledge of State practice so that the study could go beyond the definition of a unilateral act as reformulated in paragraph 589 of the Commission's report (A/54/10 and Corr.1 and 2).

6. He welcomed the widening of the topic to include unilateral acts of States in relation to one or more international organizations. However, in view of the difficulties inherent in consideration of unilateral acts formulated by international organizations, that area should be considered separately at a later stage of the Commission's work.

7. His delegation was in favour of basing the legal regime for unilateral acts on the 1969 Convention on the Law of Treaties. As to the regime of safeguards for greater legal security, he noted that the requirement for publicity contained in the original definition had been deleted, as it did not apply to all cases. However, a definition was needed of the formality required for the act to be expressed and clearly known by the States or organizations to which it was addressed, in order to avoid problems of proof and controversy about the content.

8. A restrictive formulation was appropriate for the question of State representatives with the capacity to formulate unilateral acts. In that context, article 4, paragraph 3, should be deleted as it contradicted general State practice.

9. Finally, the issue of revocability of unilateral acts required clarification, and the effects of silence and acquiescence should also be studied.

10. In relation to international liability for injurious consequences arising out of acts not prohibited by international law, he said his delegation preferred the second of the three options proposed, namely that the Commission should defer consideration of international liability until it had completed the second reading on the regime of prevention. If the Commission did not make progress in defining the concept of due diligence, it would be difficult to make proposals relating to international liability. Issues relating to fulfilment of the obligation of due diligence should be dealt with separately from the draft text on prevention.

11. **Mr. Buhedma** (Libyan Arab Jamahiriya) said that the formulation of the draft articles contained in chapter IV of the Commission's report (A/54/10) on the nationality of natural persons in relation to the succession of States was very important as it would make a major contribution

to the development and codification of international law and would assist in resolving the problem of statelessness. His delegation noted that there was a balance in the draft articles between the rights of citizens and the interests of States: draft articles 1 and 4 recognized the right of every individual who had the nationality of the predecessor State to a nationality from the date of the succession of States and required States to take all measures to prevent persons from becoming stateless as a result of succession, whereas draft articles 8 and 9 specified limits on the obligation to attribute nationality.

12. His particularly wished to draw attention to the importance of article 12 on the unity of a family and article 15 on non-discrimination in relation to nationality. In the opinion of his delegation, the draft articles fulfilled their intended purpose and would apply to situations that occurred legally in accordance with international law but not to situations that were unlawful and violated the principles of international law, such as the occupation or annexation of territory by force.

13. His delegation endorsed the recommendation of the Commission to the General Assembly concerning the adoption, in the form of a declaration, of the draft articles on nationality of natural persons in relation to the succession of States.

14. Turning to chapter VI of the Commission's report he said that his country did not distinguish between the treaties to which it had acceded because they all entailed treaty obligations. His delegation supported the approach adopted by the Vienna Conventions on the law of treaties concerning reservations which affirmed, on the one hand, the sovereign right of States to formulate reservations and, on the other, the principle that reservations to a treaty must not be incompatible with its object and purpose.

15. In connection with chapter VIII of the report, his delegation emphasized the importance of the subject of unilateral acts and the need for the codification and progressive development of that topic. The second report of the Special Rapporteur clearly identified the main issues to be addressed, although there were a number of relevant matters that were not dealt with in the draft. Since the purpose of the draft articles contained in the second report of the Special Rapporteur was to serve as a basis for discussion, his delegation considered that it would be useful to seek the views of Governments and for the Commission to prepare a questionnaire requesting materials concerning their practice in the area of unilateral acts.

16. On the subject of chapter IX, concerning international liability for injurious consequences arising out of acts not prohibited by international law, he said that, in the event of any injury, the State responsible should be obliged to compensate the State that had suffered the injury.

17. His delegation supported the second option offered by the Special Rapporteur, namely to suspend the work on international liability until the Commission had finalized its second reading of the draft articles on the regime of prevention.

18. **Mr. Vaidik** (India) said that he agreed with Commission members who felt that the scope of the Commission's consideration of unilateral acts of States should be sufficiently flexible to include the concept of estoppel. The distinction between political and legal unilateral acts should be based on the authors' intention to produce legal effects. He cautioned against excessive reliance on either the law of treaties or the autonomy of the acts, and suggested examining the effect of unilateral acts in relation to a pre-existing treaty or customary norm as well. The range of persons formulating unilateral acts giving rise to rights or obligations under international law appeared to be wider than that of persons empowered to conclude treaties under the 1969 Vienna Convention on the Law of Treaties. He noted that articles 5, 6 and 7 were controversial insofar as they relied on the 1969 Vienna Convention on the Law of Treaties.

