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Chairman: Mr. Prandler . . . . (Hungary)

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The meeting was called to order at 10.10 a.m.

Agenda item 163: Observer status for the International Institute for Democracy and Electoral Assistance in the General Assembly (*continued*) (A/C.6/57/L.26)

1. **Mr. Schori** (Sweden) said that although significant progress had been achieved on the question of granting observer status to the International Institute for Democracy and Electoral Assistance in the General Assembly, some delegations were still uncertain whether the Institute really was an intergovernmental organization. The sponsors believed that the Institute did meet the criteria for observer status, as outlined in General Assembly decision 49/426. In the interests of obtaining a consensus, he proposed that the matter should be deferred to the next session of the General Assembly, on the clear understanding that no delegation would then oppose the granting of observer status to the Institute, provided that the Institute had amended its statutes to bar associated members from participation in the decision-making process in its Council. In view of the statements made by the Chinese and Egyptian delegations during the debate on the topic, he was withdrawing draft decision A/C.6/57/L.23 and submitting draft decision A/C.6/57/L.26. He requested that immediate action be taken on it.

2. **The Chairman** suggested that, pursuant to rule 120 of the rules of procedure of the General Assembly, the Committee should waive the 24-hour requirement; he took it that the Committee wished to do so and to adopt draft decision A/C.6/57/L.26.

3. *Draft decision A/C.6/57/L.26 was adopted.*

Agenda item 160: Measures to eliminate international terrorism (*continued*) (A/C.6/57/L.22)

4. **Ms. Chatsis** (Canada) said that draft resolution A/C.6/57/L.22, submitted by the Bureau, was primarily procedural. The seventh, ninth and thirteenth preambular paragraphs referred to developments and events which had taken place during the previous twelve months. Paragraph 12 had been amended to reflect the fact that the Secretary-General had submitted the report requested in General Assembly resolution 56/253. Former paragraph 13 had become paragraph 14 and mentioned reports to the Counter-Terrorism Committee. The secretariat had advised her that the three-day meeting of the Ad Hoc Committee had been tentatively scheduled for 31 March to 2 April 2003. She proposed the addition of a new tenth preambular paragraph, reading “Mindful also of the essential need to strengthen international, regional and subregional cooperation aimed at enhancing the national capacity of States to prevent and suppress effectively international terrorism in all its forms and manifestations.”

Agenda item 156: Report of the International Law Commission on the work of its fifty-fourth session (*continued*) (A/57/10 and Corr.1)

5. **Ms. Škrk** (Slovenia) endorsed the view that the basic provisions on reservations to treaties were laid down in the Vienna regime on the law of treaties and that non-binding guidelines would best satisfy the urgent need to improve States practice in that sphere due to their technical nature, reservations to treaties required careful consideration and it would therefore be most useful if the commentaries were ultimately to form an integral part of the final text of the Guide to Practice. The draft guidelines provisionally adopted by the Commission seemed well balanced and respected both the autonomy of the reserving State and the interests of other contracting parties and the international community.

6. It was regrettable that reservations to bilateral treaties did not constitute a reservation within the meaning of the Guide to Practice, since a reservation of that kind required thorough examination and action by the other contracting party, if it wanted the treaty in question to remain in force. On the other hand, the fact that the draft guidelines covered interpretative declarations in respect of bilateral treaties was a source of satisfaction. The rule that acceptance of such a declaration constituted the authentic interpretation of a bilateral treaty amounted to progressive development of treaty law and deserved further scrutiny, because authentic interpretation by a legislative body had a binding effect in municipal law. In the context of draft guideline 2.3.2 (Acceptance of late formulation of a reservation), she observed that as time limits were binding, in that they created direct legal consequences after their expiry, they should be carefully examined before they were mentioned in a non-binding legal instrument such as the draft guidelines. While the draft guidelines on the functions of depositaries and their

role with regard to reservations to treaties were sensible, the Commission should look again at the procedure envisaged in the case of manifestly impermissible reservations, since the depositary should not be assigned the function of monitoring a treaty.

7. With regard to chapter V of the report the functional protection by international organizations of their officials and the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and passengers, irrespective of their nationality, went beyond the scope of diplomatic protection. It was also questionable whether a State or international organization that temporarily administered or controlled a territory could give protection to local residents; the right of the latter to defend their fundamental rights and freedoms was a matter which should be regulated by a special treaty regime. The State of nationality of shareholders in a company should not be entitled to exercise diplomatic protection on their behalf, because that approach could give an economically stronger party an advantage over a weaker one.

