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Chairman: Mr. Lelong ..... (Haiti)

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The meeting was called to order at 3.05 p.m.

Agenda item 165: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/56/L.6/Rev.1 and L.14)

1. **Mr. Gomaa** (Egypt), introducing draft resolution A/C.6/56/L.14, on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization explained that it largely resembled the resolution on the same subject adopted by the Committee the previous year (A/RES/55/156), with certain amendments decided upon during informal consultations. The dates for the next session of the Special Committee, from 18 to 28 March 2002, were given in paragraph 2. In paragraph 3 (b), the words "taking into consideration the reports of the Secretary-General" had been replaced by "by commencing substantive debate on all of the related reports of the Secretary-General". The words "taking into consideration" had been inserted before "the debate on the question which was held by the Sixth Committee". Paragraph 6 was entirely new. In view of the consideration by the Special Committee the previous April of the subject of assistance to working groups on the revitalization of the work of the United Nations, and other working groups dealing with the reform of the Organization, it had been decided to express to the General Assembly the willingness of the Special Committee to provide, within its mandate, such assistance as might be sought at the request of other subsidiary bodies of the General Assembly

2. **Mr. Herasymenko** (Ukraine), introducing revised draft resolution A/C.6/56/L.6/Rev.1 on implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions, sponsored by Bulgaria, the Russian Federation and Ukraine, observed that certain minor drafting changes had been made to the original text, to meet the concerns of delegations. He expressed the hope that the revised text would command their support.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

3. **Mr. Al Baharna** (Bahrain), referring to chapter VIII of the report, said that given the significant diversity of unilateral acts it might not be possible to establish common rules applicable to them all. The Special Rapporteur's plan of organizing the draft articles by drawing a distinction between general rules applicable to all unilateral acts, and specific rules applicable to individual categories of such acts, had gained support from some members of the Commission. Such a classification had also been recommended by the Commission's Working Group on the topic. However, some members of the Sixth Committee had not been convinced of the value of such a distinction, and the Special Rapporteur had therefore proposed, in his fourth report (A/CN.4/519), that unilateral acts should be classified on the basis of their legal effects. He noted that according to paragraph 46 of that report, some members of the Committee were in agreement that the draft articles should be organized around the distinction between general rules applicable to all unilateral acts, and specific rules applicable to individual categories of such acts. The Special Rapporteur should be given the chance to formulate the draft according to his proposed plan, so that both the Commission and the Committee could review the full text of the draft in the light of an agreed definition.

4. Some of the draft articles so far produced, (A/CN.4/505) and especially article 1, were still controversial and should be further improved in line with the comments made in the Commission and in the Sixth Committee. Article 1, on the definition of unilateral acts, was crucial since the classification of such acts must take place within the framework of an agreed definition. He had no basic objection to the formulation of that article, which dealt with the basic criteria which ought to apply to all unilateral acts; for instance, it was consistent with the definition of a promise in the *Nuclear Tests* case. However, he would have preferred the phrase "the expression of will" to be qualified by the insertion of the word "autonomous". Autonomy was an important criterion in determining the strictly independent character of a unilateral act. The key word "intention" should be interpreted as referring to the declared intention of the author State, rather than its true intention, which according to the rules of treaty interpretation would have to be discovered by judicial means if the declared intention was obscure. With regard to the words "formulated by a State", it should be noted that, unlike a treaty, a unilateral act could be validly formulated orally as well as in writing. Notification of the unilateral act, in accordance with the *Nuclear Tests* judgment, was made

clear in the article 1 definition through the words "which is known".

5. The category of specific acts outside the scope of the draft articles could be extended to include a unilateral reservation made in the context of a treaty. It could also include declarations of war or neutrality and protests, those being acts which reaffirmed rights.