19. His delegation welcomed the initial progress made by the Working Group on Unilateral Acts of States with a view to examining the basic elements of a workable definition; the general guidelines to State practice; and the direction of future work on the topic. The work of the Commission would be facilitated by replies from Governments in response to a recently issued questionnaire.

20. Concerning international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation agreed that the Commission should consider international liability on completion of its work on the regime of prevention; it should also consider developments taking place in various other sectors related to the topic. He welcomed the progress achieved in the area of reservations to treaties and accepted the draft guidelines on that topic, which would be useful in the process of international law-making in general and to the legal offices of foreign ministries in particular. Since the guidelines were not intended to revise the reservations regime contained in the Vienna Convention on the Law of

Treaties, they were not likely to be problematic from a policy and political point of view.

21. **Mr. Alabrune** (France) said that although unilateral acts of international organizations should be excluded from the study on unilateral acts, they could be the subject of a special review by the Commission at a later date.

22. If, however, unilateral acts of States which gave rise to obligations for States were excluded from the topic's scope, there was a risk of excluding all unilateral acts, as they were almost all, in certain circumstances, likely to involve State obligations. The conditions for engaging State responsibility by a unilateral act could appropriately be excluded as the Commission was working on State responsibility as a separate topic.

23. It was often difficult to determine whether an act formulated by a State was of a legal or a political nature. Most often, international courts would assess the consequences of the act in question after determining the intentions of the State author of the act. Such was the explanation of the International Court of Justice in the *Nuclear Tests* cases, which had also stated that the subject should apply to unilateral acts which purported to, or were likely to, have legal effects at the international level.

24. Article 1 stated that the draft articles applied to unilateral legal acts formulated by States which had international effects. The word "legal" should be deleted, so as not to exclude political acts which could have legal effects. That comment also applied to draft article 3.

25. The provision for acts with legal effects took no account of the intention of the author and focused only on the consequences of the act. However, the intention of the author State was as essential an element as the legal consequences for defining the act. Establishing the intention of the author would often show whether the act was political or legal in nature.

26. With regard to legal effects of a unilateral act, he said the role of the addressee was also important. The addressee might sometimes reject the legal effects for political reasons, for example in order to oblige the author State to enter into negotiations, whereas the author State sometimes wished to avoid entering into negotiations. Consideration should be given to whether the addressee could reject legal effects intended to be in its favour.

27. The wording of the definition of unilateral legal acts in draft article 2 gave rise to some difficulties. Rules of international law applicable to unilateral acts of States could not be elaborated if there was no clear definition of those acts. The objective of codification should be to bring the different kinds of unilateral acts together in a system of rules that would apply to all of them. A reference to unilateral declarations alone would be too restrictive an approach.

28. The word "autonomous" also gave rise to difficulties. A unilateral act, to be defined as such, had to have autonomous legal effects, which meant legal effects independent of any manifestation of will on the part of another subject of international law. The autonomy of obligation created by a unilateral act was an important criterion in determining the purely unilateral nature of the act.

29. If an autonomous unilateral act was an act that created legal effects on the international level without any link with a pre-existing customary or treaty norm, the topic would lose a great part of its interest. It was appropriate to exclude unilateral acts based on treaty law, but unilateral acts that could contribute to the implementation of existing norms did come within the topic's purview.

30. The word "publicly" in article 2 seemed inappropriate, as a unilateral act did not necessarily have to be formulated publicly, although the addressee would need to be aware of it. It also seemed inaccurate to say that the State formulated an act in order to acquire international legal obligations, as unilateral acts could also be a means of acquiring or maintaining rights. Use of the term "legal effects" would be an improvement.

31. Draft article 4, particularly paragraph 3, also raised a few difficulties, and State practice in that area should be reviewed.

32. Draft articles 5, 6 and 7 followed the provisions of the 1969 Vienna Convention on the Law of Treaties too closely. Generally speaking, the process of taking rules from the Vienna Convention which applied to treaty acts and applying them to unilateral acts appeared somewhat risky. Again, State practice should be considered.

33. In relation to all of the draft articles, the Working Group on Unilateral Acts of States should pay close attention to the practice of States, whether author States or addressees of unilateral acts. France was ready to assist the Commission by providing information on current French practice in relation to unilateral acts.