8. Her delegation supported the "mixed" position on the question whether the exhaustion of local remedies was a matter of procedure or of substance and also the Commission's opinion that an empirical study of local remedies should be made. To that end, the Commission should also examine the practice of the European Court of Human Rights, which made the exhaustion of local remedies one of the criteria determining the admissibility of an application. As far as draft article 14 (a) was concerned, her delegation was in favour of the third option. In addition, it believed that the waiver of immunity must be express and not implied and it had some reservations about the inclusion of estoppel as a form of implied waiver. It also had both substantive and terminological reservations about the voluntary link mentioned in draft article 14 (c) and therefore endorsed the Rapporteur's suggestion that the draft articles on diplomatic protection should not make an explicit reference to it.

9. Draft article 14 (e) was not entirely felicitous. A case should be brought before an international forum only if undue delay resulted from the malfunctioning of a domestic court in a specific case, but not if it had been caused by the systemic delays affecting many national courts. Once again, it might be advisable to examine the practice of the European Court of Human Rights with regard to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. With regard to draft articles 15 and 16, the burden of proof formula and the Calvo clause were out of place in the draft articles on diplomatic protection, whereas the concept of the denial of justice should be further elaborated in the context of diplomatic protection as it was closely linked to the issue of the exhaustion of local remedies.

10. Commenting on draft articles 1 to 7, she reiterated the opinion that the right of an individual to diplomatic protection should be treated as an individual human right and expressed support for the Commission's position on continuous nationality. Her delegation considered, however, that a State where stateless persons or refugees were habitually resident was entitled to exercise diplomatic protection on behalf of those persons against third States.

11. **Mr. Ghandi** (India), referring to reservations to treaties, said that he could accept draft guidelines 2.1.1 and 2.1.2 (formulation in writing of reservations and formal confirmations) because they were in conformity with article 23, paragraph 1, of the Vienna Conventions on the Law of Treaties of 1969 and 1986. Interpretative declarations should likewise be made in writing. The formulation of draft guideline 2.1.5 reflected practice under article 23 of the 1969 Vienna Convention and was therefore acceptable, but since reservations were generally made at the time of ratification or accession and, for that reason, formed part of the communication of the relevant instrument, the issue raised in relation to draft guideline 2.1.6, concerning the communication of a reservation by electronic mail or facsimile, seemed to be irrelevant.

12. The functions of depositaries as set forth in draft guideline 2.1.7 were generally acceptable. With regard to draft guideline 2.1.8, the impermissibility of a reservation generally rested on its incompatibility with the object and purpose of the treaty and was therefore a matter to be decided by the States parties. Consequently, the depositary should not have any role in judging the impermissibility of reservations, in communicating a manifestly impermissible reservation to other signatory States or in drawing attention to any legal problem raised by it.

13. His country had found the discussion of unilateral acts of States inconclusive. It did not concur with the Special Rapporteur's proposal to make a new concept, *acta sunt servanda*, the legal basis for the binding

nature of a unilateral act, because under international law, *pacta sunt servanda* was not regarded as the basis of a treaty relationship. The topic of unilateral acts of States involved progressive development rather than codification. Not every unilateral act created a legal obligation and hence no mechanism should be provided from which it might be inferred that a legal obligation had come into existence. The Special Rapporteur should first concentrate on those unilateral acts which, in recorded international practice, had culminated in obligations, as that approach offered the best prospect for the fruitful completion of work on the topic.

14. He welcomed the establishment of a working group on international liability in case of loss from transboundary harm arising out of hazardous activities. He agreed that, during the preliminary stage, the scope of the topic should be the same as that for the topic of prevention. A threshold would indeed have to be determined in triggering the application of the regime on allocation of loss and any such regime should include not only States, but also operators, insurance companies and pools of industrial funds. Operators should bear primary responsibility in any loss allocation regime, as it was the operator who profited from the operation and not the State. Nevertheless, some thought would also have to be given to third-party involvement, force majeure and the impossibility of foreseeing harm or tracing its source with complete certainty. A careful study should be made of international precedents regarding the role of the State under the liability regime. While the liability regime established under treaties might provide some insight into the utility of time-tested mechanisms, it was debatable whether those practices would work outside a treaty regime.