6. The Special Rapporteur, in paragraph 98 of his fourth report (A/CN.4/519), had set out a scheme for proposing draft articles, which could be followed when he submitted articles on the first category of unilateral acts, those whereby the State undertook obligations. The Commission could then share with him the complexities involved in classifying such acts. Ample material already existed relating to various types of unilateral acts, and could be used for the purpose of classification and drafting. For example, there were many different kinds of declaration, as revealed in State practice or in judicial decisions, which could be classified in one or more categories to which a general or specific rule might apply. Acts outside the scope of the topic, such as silence, acquiescence, estoppel, acts involving countermeasures, interpretative declarations and declarations in respect of the optional clause in Article 36 of the Statute of the International Court of Justice, could be classified separately. The Commission might need to consider drafting separate guidelines defining the regime of the various unilateral acts, and showing to which categories of acts a general rule would and would not apply. The category of unilateral acts outside the scope of the topic should be treated separately.

7. The part of the Commission's report, dealing with rules for the interpretation of unilateral acts, and introducing draft articles (a) and (b), seemed to be premature at the current juncture, since it was not yet clear how drafting would proceed for the articles relating to the two categories of acts referred to by the Special Rapporteur, namely, those whereby the State undertook obligations and those whereby it reaffirmed a right or a legal position. Moreover, the drafting of articles on general rules of interpretation applicable to unilateral acts should take place only when the substantive and procedural rules on the topic had been drafted.

8. Turning to draft articles (a) and (b) in the form presented in the Commission's report, he noted the Special Rapporteur's conclusion that although the rules of interpretation of the 1969 and 1986 Vienna Conventions on the Law of Treaties could not be applicable mutatis mutandis to unilateral acts of States, they might be applicable to the extent that they were adapted to reflect the particular nature of those acts. The Special Rapporteur had therefore attempted to apply to unilateral acts articles 31 and 32 of the 1969 Vienna Convention relating to the general rules for the interpretation of treaties.

9. His delegation shared the Special Rapporteur's view that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts. Thus the principle of "good faith", which appeared in article 31 of the 1969 Convention, also appeared in draft article (a), paragraph 1. It seemed doubtful, however, whether the rule — which in itself was unexceptionable — would apply to all categories of unilateral acts, given their diversity. Moreover, the Special Rapporteur had rightly referred to the subjective, as opposed to the objective, nature of a unilateral act, which had necessitated the introduction of the expression "in the light of the intention of the author State". There had been disagreement in the Commission about the meaning of the phrase. In his view, reference should be made to the declared intention of the State rather than its true intention, since the latter was very difficult to determine in the case of a unilateral act, which could also be formulated orally. Unlike a treaty, a unilateral act would not generally be preceded by preparatory work that could be referred to in order to deduce the author's true intention. Even if such preparatory work existed, it would be extremely difficult for the addressee State to gain access to it.

10. Similarly, although draft article (a), paragraph 2, had been properly adapted to suit the particular nature of unilateral acts, the reference to the "preamble and annexes" might not always be applicable, as in the case of an orally formulated act. Perhaps the words "if available" should be added after the word "annexes".

11. Draft article (a), paragraph 3, which embodied the provisions of article 31, paragraph 3 (a), (b) and (c), of the 1969 Vienna Convention, was also acceptable, except that it might be preferable to insert the word "unilateral" before the word "act".

12. Draft article (b), modelled on article 32, conformed even more closely to the 1969 Convention. The reference to "preparatory work", however, should

be deleted, since it did not qualify as a supplementary means of interpretation, as he had argued in connection with draft article (a). Again, the word "unilateral" should be inserted before the word "act". The reference to "circumstances", on the other hand, should be retained, since they were as relevant to the formulation of a unilateral act as to the conclusion of a treaty.

13. The two draft articles were in any case premature, since, before tackling the rules of interpretation, the Special Rapporteur would first need to present a consolidated set of draft articles on the other substantive issues involved.

14. **Mr. Florent** (France), referring to chapter VIII of the report, said that unilateral acts of States were extremely hard to classify. While such an exercise — which was described in paragraph 226 of the report — might be valuable from the theoretical point of view, he doubted whether it was really important or useful for States. Indeed, it might actually complicate their relations still further. What mattered was not what category a unilateral act belonged to but whether it was binding on the author State and whether other States could take advantage of that in any way. There was also the possibility that some unilateral acts might fall into two categories at once. For example, where a State declared itself neutral, it could be considered both to be assuming obligations and to be reaffirming a right. In that context, he wondered why the Special Rapporteur had referred only to the reaffirmation of a right, not the establishment or affirmation of a right.