34. Referring to the Commission's long-term programme of work, his delegation was unsure whether some of the topics identified by the relevant working group (for example, the right to collective security, and the risk of fragmentation of international law) were relevant to the

Commission's task of codification and progressive development of international law.

35. It was essential that the topics to be studied by the Commission should meet the desires and needs of Member States. The Commission could usefully undertake a separate study on the regime of countermeasures, instead of dealing with that topic in its draft articles on State responsibility. It would be useful for the Commission to consider the decisions adopted by international organizations, particularly their legal effects, especially as it did not wish to deal with unilateral acts of international organizations before completing its work on unilateral acts of States.

36. Two of the topics identified by the Working Group on the long-term programme of work should be studied by the Commission: responsibility of international organizations and the effect of armed conflict on treaties. Those topics should be added to the draft resolution prepared by the Colombian delegation on the Commission's report. However, it would not be useful to deal with environmental law, except to define a specific aspect that was problematic. A topic such as legal aspects of corruption and related practices was also inappropriate. Those two topics were a subject for international negotiation rather than codification.

37. **Ms. Kalthum** (Malaysia), after noting that the task of the reconvened Working Group on Unilateral Acts of States had been to agree on the basic elements of a workable definition of unilateral acts, to set general guidelines and to point the future direction of the Special Rapporteur's work, said that she regretted that the Special Rapporteur's report (A/CN.4/500 and Add.1) did not deal with unilateral acts of States in the form of the unilateral enactment of domestic laws having extraterritorial effects on other States and in turn affecting other forms of international relationships, including commercial and financial ones, whether with third States or their nationals. As such unilateral acts affected not only international relationships but also the equally binding international obligations of States under the relevant treaties, such as the various international agreements under the auspices of the World Trade Organization, the scope of the Special Rapporteur's work should not have been limited to studying the subject within the framework of the 1969 Vienna Convention on the Law of Treaties. The Working Group had, however, made salient comments on the Special Rapporteur's report, finding his interpretation of what constituted unilateral acts of States rather restrictive. It had then recommended a broader concept, which appeared in paragraph 589 of the Commission's report. Even that recommendation fell far short of the concerns of her delegation, which therefore urged the Commission to expand the scope of the definition of unilateral acts to include both acts of enactment of domestic legislation which had direct and/or indirect extraterritorial application to other States or nationals of other States and the recourse to unilateral use of force by a State on nationals of other States within the territory of other States in furtherance of the enforcement of domestic legislation. In that context, her delegation also noted that a unilateral act could be formulated by one or more States jointly or in concert. Her delegation would be replying to the questionnaire that had recently been distributed to members of the Sixth Committee on the topic.

38. Her delegation would also welcome a study of State responsibility in the light of the research to be done on the aspects of unilateral acts to which she had just referred and in the light of the provisions of Article 2, paragraph 4, of the Charter of the United Nations. A study of the two topics, together with recommendations, would serve at least as a useful guide to States in their dealings with each other. It should also mean that the rule of international law in that sphere would not be ignored nor given scant respect.

39. **Mr. Traore** (Burkina Faso) said that it was highly significant that the Commission's work on nationality related only to the succession of States. The narrow scope of the topic justified the Commission's work in an area generally considered to be solely within the jurisdiction of each sovereign State. It also justified the Commission's choice of habitual residence as the primary criterion for determining the nationality of individuals, a presumption that would not necessarily be made outside the context of a succession of States. His delegation supported the Commission's choice because it considerably reduced the risks of statelessness; better that a State should have a few extra nationals than that an individual should be left without nationality, without citizenship, without rights, without legal existence.

40. The issue of immunities was fundamental to good international relations. A balance must be struck between diplomatic protection and the rights of the States and its ordinary citizens. The courts of Burkina Faso consistently refused to hear proceedings against persons covered by immunity in order to preserve good relations with other States. On the other hand, immunity should not permit a natural or legal person to ignore civil obligations. His delegation hoped that the work under way would bring greater equity and justice to the system of immunities.