15. With regard to the three new topics taken up by the Commission, his delegation agreed in principle that the concept of responsibility should encompass the responsibility of international organizations for their wrongful acts. However, the Working Group's decision to restrict its study to intergovernmental organizations was appropriate. As for the fragmentation of international law, the Study Group on the topic could address the growing concern about the possible negative implications arising from the expansion and diversification of international law. The subjects for consideration in the first instance were well chosen. The Study Group should, however, avoid duplicating work already done or under consideration by another working group.

16. **Mr. Dhakal** (Nepal), said that his delegation would respond in due course to the thematic questions contained in paragraphs 26-31 of the Commission's report. With regard to reservations to treaties, his delegation shared the Commission's view that a reservation must be formulated in writing. Although the draft guidelines would not affect the relevant provisions of the Vienna Conventions of 1969, 1978 and 1986, they would be of assistance to States and international organizations. Draft guideline 2.1.3 was in conformity with the prevailing practice among international organizations and with article 7 of the 1986 Vienna Convention. Draft guideline 2.1.6 followed the 1969 and 1986 Conventions.

17. On the question of diplomatic protection, his delegation had noted with appreciation the Commission's adoption of seven draft articles on key aspects of the topic, which would facilitate a wider acceptance of the final text. It welcomed the Commission's intention to complete consideration of the topic during the current quinquennium.

18. The topic of unilateral acts of States was complex and required careful consideration, but his delegation was confident that the Commission would be able to reach agreement on an acceptable methodology. It should begin by formulating rules common to all unilateral acts and only then focus on the consideration of specific rules for particular categories of such acts.

19. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation commended the Working Group for recognizing the need to strike a balance between prevention and liability. It also supported the Working Group's view that organizations established under municipal law and non-governmental organizations should be excluded from the study of the topic.

20. Concerning the fragmentation of international law, his delegation hoped that a study of the topic would strengthen the rules, regimes and institutions of international law. He endorsed the Commission's intention to organize a seminar in order to gain an overview of State practice and to provide a forum for dialogue and potential harmonization. Lastly, his delegation believed that Member States should revisit the question of honoraria and ensure that research by

special rapporteurs was not adversely affected by budget cuts.

21. **Ms. Grabowska** (Poland) said that, during the twentieth century, unilateral acts had come to play an increasingly important role in the process of creating law and incurring international obligations. Although they might vary significantly in their content and effects, unilateral acts should, as a new, very flexible instrument, be governed by international law. The definition in draft article 1, which appeared in the Special Rapporteur's fifth report (A/CN.4/525, para. 81), was satisfactory, although her delegation concurred with the suggestion that it would be improved if the words "governed by international law" were incorporated.

22. There were neither formal nor substantive grounds for the application of the 1969 Vienna Convention, mutatis mutandis, to unilateral acts. A formal obstacle was posed by the scope of the Convention, which applied only to inter-State agreements made in writing, while the substantive obstacle arose from the fact that such acts were, by definition, unilateral. Moreover, not all States had yet ratified the 1969 Convention, whereas any State could formulate a unilateral act. The Convention should not, however, be completely disregarded: specific provisions could be reflected in the future codification of unilateral acts, particularly in such areas as international and domestic effects, bona fide fulfilment of a unilateral obligation, rules regarding representation of States, the granting of authority, interpretation, invalidity and reservations. On the other hand, such aspects of the Convention as conclusion, entry into force, termination and suspension might well not be applicable to unilateral acts.

23. Despite the differences between unilateral acts and treaties, the two could be regulated in a similar manner. The Vienna Convention could therefore provide useful guidance on a number of issues. Although unilateral acts did not offer the same degree of legal certainty as treaties, their flexibility enabled them to play an increasingly important role in many fields of international cooperation. The new principle of *acta sunt servanda*, however, which had been introduced into draft article 7, would be hard to accept before the binding force and legal effects of unilateral acts were established. As for whether such acts constituted a source of international law on a par with ordinary sources, further thorough examination was required. In view of their growing frequency, however, they were likely to become so.