15. The question of the interpretation of unilateral acts was also a complex one. The two proposed draft articles, which were based on the provisions of the 1969 Vienna Convention on the Law of Treaties, were not convincing, for several reasons. First, it was by no means certain that the Vienna Convention could be applied to unilateral acts, given the specific nature of such acts. For example, the expression "preparatory work" was meaningless in that context. Secondly, when it came to interpretation, the intention of the author State was the most important factor, even more important than the actual content of the unilateral act. It would therefore be wrong for the State to be held accountable for more than it had intended, merely on the basis of the content of the act. Thirdly, the two draft articles contained various contradictions, in that they seemed to make the intention the overriding criterion yet situated the means of establishing that intention, such as preparatory work and the circumstances of the formulation of the act, among the supplementary means of interpretation. Generally, it seemed doubtful whether the Special Rapporteur's approach was compatible with that of the International Court of Justice, which had, to date, attached most importance to the intention of the author State.

16. Turning to the questions on which the Special Rapporteur had requested guidance from the Commission, he reiterated his view that silence could not be equated with a unilateral act, since it could not be considered an unequivocal manifestation of will. He therefore welcomed the Special Rapporteur's decision to omit it from the study undertaken by the Commission. As for the invalidity of unilateral acts, in that case, too, it was rather hit-or-miss to apply to unilateral acts the rules that applied to conventional acts. Again, State practice was what counted. His delegation looked forward to hearing the conclusions reached by the open-ended Working Group set up by the Commission.

17. With regard to countermeasures, he thought that they should not be broached in the Commission's study. Countermeasures as such were not comparable with unilateral acts, although he did not necessarily agree with the Special Rapporteur's view that countermeasures constituted a reaction by a State and thus lacked the necessary autonomy to be considered unilateral acts. If that were so, protest could also be considered a reaction and not a unilateral act. The important issue was that countermeasures should not be formulated with the intention of producing legal effects.

18. At their fifty-third session, some members of the Commission had emphasized the autonomy of unilateral acts. In his delegation's view, to qualify as unilateral an act should produce autonomous legal effects independent of any manifestation of will on the part of any other subject of international law. Autonomy was an essential criterion in determining the purely unilateral nature of the act and that criterion should be duly taken into account in its definition. On the other hand, if the Commission's study considered only unilateral acts which had no connection with existing customary or conventional rules, there was a risk of depriving the subject of much of its importance. Although he had indicated, during the debate on the first report, that his delegation supported the Commission's approach, whereby unilateral acts clearly relating to the law of treaties were excluded, he

did not believe that that should apply to unilateral acts that could contribute to the implementation of existing rules.

19. Turning to the topic "diplomatic protection", he said that, subject as it was to the conditions set in 1924 by the Permanent Court of International Justice in the *Mavromattis Palestine Concessions* case, it raised a number of difficulties in international law and was therefore a particularly appropriate topic for the Commission. The Commission should, however, restrict itself to the codification of State practice.

20. In article 9, on continuous nationality, the Special Rapporteur proposed the abandonment of the traditional rule, according to which a State could exercise diplomatic protection only on behalf of a person who had been a national of that State at the time of the injury on which the claim was based and who had continued to be a national up to and including the time of the presentation of the claim. The Special Rapporteur favoured a new approach, whereby a State would be allowed to bring a claim on behalf of a person who had acquired its nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Despite his intention of retaining the safeguards listed in paragraph 170 of the report, the Special Rapporteur had become engaged in the delicate task of questioning an established rule of international law, which could even be considered a customary rule. Admittedly, the traditional approach might be considered too rigid and even well-established rules could be modified if they were no longer considered appropriate. Nonetheless, his impression was that the draft article, like some considered the previous year, reflected the predominant influence of what he would term a "human-rights logic", and he seriously doubted whether such a logic was appropriate for the Commission's study. He was not convinced that the protection of individuals justified changing the continuous nationality rule. Obviously, a State exercising diplomatic protection had to take the rights of the injured person into account, but, diplomatic protection was not in itself a human-rights institution. Its discretionary nature was proof of that. His delegation would prefer to retain the traditional rule, although ways of making it more flexible could undoubtedly be sought, with a view to avoiding some inequitable results. To that end, more consideration should be given to the idea of introducing "reasonable" exceptions to deal with situations where the individual would otherwise have no possibility of obtaining a State's protection. It would not, however, be appropriate for the Commission to attempt to define the nationality link for legal or natural persons or the conditions for granting nationality. It should rather focus on defining the conditions under which nationality could be invoked before another State in the context of diplomatic protection. The International Court of Justice had broached the question in the *Nottebohm* case but only in very general terms and its jurisprudence had not been unanimously accepted.