41. In the view of his delegation the concept of responsibility attached to all acts of a State, regardless of whether they were wrongful or not. The draft resolution currently being considered in the Committee on assistance to third States affected by the application of sanctions implicitly recognized the responsibility of the international community for the injury suffered in such case by a State without there having been a wrongful act. Conceptually, the problem was related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. On that topic the Commission had concentrated its efforts to date on a subject of particular importance to his country, the issue of prevention of transboundary damage from hazardous activities. Disparities in level of development were so great that the acts of some countries, although not prohibited under current international law, could be disastrous for others. In that area, the law was not concerned with whether an act was wrongful or not, but with whether there was a link of causality between the harm and the act. The responsibility in that case, that is, the liability, was to repair the harm suffered, whether the causative act was wrongful or not.

42. In the case of State responsibility for a wrongful act, his delegation supported the approach of identifying levels of seriousness; responsibility should be greater where was a breach of a *jus cogens* norm or an obligation *erga omnes*. The definition of "injured State" in article 40 should include two elements: the element of moral or material injury and the element of causality between the injury and the act. His delegation felt that the distinction between a State or States specifically injured by an internationally wrongful act and other States having a legal interest in the performance of the obligations was relevant. Articles 42 to 46 on reparation were well balanced. There was no reason to change the wording of article 44 to make it more specific with respect to the obligation to pay interest.

43. Articles 51 to 53 were out of place, because they focused primarily on distinguishing the wrongfulness of an act, whereas in the opinion of his delegation the question of responsibility was paramount. Chapter V on circumstances precluding wrongfulness needed to be reworded, because the circumstances cited precluded responsibility rather than wrongfulness.

44. His delegation felt that the draft articles should deal with the questions raised by the existence of a plurality of States involved in or injured by a breach of an international obligation. Linking countermeasures to compulsory arbitration was an unfortunate method of initiating dispute settlement procedures. His delegation was surprised that the Commission had not dealt with the issue of State responsibility in the case of reprisals out of proportion to the original breach.

45. As a weak State, Burkina Faso was subject to many forms of coercion, and it was not always possible to judge the lawfulness of the consequences. His country was well aware that many factors entered into responsibility for the commission of the act as between the coercing State and the coerced State. The key issue was to establish the existence of the coercion and the link between the effects and the act that created them.

46. On the topic of reservations to treaties, his delegation took the view that any reservation that called into question the substance of a treaty should be rejected. Use of reservations was common and indeed indispensable; however, they should not relate to *jus cogens* norms or obligations *erga omnes*.

47. **Mr. Szénázi** (Hungary) was pleased to note that, despite the complexity of the issues involved, progress had been achieved on the topic of unilateral acts of States. The Commission had laid down the groundwork necessary for keeping the size of the project within manageable boundaries. The streamlined scope should be maintained, since it would conduce to a timely completion of the study. His delegation endorsed the concept recommended by the Working Group, as it appeared in paragraph 589 of the Commission's report. The recently issued questionnaire would also serve as a good starting point for ascertaining State practice, enabling the Commission to revert to the seven draft articles formulated by the Special Rapporteur.

48. On chapter IX, relating to international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), he said his delegation preferred to comment at a later stage, when the Commission's views were known. It was regrettable that the Commission had been unable to consider the proposals contained in the Special Rapporteur's second report (A/CN.4/501), which enumerated a detailed set of principles relating to the obligation of due diligence and the treatment of international liability. He noted that the Commission had decided to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities. His delegation took that decision to be a procedural one, aimed at facilitating further progress on the issue of prevention.

49. There was, nonetheless, an inherent interrelationship between the duty of States to exercise due diligence while

discharging their obligations relating to prevention and, on the other hand, the question of liability if such obligations were not fulfilled. It was therefore a matter of particular concern that both the Special Rapporteur and the Chairman of the Commission had raised the possibility of terminating work on the topic of liability altogether. Such a decision would clearly hamper the full development and effectiveness of rules relating to prevention. Moreover, it could not be reconciled with Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration, which urged States to cooperate in developing further international law regarding liability. The Commission should not lose sight of the original task of elaborating rules on liability.

50. **Mr. Rogachev** (Russian Federation), speaking on reservations to treaties (chapter VI of the report), said that the progress made on the topic was due to the fact that the Commission had adopted the balanced approach based on the status quo established by the 1969, 1978 and 1986 Vienna Conventions. That approach had proved its worth on both theoretical and practical grounds and had also passed the essential test of durability. It was therefore time to finalize the draft guidelines.