24. Although neither international treaties nor custom provided any procedural guidelines as to the adoption of unilateral acts, academics and international tribunals had, on the basis of article 38 of the Statute of the International Court of Justice, drawn on the Court's case law, whereby the decisive factor was not the form of a unilateral act but its content and the intention of the adopting State. The form was relevant, however, from the point of view of the effects of the act: should it have international effects, its form had to comply with the requirements of international law, while if it were to take effect in the domestic sphere, national law requirements had to be complied with. Since, therefore, international law did not impose specific formal requirements, no such procedural requirements should apply. Like treaties unilateral acts must be interpreted in good faith, and the result of such an interpretation must not be contrary to law. Further consideration should, however, be given to the question whether, in cases of doubt, international tribunals should be requested to provide interpretations.

25. Unilateral acts, as opposed to treaties, did not involve time-consuming and complicated procedures, and, since they made international cooperation more efficient, it could reasonably be assumed that they would become increasingly common. At the same time, they were extremely complex in nature, so their codification might not be feasible in the foreseeable future. Meanwhile, it would be useful to establish a set of minimum standards of conduct, perhaps appearing in the form of a General Assembly resolution containing non-binding rules that would help develop a uniform practice.

26. **Ms. Telalian** (Greece) said that, inasmuch as it incorporated provisions of the Vienna Conventions word for word, as well as customary rules of international law, the draft Guide to Practice on reservations to treaties would be of great practical value to users. With regard to the questions posed by the Commission, her delegation endorsed the current formulation of the fourth paragraph of draft guideline 2.1.6, according to which a reservation to a treaty could be made by electronic mail or facsimile. As the Commission had suggested, however, a confirmation must be made in writing. Secondly, her delegation considered that the question whether a reservation held to be impermissible by a treaty-monitoring body should

be withdrawn by the reserving State was closely linked with the question of the powers of treaty-monitoring bodies to determine the compatibility of a reservation, as well as the consequences of such a determination. Both issues raised complex and sensitive questions. The competence of such bodies to pronounce on the validity of a reservation depended on the powers assigned to them by the treaty in question.

27. Judicial supervisory organs such as the European Court of Human Rights had long established their competence to determine the validity of a reservation. In the case of an invalid reservation, the reserving State should withdraw it, totally or partially. Another option would be for the reserving State to refuse to become a party to a treaty if a reservation was a fundamental condition for its doing so. Human rights treaties, too, had established independent monitoring bodies of a non-judicial nature that had played a determining role in appraising the admissibility of reservations. Since their assessments were objective, a bona fide reserving State would be forced seriously to reconsider its position. The system of objections and acceptances provided for by the Vienna Convention was also relevant; it could offer valuable support to a monitoring body in its interpretation of the compatibility of a reservation.

28. The preliminary conclusions adopted by the Commission at its forty-ninth session, to the effect that monitoring bodies could not exceed the powers given them under the relevant treaty, should be reconsidered, in the light of the recent practice of human rights treaty-monitoring bodies and the need to preserve the integrity of such treaties against the increased use of reservations. In that connection, her delegation commended the Commission's decision to offer to work with the Special Rapporteur on reservations to treaties of the Sub-Commission on the Promotion and Protection of Human Rights.

29. Her delegation strongly supported the ideas contained in draft guideline 2.1.8, which allowed the depositary to play a more active role, in relation to manifestly impermissible reservations. The draft guideline would give bona fide reserving States a further opportunity to reconsider their position. The term "manifestly impermissible" should, however, be clarified by the establishment of criteria on which the depositary could make an assessment of the impermissibility. Ultimately, however, the final responsibility of protecting the object and purpose of a treaty rested with States Parties.

30. Her delegation welcomed the conclusion of the second reading of the draft articles on prevention of transboundary harm and agreed with the Commission's opinion that a breach of duty to prevent might entail State responsibility under international law. Prevention was, however, only one aspect of the problem; the other was to provide for remedial measures when transboundary harm had been caused, despite prevention efforts. If harm had occurred, there must be adequate and prompt compensation, and loss to persons, property and the environment should be covered. The Commission should also address the question of liability for harm caused to areas beyond national jurisdiction. The threshold for triggering the application of the regime on allocation of loss should be similar to that required for prevention. The Working Group's approach of combining elements of both civil and State liability regimes would be a most effective way of distributing loss between the various actors and ensuring that innocent victims were not left to bear the loss, which should be the primary responsibility of the operator. A consideration of the various international treaties in the field of liability, especially those relating to civil liability, and work in other international forums should be of benefit to the Commission's work.