21. He recalled that at the fifty-fifth session he had expressed doubts about article 8, which provided that a State could exercise diplomatic protection on behalf of a stateless person or a refugee if he habitually and legally resided in the territory of that State The article, which clearly involved the progressive development of international law, was not supported by State practice and even seemed contrary to some provisions of the schedule annexed to the 1951 Geneva Convention relating to the Status of Refugees, which stated clearly that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue and did not confer on those authorities a right of protection. The 1961 Convention on the Reduction of Statelessness, meanwhile, was silent on the question of diplomatic protection.

22. Article 10, paragraph 1, posed no particular difficulty, since it simply stated the principle involved and defined its application to both natural and legal persons. He noted that administrative remedies which were discretionary or available as a matter of grace had been omitted as examples of "legal remedies". That was the right approach. As the *Ambatielos* case showed, jurisprudence envisaged only judicial or administrative remedies available as of right. The Commission should also consider the question whether a claim before a jurisdiction which was not domestic, but was accessible to all the nationals of the State could or could not be considered a local remedy, even if a literal interpretation did not suggest an affirmative reply to the question.

23. With regard to article 11, which dealt with the distinction between direct and indirect claims, he said that the notion was correct in principle, but the Special

Rapporteur's criteria for the distinction were not very persuasive and should be examined further.

24. **Mr. Gomez Robledo** (Mexico), referring to the topic "Reservations to treaties", said that, since the Guide to Practice would be extremely useful in resolving the problems arising in State practice, it was essential that the guidelines should be in full accord with the relevant provisions of the Vienna Convention on the Law of Treaties. The Commission should therefore focus on those aspects of the Convention that merited further development in the light of State practice, with particular emphasis on any grey areas.

25. A conditional interpretative declaration expressed the interpretation placed by a State on given provisions of a treaty to which it became a party and, in that regard, could amount to a reservation, sometimes even a reservation not permitted under the treaty. That being so, his delegation considered that such declarations should, mutatis mutandis, be subject to the guidelines relating to reservations. The Commission was, however, right to wait to conclude its study on the effects of both before reaching a decision. If it was found that the effects were identical, there would be no need to include a specific chapter on conditional interpretative declarations in the Guide.

26. With regard to the late formulation of reservations his delegation shared the concern expressed by some members of the Commission that including a guideline on that subject could have the undesirable effect of encouraging recourse to a practice that had previously been used only in exceptional circumstances. There might well be no need for a guideline which deviated from the Vienna Convention and which, if used extensively, could cause uncertainty in relations between States parties to a treaty, even though reservations formulated late had on occasion been permissible. While there was thus no need for a specific guideline, a treaty could expressly provide for late reservations. If a treaty contained no such specific provision, the existing provisions should apply, according to which reservations should be formulated when signing, ratifying, accepting, approving or acceding to a treaty.

27. With regard to the role of the depositary on receiving manifestly inadmissible reservations, a distinction should be made between two kinds of situation. The depositary should not accept reservations formulated despite being absolutely and expressly prohibited under the treaty, in accordance with article 19 (a) and (b) of the Vienna Convention. However, the depositary had no need to inform the other parties unless the State formulating the reservation persisted with its action. The situation was different in the case of reservations that were not expressly prohibited under the treaty in question but would be incompatible with the object and purpose of the treaty under article 19 (c) of the Vienna Convention. Such cases inevitably involved subjective judgements which, naturally should be left to the Contracting Parties. That was not to say, however, that the depositary did not have a role to play in such situations. On the contrary, when notifying the reservations to the other Contracting Parties, the depositary should be able to point out any possible incompatibility between the reservation and the instrument involved, although the decision on the admissibility of the reservation should remain with the States parties. The Commission should also consider the question of the role to be played by any body established under a treaty, with the purpose, among others, of following up the obligations of States in such areas as human rights.