51. One of the main problems arising from the implementation of the relevant provisions of the Vienna Conventions was the need to distinguish between reservations and unilateral statements, which could appear to be reservations but were not. Such a distinction could obviously be drawn only if there were established and practical criteria making clear the difference between them. The Vienna Conventions were deficient in that respect, which meant that to determine the nature of a given unilateral statement its content had to be scrutinized. The complexity was increased by the fact that those making the statement wished to conceal their intentions. A possible approach to the difficulty would be to define unilateral statements which were near-reservations in terms of what they were not.

52. With regard to draft guideline 1.3.1, his delegation also supported the Commission's conclusions on supplementary means of interpretation, which should be used in cases where the interpretation of the statement in the light of the treaty to which it referred left the meaning ambiguous or obscure or would lead to a result which was manifestly unreasonable.

53. His delegation was less impressed with the second sentence of the draft guideline. The intention of the State formulating the statement was always reflected in the text of the statement and the way to interpret it was to use the rule in the first sentence. The second sentence was merely a more generalized statement of the principle contained in the first. His delegation therefore thought it useful to include in the draft guidelines recommendations on the use of supplementary means of interpretation, once the nature of unilateral statements had been resolved. His delegation believed that such supplementary means could include any other document, in addition to the treaty and the relevant unilateral statement, that established the intentions of the State formulating the statement. The occasions on which supplementary means should be used would have to be specified: perhaps they should be restricted to cases where the interpretation in terms of the first sentence of draft paragraph 1.3.1 left the meaning ambiguous or led to a manifestly unreasonable result.

54. One issue that was not sufficiently reflected in the Commission's report was that of declarations which were internally inconsistent, sometimes seeming to be a reservation and sometimes an interpretative declaration. Such declarations were not uncommon and it might be useful if the Commission considered the conditions under which the rules on reservations or interpretative declarations applied to such documents.

55. Given the practical orientation of the draft guidelines, the illustrative list of unilateral statements that could in certain circumstances be confused with reservations (draft guidelines 1.4-1.4.5) was useful. With regard to draft guidelines 1.5 to 1.5.3, his delegation endorsed the view that "reservations" to bilateral treaties were not reservations as understood in the Vienna Conventions. Such a "reservation" was tantamount to a proposal of negotiations to finalize the text of a treaty.

56. Ending with a few suggestions of an editorial nature, he said that the term "act of official confirmation" did not appear in article 11 of the Vienna Conventions; it would therefore be useful to provide a definition, perhaps as an explanatory footnote to draft guidelines 1.1 and 1.2.1. Secondly, since the overwhelming majority of reservations limited the obligations imposed on the party making the reservation, it seemed logical — on the principle of going from the general to the particular — to insert draft guideline 1.1.5 between draft guidelines 1.1.2 and 1.1.3.

57. Thirdly, it was hard to detect any real meaning in the phrase contained in draft guideline 1.1.6, requiring equivalence in the manner in which an obligation was discharged. That requirement would be redundant if the object of the provision was a specific result and not the way in which it was achieved. Draft guideline 1.6 stated that the definitions of unilateral statements were without

prejudice to their permissibility under the rule applicable to them. Reference to the "equivalent" manner of discharging the provisions of a treaty, however, did call into question the statement's permissibility. Moreover, the notion of equivalence was rather indeterminate and could thereby complicate the implementation of draft guideline 1.1.6. The point of the draft guideline was to establish the principle whereby a unilateral statement aimed at changing the legal effect of provisions relating to the manner in which the treaty was discharged was a reservation. The words "but equivalent to" should therefore be deleted. The Russian text, too, was unsatisfactory.

58. **Mr. Varso** (Slovakia) said that his delegation supported all efforts to specify the scope of the application of reservations to treaties. It welcomed the progress the Commission had achieved thus far on the Guide to Practice, particularly the efforts of the Special Rapporteur. His delegation supported the Commission's conceptual approach to the structure of the draft guidelines and, in principle, their content as well, which was based on the relevant provisions of the Vienna Conventions of 1969, 1978 and 1986, as clearly illustrated by draft guideline 1.1.1. The scope of reservations or interpretative declarations, taking into account their phrasing and name, should be confined to the exclusion or modification of the legal effects of certain treaty provisions; the phrase "of specific aspects" would also restrict across-the-board reservations somewhat.