31. She welcomed the inclusion of the topic of fragmentation of international law in the Commission's agenda. The international community was currently witnessing a proliferation of rules governing almost every field of human activity, and the institutional components of the international legal order were also multiplying fast. There was a need for some coordination or harmonization of the various regimes, and also for greater synergy and cooperation between the institutions and actors involved. By analysing the existing problems and suggesting practical solutions, the Commission could make a valuable contribution.

32. She welcomed the decision to establish a Working Group on the topic of responsibility of international organizations, and agreed with the Commission's proposal to focus initially on the responsibility of intergovernmental organizations. It was important to examine existing State practice and case law on the questions of attribution of wrongful acts and responsibility of member States for conduct attributed to an international organization. Her delegation was strongly in favour of the adoption of an international

convention on the topic, to include appropriate procedures for dispute settlement.

33. **Mr. Špaček** (Slovakia), referring to the topic of diplomatic protection, observed that draft article 1 defined the concept but not its scope. He therefore suggested adding the words: "These articles apply to the diplomatic protection of a State exercised in respect of natural and legal persons". Diplomatic protection was the discretionary right of a State to espouse the cause of its national injured by an internationally wrongful act of another State. It could be exercised subject to at least three conditions: the wrongful act must be committed by a State other than the State of nationality; the injury must result from that act; and the injured person must be a national of the State intending to exercise the diplomatic protection. The proposal, in draft article 1, paragraph 2, and in draft article 7, that it could be exercised in respect of non-nationals was based on human rights considerations. His delegation was not, however, in favour of transforming diplomatic protection into an instrument for protecting human rights, since there were more effective procedures available for that purpose. Nor was it convinced of the need to grant the State of nationality of a ship the right to exercise diplomatic protection for crew members of another nationality. That question was sufficiently covered by the law of the sea, especially the United Nations Convention on the Law of the Sea. As for the diplomatic protection of shareholders, the Commission could safely base its work on the jurisprudence of the International Court of Justice in the *Barcelona Traction* case.

34. He supported the Commission's decision not to extend the scope of the topic to functional protection by international organizations, the delegation of a right of diplomatic protection by one State to another, and cases where an international organization controlled a territory. He also supported its decision to refrain from discussing whether the exhaustion of local remedies rule was substantive or procedural, and not to refer draft articles 12 and 13 to the Drafting Committee. Likewise, there was no need to include draft article 15, on the burden of proof. The issue of procedure was best dealt with by courts on a case-by-case basis. On draft article 16, he shared the view that the Calvo clause was merely a contractual device and not a rule of international law. If the right of diplomatic protection was a right of States, it could not be affected by a contractual agreement between a national and a third State. He therefore agreed with the Commission's decision not to include draft article 16.

35. He welcomed the progress achieved on reservations to treaties, and hoped the Commission would soon be able to tackle the clarification of legal effects of reservations and objections to them. He also hoped the Guide to Practice would become a useful tool for the various State institutions involved in the different stages of the treaty-making process. He supported draft guideline 2.1.6, which reflected the procedure commonly adopted for the communication of reservations. However, draft guideline 2.5.X was problematic. While he agreed with the Special Rapporteur that the fact that a reservation was found impermissible by a body monitoring the implementation of the treaty to which the reservation related did not constitute the withdrawal of that reservation, he could not concur with the conclusion drawn from that finding. There was no obligation, under general international law or the law of treaties, for a reserving State to withdraw a reservation in those circumstances.

36. On the topic of unilateral acts, in view of the current impasse he expressed some scepticism as to the prospects for successful codification. He hoped the Commission would be able to find a methodological way out.

37. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed such situations should be dealt with on a case-by-case basis. Rather than elaborating detailed rigid rules, the Commission should focus on providing guidelines to be used by States to negotiate the allocation of loss.

38. Lastly, the topic of responsibility of international organizations should be limited to issues relating to responsibility for internationally wrongful acts under general international law. It should not cover liability for injury caused by activities which were not prohibited, or special regimes established by particular instruments. The focus should be on intergovernmental organizations, leaving aside other types of international organizations.