28. With regard to the guidelines considered by the Commission on receiving the Special Rapporteur's sixth report, he said that, although the Special Rapporteur had based guideline 2.1.3 on the practice of the United Nations and other depositaries, he had extended the number of persons who might be competent to formulate a reservation at the international level. The current United Nations practice was, however, well-established, did not make excessive demands on States and had proved its usefulness and reliability. There was no need to widen its scope or even to raise the possibility of such a change. As he had said, the Guide to Practice should concentrate on areas where State practice was confused and should be further developed. That was not the case with guideline 2.1.3.

29. With regard to guidelines 2.1.3 bis and 2.4.1 bis, paragraph 1, relating to the competence to formulate reservations or interpretative declarations at the internal level, his delegation concurred with the Special Rapporteur's view that they were matters that should be dealt with under the domestic legislation of each State. It was therefore unnecessary to include them in the guide.

30. As for guideline 2.1.4, on the absence of consequences at the international level of the violation

of internal rules regarding the formulation of reservations, his delegation frankly failed to understand its purpose. Since a reservation weakened the scope of a treaty and affected its overall integrity, there seemed no point in looking for ways to maintain the validity of a reservation when it was invalid under the domestic law of the State formulating it. Domestic law should be decisive and no assistance should be given to a State formulating a reservation in violation of an internal rule. That was a clear example of the Commission attempting to extend the boundaries that it should maintain in its treatment of the topic. There was a danger that, in seeking problems where there were none, the Special Rapporteur might upset the wise balance of the Vienna Convention on the Law of Treaties.

31. Turning to the topic "diplomatic protection", he said that since there was an abundance of State practice, especially with regard to the protection of natural persons, existing customary rules should be preserved, unless there was clear justification for departing from them. Diplomatic protection was a State prerogative, not an individual right and, as the International Court of Justice had affirmed in the *Barcelona Traction* case, the State had complete freedom of action in that domain. The protection of human rights and diplomatic protection were two separate disciplines and hence any attempt to combine them would end in confusion.

32. The diplomatic protection of legal persons would raise many special issues deserving careful analysis and elucidation by the Commission. For that reason, work should first focus on the protection of natural persons and any decision about the inclusion of legal persons in the final text should be left until a later stage.

33. As the continuous nationality rule had attained the status of a customary rule of international law, it was essential to uphold it in the draft articles, although admittedly there were cases in which an involuntary change of nationality should not be allowed to deprive the persons concerned of the possibility of securing the diplomatic protection of the State of their new nationality. Consequently the rule should be made more flexible, but exceptions should be clearly delimited in order to prevent abuse.

34. Article 10 reflected a judicious approach to the rule of the exhaustion of domestic remedies, which was well established in international practice and embodied in existing international instruments. In its final form, the article should strike a balance between respect for the internal legal order of States and the interests of both the persons concerned and the State exercising diplomatic protection on their behalf. The burden of exhausting such remedies should not be excessively heavy, yet steps must be taken to prevent subjective interpretations being used to bypass the machinery that domestic legislation offered the person concerned to enable them to obtain reparation of an injury.

35. It was questionable whether the rule of the exhaustion of domestic remedies required qualification since it was sufficient for such remedies to be available within a reasonable period and for the rule to be interpreted in good faith. At all events, it would be advisable to bear in mind the case law of regional human rights courts.

36. As far as the Commission's forthcoming programme of work was concerned, the responsibility of international organizations and shared natural resources of States appeared to be topics ripe for codification and progressive development and subjects allied to those in which the Commission had already gained valuable experience. The Commission's summaries of the other three themes did not reveal any justification or necessity for studying them. Obviously, the Commission had to remain alive to the concerns of the international community as a whole and it would therefore be preferable for the Commission to review the list of five topics at its next session, with a view to presenting definite recommendations to the Sixth Committee.