59. He stressed the practical nature of guideline 1.3.1 on the method of implementation of the distinction between reservations and interpretative declarations and guideline 1.4 on unilateral statements other than reservations and interpretative declarations. With regard to the latter, his delegation accepted the underlying philosophy of the distinction drawn in paragraph (1) of the commentary, which stated that interpretative declarations generally did not have as close a relationship with the treaty. Guideline 1.1.6 on statements purporting to discharge an obligation by equivalent means and guideline 1.3.3 on formulation of a unilateral statement when a reservation is prohibited seemed to add further elements to a treaty and should be subsumed under draft guideline 1.4.2. His delegation hoped that the Commission would also elaborate procedural guidelines on implementing reservations and interpretative declarations as defined.

60. The lack of a unified set of rules on the jurisdictional immunities of States and their property posed difficulties for some States, including Slovakia, particularly in the application of property immunities. His delegation supported the efforts of the Working Group on Jurisdictional Immunities of States and their Property and hoped that it would make further progress during the current session of the General Assembly. With regard to the "concept of State for purpose of immunity", his delegation agreed with the Commission that it would be desirable to bring the draft article into line with the draft on State responsibility, including with regard to federal States. In principle, international rights and obligations of a State as a subject of international law should also be applicable within the context of jurisdictional immunities.

61. Referring to the section on criteria for determining the commercial character of a contract or transaction, he said that the nature and purpose of the commercial transaction should be the starting point for consideration of its commercial character. He noted that, with regard to contracts of employment, the Working Group was attempting to maintain a balance between the interests of the employer State, which should be able to invoke immunity from jurisdiction if the contract of employment was directly related to the exercise of its sovereignty, and the State of the forum, which should have jurisdiction in almost every other case.

62. His delegation agreed with the Working Group that measures of constraint against State property required a more complex approach (A/54/10, annex, para. 118). The reasons and circumstances for bilateral measures of constraint against State property should always be taken into account and informed by the principle of universal justice. On that basis, a State's failure to fulfil its international obligations was an understandable ground for constraint; however, legislative measures against another State's property were not, unless the State of the forum provided just and adequate compensation. His delegation hoped that the Working Group would reconsider all aspects of measures of constraint in order to ensure that States were sufficiently protected in the courts of the forum State, and also to protect States which had acquired property legally and in good faith.

63. His delegation agreed with the Commission that it would be premature to draw final conclusions on the place of unilateral acts of States within the system of international law. It supported the Commission's decision to return to the starting point and analyse the components of the proposal set out in paragraph 589 of the report. The definition of unilateral statements in that paragraph and its components, namely, unilaterality, legal effects and notification, closely paralleled unilateral declarations within the framework of reservations to treaties. Indeed, it seemed that many of the rules applicable to treaty reservations could be applied *mutatis mutandis* to unilateral

acts. The more important question of what distinguished a unilateral act from a reservation should be addressed within the framework of the obligations of States and all their consequences, including sanctions in the case of non-compliance. It must be determined whether the particularities of unilateral acts, with respect to both form and content, were so specific and numerous as to comprise a separate category of international law. For the time being, his delegation believed that they were not, and that unilateral acts should form part of international law on international obligations.

64. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said that the International Law Commission was to be commended on completing its work on nationality in relation to the succession of States in a reasonable period of time. The draft articles struck the right note by reaffirming the principle that nationality was essentially governed by internal law within the limits set by international law. The articles had achieved an appropriate balance between the legitimate interests of States and of individuals and presented helpful guidelines on avoiding statelessness. Significantly, the Commission had excluded cases of occupation and illegal annexation of territory from the scope of the articles. The Commission's recommendation that the draft articles should be adopted by the General Assembly in the form of a declaration was a pragmatic approach. Although non-binding, the draft articles would immediately be available to States currently coping with problems of nationality in relation to a succession of States. His delegation would support the majority view on the method of adoption. Given the absence of interest from Member States in work on the nationality of legal persons, the topic could be considered concluded.

65. His delegation attached great importance to the Commission's work on jurisdictional immunities of States and their property. In recent years, a number of States had enacted national legislation restricting the immunity of States. Although the tendency was to exclude commercial activities from the scope of State immunity, State practice and legislation varied widely and in some cases went far beyond the emerging trend to undermine the very principle of State immunity. An international standard was therefore urgently needed, and the Sixth Committee should spare no effort to bring to fruition the endeavours of the Commission. A clear definition of "commercial transaction" for the purpose of State immunity was essential in order to avoid conflicting interpretations at the national level; the definition should include both nature and purpose criteria.