39. **Mr. Hafrad** (Algeria), commenting on diplomatic protection, welcomed the decision of the Special Rapporteur to confine the draft articles to the traditional issues of the nationality of claims and the exhaustion of local remedies. The functional protection

of officials of international organizations was an exception to the rule of link of nationality which underpinned the regime of diplomatic protection, and should therefore be excluded. The Commission should, however, clarify the question of competing claims by the State of nationality and the international organization concerned. His delegation was not in favour of making provision for situations in which a State occupying, controlling or administering a territory other than its own exercised diplomatic protection on behalf of its residents. Since such occupation was internationally unlawful, it could not form a legal basis for the exercise of diplomatic protection. The complex question of the burden of proof should be dealt with by the rules of procedure or the special agreement, where a case came before an international court, or by national law if it was handled by a national court. Although his delegation attached importance to the question whether the exhaustion of local remedies rule was procedural or substantive it felt that draft articles 12 and 13 were of little practical value and therefore supported the decision not to refer them to the Drafting Committee. It also supported the decision to refer draft article 14 (a) to the Drafting Committee, and expressed a preference for the third option, under which local remedies would not need to be exhausted if they provided no reasonable possibility of an effective remedy. As for draft article 14 (b), the concept of estoppel was already covered by the broader concept of implied waiver. However, silence did not necessarily imply consent; its actual purport must be determined in the light of the particular circumstances of the case. He agreed with the decision to refer draft article 14 (b) to the Drafting Committee, and the recommendation that the latter should exercise caution with respect to implied waiver. As for the question of protection by the flag State of crew members of a different nationality, that was not properly speaking diplomatic protection, but a prerogative governed by the rule of *lex specialis*, as shown by the *M/V Saiga* case. It was already sufficiently provided for in other relevant legal instruments, such as the United Nations Convention on the Law of the Sea. The same applied to the crews of aircraft and spacecraft. His delegation was very reluctant to endorse any increased right of States to intervene on behalf of non-nationals, thereby departing from the principle of link of nationality which was essential to the system of diplomatic protection.

40. Concerning reservations to treaties, he noted that draft guideline 2.1.7 extended the functions of depositaries beyond the role assigned to them by the Vienna Conventions. Their role in the case of impermissible reservations warranted careful study. However, he welcomed the decision not to refer draft guideline 2.5.X to the Drafting Committee. Under the Vienna Convention on the Law of Treaties, it was for States to decide whether a reservation was lawful.

41. Turning to chapter VII of the report, he agreed with the idea that the question of international responsibility for injurious consequences arising out of acts not prohibited by international law should be regulated in terms of the allocation of loss among the various actors. The operator should bear the primary liability under any regime for the allocation of loss.

42. Lastly, noting the fundamental changes taking place in international law and its adaptation to new phenomena such as security, the economy, the environment and the proliferation of international courts and tribunals, he welcomed the Commission's proposal to undertake a study of the fragmentation of international law.

43. **Ms. Taylor** (Australia) welcomed the decision to establish an open-ended informal consultation on unilateral acts of States. One area of particular interest to her country was the issue of reciprocity: whether a State which had unilaterally made a promise could be legally bound without expecting reciprocity on the part of any other State. The example given by the Special Rapporteur, of a State requesting extradition of an individual and promising the requested State that the death penalty would not be applied, was of great interest to Australia, whose national law prohibited extradition where the extradited person might face the death penalty. In such a case, it would be anxious to preserve the enforceability of the unilateral act at international law, without the need for any element of reciprocity. Australia shared the view that unilateral acts did exist under international law and could be binding on the author State under certain conditions. Although they were not norm-creating mechanisms, if sufficiently widespread they could in theory be evidence of State practice and result in the creation of customary international law.

44. Australia welcomed the Commission's decision to include three new topics in its programme of work. It especially welcomed the establishment of a Working

Group on shared natural resources, which should help to clarify the general principles of international law governing those resources. Australia hoped its work would assist in defining the obligation of States to cooperate in the management of fisheries resources, through such action as combating illegal fishing, which threatened endangered species.