37. **Ms. Eugène** (Haiti) said that the draft articles on State responsibility had been improved by the clear distinction drawn in articles 40 and 41 between breaches of peremptory and other norms. Accordingly, all breaches of *jus cogens* were deemed serious per se. The obligations to cooperate to end a serious breach and not to recognize as lawful a situation created by a breach were new legal obligations for States. As for countermeasures, the scope of article 54 was too vague and required more detailed definition. More emphasis should be placed on the settlement of disputes. Haiti was in favour of a step-by-step approach to the final form to be given to the draft articles and therefore supported the Commission's recommendations on the subject.

38. The draft articles on the liability of States for the injurious consequences of activities not prohibited by international law had greatly advanced the progressive development of general international law and environmental law. Articles 3 and 9 were particularly important, in that they introduced the key concepts of due diligence and degree of risk. Article 3 clearly outlined the obligation of the State of origin to prevent significant transboundary harm, with priority going to risk reduction. The principle of due diligence meant that a State would be required to adopt national measures, but even if a State discharged that duty in good faith, there was no guaranteeing that harm would not occur, especially in developing countries lacking the technology and economic resources to avert such risks. Her delegation supported the Commission's recommendation that the General Assembly should elaborate a convention on the basis of the draft articles.

39. Her Government took the view that reservations to treaties should be permitted only before the entry into force of the treaty in question and only if the treaty authorized reservations.

40. **Mr. Leanza** (Italy) referring to diplomatic protection, said that it was indeed reasonable to contemplate some exceptions to the rule of continuous nationality in order to take account of cases where individuals would be unable to obtain the diplomatic protection of any State. Those exceptions could be allowed when there had been an involuntary change of nationality resulting from State succession, adoption or marriage although, in the latter case, the involuntary nature of the change might be open to some doubt.

41. Diplomatic protection could be exercised by a State to protect a natural or a legal person, despite the fact that the nationality of legal persons was not a clearly defined concept. While in the *Barcelona Traction* case, the International Court of Justice had introduced some formal legal criteria which had to be borne in mind if diplomatic protection were to be exercised on behalf of a company, it had not ruled on the question whether a State could exercise diplomatic protection on the ground of the nationality of the majority of shareholders if the company had been wound up, or if the company had the same nationality as the State from which it was to be protected. It would therefore be useful for the Commission to examine both hypotheses in order to specify the conditions on which exceptions to the general rule could be formulated.

42. The exhaustion of domestic remedies was an inherent and not a procedural condition for the right to diplomatic protection. The Special Rapporteur's claim that, in the *ELSI* case, Italy had contended that it was a procedural requirement, was unfounded. At all events, the nature of the rule had not been questioned in that case.

43. The Special Rapporteur had been right to take account of the Vienna Convention on the Law of Treaties of 1969 when drawing up the draft articles on unilateral acts, because treaties and unilateral acts were congeners to which separate rules applied. Nevertheless, the lack of an adequate analysis of State practice in respect of the different categories of unilateral acts was worrying, as it robbed the Commission of a firm basis for classifying such acts.

44. Despite the fact that the Special Rapporteur had based his text on articles 31 and 32 of the Vienna Convention when dealing with the interpretation of unilateral acts, the intention of the author State should be a main criterion. Greater emphasis should therefore be given to preparatory work, as it offered a clear indication of a State's intention, although of course any reference to such work would have to be limited to sources which were reasonably accessible to other States.

45. Silence could not be deemed a unilateral act in the strict sense of the term since it was completely devoid of intention, nor could estoppel be regarded as a legal act, but rather as one of the possible consequences of a unilateral act. It would therefore be preferable to analyse that question in the context of the effects of unilateral acts.

46. As for the future programme of work, priority should go to the further consideration of international responsibility, more particularly that of international organizations. Moreover, it was important for the Commission to cooperate with other international bodies which contributed to the consolidation of general international law by promoting significant international agreements.

The meeting rose at 4.50 p.m.