66. With regard to contracts of employment, his delegation felt that the clarification relating to article 11 proposed in paragraph 105 of the report of the Working Group contained in the annex to the Commission's report was a constructive approach. His delegation looked forward to the substantive discussions on the topic scheduled to take place in a few days by an open-ended Working Group of the Sixth Committee, but felt that three days might not be sufficient to finalize the draft articles and supported serious consideration of the matter at the next session of the General Assembly with a view to adopting the articles in the form of a convention.

67. In view of the lack of a legal regime encompassing all types of unilateral acts of States, developing relevant rules or guidelines in that field would enhance predictability in international relations. His delegation concurred with the majority view in the Commission that unilateral acts which gave rise to international responsibility were beyond the scope of the topic. Unilateral acts of international organizations should also be left aside for the time being. However, a study on estoppel would be useful, without prejudice to its possible inclusion. A survey of various types of unilateral acts of States and their classification was essential.

68. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation commended the Commission for its comprehensive examination of the issues of prevention and due diligence. It agreed with the Commission's decision to defer consideration of the question of international liability pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

69. On the subject of reservations to treaties, his delegation favoured the Commission's approach in preparing a Guide to practice, taking as a basis the general regime for reservations contained in the Vienna Conventions on the Law of Treaties, rather than developing a more formal instrument.

70. The Commission's recent practice in identifying issues to be addressed by Governments had undoubtedly contributed to a more focused debate within the Sixth Committee. It would be an ideal situation if the majority of States could prepare written replies to the queries of the Commission. However, experience had shown that a considerable number of States were not in a position to respond in writing. Under those circumstances, his delegation expected the Commission to pay due attention to the statements of delegations in the Sixth Committee.

71. His delegation would not object to a split session of the Commission in the year 2000 and agreed with the special organizational arrangements suggested in order to accommodate the split session within the existing budget. The International Law Seminar held every year in conjunction with the sessions of the Commission was invaluable for the dissemination of international law and should be continued.

72. Lastly, his delegation urged the Commission to make every effort to complete the second reading of the draft articles on State responsibility in the remainder of its current quinquennium. Substantive comments on that topic had been prepared by Professor John Djamchid Momtaz on behalf of the delegation of the Islamic Republic of Iran and would be transmitted to the Special Rapporteur and the members of the Commission.

73. **Mr. Jacovides** (Cyprus) said that the role of the Sixth Committee, as the political body in which all Member States were represented, was to provide clear guidance on specific issues, such as those mentioned by the Commission in chapter III of its report. He shared the view that the positions stated orally by Governments should be given no less weight than the written comments submitted by States in response to questionnaires. Small States, in particular, were necessarily limited in producing written comments on a wide variety of topics.

74. Turning to chapter IV of the report, he said that the selection of the topic of nationality in relation to the succession of States met a real need. His delegation noted with satisfaction that the *raison d'être* of the draft articles was the concern of the international community as to the resolution of nationality problems of natural persons in the case of a succession of States, and that, although nationality was essentially governed by national legislation, the competence of States could be exercised only within the limits set by international law. His delegation agreed that the fundamental concern was the protection of human rights and that the legitimate interests of both States and individuals should be taken into account. The key provision of article 1, based on article 15 of the Universal Declaration of Human Rights, was the right of everyone to a nationality. Another key provision in article 16, also based on the Declaration, was that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Traditional concepts of nationality law, such as the status of habitual residents (article 14) and the criterion of an effective link, were also taken into account (article 19).

75. His delegation noted, in particular, that article 3 explicitly limited the application of the draft articles to a succession of States occurring in conformity with international law. Accordingly, questions of nationality that might arise in situations of illegal occupation of territory, illegal annexation, or purported separation or secession contrary to existing treaties or other provisions of international law were outside the scope of the draft articles.

76. His delegation endorsed the Commission's recommendation that the text should be adopted by the General Assembly in the form of a declaration, while reserving the right to make specific comments at the time such action was taken. His delegation also shared the Commission's view that there was no need to deal with succession in relation to the nationality of legal persons and that the work of the Commission on the topic should be considered concluded.

77. With regard to jurisdictional immunities of States and their property (A/54/10, chap. VII), his delegation welcomed the report of the Working Group on the topic. The Working Group had concentrated on five main issues, identified in 1994, and had produced a valuable study, together with a short background paper attached as an appendix, dealing with the existence or non-existence of jurisdictional immunity in actions arising out of violations of *jus cogens* norms, particularly acts of a State in violation of human rights norms having the character of *jus cogens*. His delegation noted with interest the contents of the appendix, especially the two new developments, one concerning the amendment by the United States of its Foreign Sovereign Immunity Act through the Anti-Terrorism and Effective Death Penalty Act of 1996, and the other concerning the *Pinochet* case in the United Kingdom. His delegation noted and agreed with the view of the German delegation that the question was of enormous importance and was an essential part of the subject of jurisdictional immunity.