45. **Mr. Simon** (Hungary), commenting on chapter VII of the report, noted that international liability would arise for States if harm occurred even though they had complied with their duties of prevention. States should be reasonably free to permit desired activities in their territory or within their jurisdiction despite that possibility, and some form of relief, as by way of compensation, should be available. The Commission had made progress towards a solution of the liability issue by tackling the question of allocation of loss. His delegation agreed that the activities covered should be the same as those covered under the topic of prevention. The threshold for triggering the application of the regime on allocation of loss should not be higher in the case of State liability than "significant harm", in accordance with international law. In principle, the innocent victim should not be left to bear the loss, although it had to be considered whether the victim had taken reasonable steps to minimize the damage. The operator should bear the primary liability. In that respect, he agreed with the Working Group's proposals. If the operator's insurance or other resources proved insufficient, the remainder of the loss should be allocated to the State. It was therefore necessary to define the rules of liability for all the actors involved, and especially for States.

46. His delegation recognized the importance of the role of unilateral acts in international relations and the need to codify the relevant rules; it looked forward to a successful outcome of the work on the topic.

47. He welcomed the establishment of a Working Group on shared natural resources, an issue of crucial importance to future generations. In the course of future discussions, it would be useful to bear in mind that the completion of the work on confined transboundary groundwater might provide a useful basis for further work on the topic.

48. **Ms. Cavaliere de Nava** (Venezuela), referring to chapter V of the report, concurred with the Special Rapporteur's suggestion that the scope of the topic should be limited to nationality of claims and the exhaustion of local remedies rule and to natural persons, at least at the current stage of the study. That did not, however, diminish the importance of the study of protection of legal entities, about which a substantial literature and jurisprudence also existed. Other issues should be examined in greater detail to see whether they should be excluded definitively; those included exceptions to the principle of nationality of claims, including diplomatic protection of crew members holding the nationality of a third State, protection by a State or an international organization of persons residing in territory under their administration or control, and protection by international organizations of their officials. Such functional protection issues appeared to have the support of most members of the Commission and of the Committee.

49. With regard to the draft articles provisionally adopted by the Commission, her delegation underscored the importance of including a provision on diplomatic protection of stateless persons and refugees who were lawfully and habitually resident in a State. In the case of refugees, it was appropriate to specify that such persons must be recognized as refugees by that State at the time of the injury and at the date of the official presentation of the claim. That was the basic requirement for the exercise of protection. Such protection should, however, not prejudge the State's decision to grant nationality.

50. Her delegation also welcomed the Special Rapporteur's proposal to deal with two very important questions in the context of diplomatic protection, namely, denial of justice and the Calvo clause. The latter question, while excluded from the study, was closely related to the topic of diplomatic protection and was of undeniable importance in State practice. In addition, the Commission should give careful consideration to the "clean hands" doctrine to see whether it should be included in the draft article. Her delegation supported the decision to refer to the Drafting Committee article 14 (a) on exceptions to the exhaustion of local remedies rule, an issue that should be approached with great care so as to avoid subjective interpretations.

51. Turning to chapter VI of the report, she expressed concern that no progress had been made in the consideration of the topic, which certainly lent itself to codification and progressive development. Unilateral acts were becoming increasingly frequent in State practice and there could be no doubt about the need to

elaborate rules governing their functioning. Her delegation hoped that the Commission would take up some draft articles in the Drafting Committee, including one containing a definition of unilateral acts, about which a basic general agreement had been reached following lengthy debate. Moreover, her delegation would be grateful if in his sixth report, the Special Rapporteur would consider a specific category of unilateral acts, such as recognition. Such an approach would make it possible to elaborate concrete rules for a specific category of unilateral acts. It was to be hoped that Governments would transmit to the Commission information on their practice in that area.

52. With regard to chapter VIII of the report, study of the topic should be limited to intergovernmental organizations, in other words, organizations that States established by means of a treaty or other arrangement. The reference to the definition contained in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was appropriate.

53. It was not easy to establish a clear and definitive pattern applicable to all intergovernmental organizations. Nevertheless, some basic elements should be considered, such as permanence, structure and functioning, that could be valid for a general definition of such organizations. In any case, the topic should focus on the international responsibility of international organizations for internationally wrongful acts, and should therefore exclude the study of liability for the time being.

54. Concerning chapter IX of the report, the fragmentation of international law was unquestionably an important topic, although her delegation shared the doubts expressed regarding its viability. It was not certain what the outcome of the Commission's work on the topic might be.