78. From the beginning of the consideration of the item in the Committee and the Commission, his delegation had favoured a pragmatic approach, avoiding differences between the theories of absolute and restrictive immunity, while aiming at a compromise on outstanding issues. State immunity was an important institution in international life; if a generally accepted convention could be achieved, that would indicate the time and efforts devoted to its realization. Realistically, however, the likelihood of reaching agreement in the near future was doubtful. Moreover, as the United Kingdom delegation had pointed out, the institutions of State immunity were bound up with

the development of a modern system of trade and commerce, and to be successful, any attempted codification must correspond to modern conditions of international trade and cover adequately all issues that were likely to arise, including enforcement. The possibility of drawing up a model law offered a means of preserving what had been achieved while leaving room for practice to develop.

79. Chapter V of the report (State responsibility) raised fundamental issues. His delegation had consistently held that State responsibility had been transformed from the traditional approach of dealing primarily with injury to aliens to the current, much broader context, in which the interests of international public order and of the international community as a whole must be taken into account. Due weight must be given to the development of such notions as *jus cogens* and *erga omnes* obligations, as well as State practice. His delegation shared the confidence expressed by the Nordic countries that the second reading of the draft articles would be completed within the term of office of the Commission's current members, in other words, by 2001.

80. Overall, his delegation concurred with the Special Rapporteur's approach. There was a practical reason for the distinction between a State and States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations but did not suffer economically quantifiable injury. While the legal interest existed for both categories of States, in the practice of States it was the specifically injured State that had the right to reparation. His delegation subscribed to the view that a wrongdoing State must provide compensation to the specifically injured State, including, in addition to the principal amount of pecuniary damage, interest and loss of profit. With regard to the question of a plurality of States involved in a breach of an international obligation, his delegation preferred that it should be dealt with in the framework of the draft articles, and agreed with the Special Rapporteur's approach to draft article 27.

81. His delegation's position on countermeasures was that their scope should be narrowly defined, since they lent themselves to abuse at the expense of weaker States; that they should not be punitive, but should be aimed at restitution and reparation or compensation, rather than punishment; that there should be an extensive third-party dispute settlement system; and that they should be applied, if at all, objectively and not abusively. His delegation stressed that armed countermeasures were prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which had become a customary rule of international law.

82. His delegation agreed with the Nordic States that third-party dispute settlement procedures were a sine qua non in modern international law and an indispensable protection for small and weaker States.

83. His delegation was of the view that the international community, having adopted the notion of *jus cogens* in the Vienna Convention on the Law of Treaties of 1969, must also take the next logical step of giving exact content to the concept. In that connection, he drew attention to document A/CN.4/54, paras. 16, 26 and 105 to 119, and document A/C.6/47/SR.21.

84. His delegation noted with interest the discussion that had taken place in the Commission on the basis of the report of the Chairman of the Drafting Committee. The issue of consent, which must be freely given, should be approached with caution since the very essence of the notion of peremptory norms was that they could not be derogated from by agreement between the parties, because that would be contrary to international public policy.

85. The relationship between the effect of *jus cogens* and that of Article 103 of the Charter of the United Nations should be made clear. Article 103 related to incompatibility and dictated that in case of conflict between the Charter and a treaty, the Charter prevailed. The effect of *jus cogens*, however, was more drastic, in that if established, it nullified the treaty.

86. On the topic of reservations to treaties (A/54/10, chap. VI), his delegation shared the view that the basic provisions on the subject were to be found in the Vienna regime on the law of treaties. It agreed with the approach taken of elaborating a Guide to practice rather than a more formal document.

87. Likewise, with regard to unilateral acts of States (A/54/10, chap. VIII), his delegation hoped that further progress would be made once replies had been received to the questionnaire in paragraph 594 of the report.

88. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/54/10, chap. IX), his delegation appreciated the useful work done by the Commission on the issue of prevention and the obligation of due diligence, and looked forward to fruitful progress on the second reading of the draft articles.

89. With regard to chapter X of the report, the Commission was on the right track in its planned future

activities and contacts, as well as in the very useful International Law Seminar.

The meeting rose at 12.40 p.m.