55. Lastly, with regard to chapter VII of the report, she noted with satisfaction the completion of the work on prevention and the progress made in the consideration of international liability in that context. Her delegation believed that failure to comply with obligations of prevention in accordance with the draft articles adopted by the Commission in 2001 gave rise to State responsibility. The Venezuelan delegation also shared the view of the Working Group that the scope of the topic should be limited to the same activities as those included within the scope of the topic of prevention. Loss to persons, property and environment should be considered. The Commission should continue the study of the topic along the lines indicated, while seeking to determine the role of the operator and the role of the State in a balanced and appropriate way.

56. **Ms. Álvarez-Núñez** (Cuba), referring to the topic of diplomatic protection, said that the Commission should limit itself to the traditional questions falling within the scope of the topic, namely nationality of claims and exhaustion of local remedies. That approach not only reflected customary practice and jurisprudence, but would avoid abuses in the exercise of diplomatic protection. The use of diplomatic protection for groups and special regimes governed by other norms of international law, such as functional protection, seemed inappropriate. Extension of the scope of the topic to other areas where no genuine link of nationality existed would inevitably harm the institution of diplomatic protection.

57. Her delegation believed that draft articles 1 to 7 provisionally adopted by the Commission required theoretical clarification, especially articles 1, 3 and 4. As a rule, her delegation supported the Commission's approach of indicating that diplomatic protection was a discretional right of the State of nationality of the natural or legal person affected by the internationally wrongful act of another State. With regard to the approach taken in the draft articles, which sought to substitute the criterion of an "effective link" for that of a "genuine link", that was a controversial area which should be avoided.

58. Draft articles 10 to 14, exceptions to the exhaustion of local remedies rule should be based on strict criteria, and their application should be clearly defined.

59. No study of diplomatic protection would be complete without examining the Calvo clause. The clause was rooted in the practice of many States, without affecting the settlement of commercial disputes through arbitration or the conclusion of reciprocal investment protection agreements. Her delegation regretted, therefore, that draft article 16 on the conclusion of contracts between foreign nationals and the States in which their activities were carried out had not been referred to the Drafting Committee. The Calvo clause reaffirmed the categorical norm of non-intervention in the internal affairs of States and did not

affect the sovereign right of a State to decide when to exercise diplomatic protection.

60. As to chapter IV of the report, her delegation believed that the reservations regime contained in the Vienna Convention of 1969 was fully relevant and that the respective provisions of the 1969, 1978 and 1986 Vienna Conventions should not be modified. Some approaches taken in the draft guidelines should be brought into line with that regime, for example, the procedure described in draft guideline 2.1.8. In accordance with the 1969 Vienna Convention, only States parties to a treaty could evaluate the compatibility of a reservation with that treaty, particularly in relation to reservations prohibited by the treaty, which should be subject to consideration by the parties under all circumstances. That right should not be delegated to the depositary, who was under an obligation to act impartially in the performance of functions of an international character.

61. The guidelines on the role of treaty bodies should also be brought into line with universally accepted norms. In its further consideration of the topic, the Commission should continue to pay close attention to the comments of Member States.

62. With regard to chapter VI of the report, her delegation reaffirmed the importance of the topic and of its future codification and progressive development. The Commission should give special attention to the study of the legal effects of unilateral acts, especially those that sought to create obligations for third States. The achievement of consensus on the definition of unilateral acts and their causes of invalidity was of great importance. Any draft articles on the topic should embody the rule that unilateral acts were enforceable. Her delegation fully supported the conclusions of the Special Rapporteur contained in paragraphs 417 to 419 of the Commission's report.

63. With regard to chapter VII of the report, her delegation noted with satisfaction that the Commission had resumed its study of the topic of liability which should be given the priority it deserved. Greater attention should be paid to the analysis of international liability regimes contained in multilateral treaties on environmental conservation, protection and management, which had been partially or insufficiently applied by States.

64. With regard to chapter VIII of the report, the study of the topic should be limited to responsibility for internationally wrongful acts under general international law, and to intergovernmental organizations.

65. With regard to the Commission's decision to include the topic "Fragmentation of international law" in its programme of work, it was doubtful that any practical results could be achieved from study of the topic.

66. **Ms. Hahn** Jaesoon (Republic of Korea), referring to chapter IV of the report, said that her delegation was generally satisfied with the draft guidelines and accompanying commentaries provisionally adopted by the Commission; it wished, however, to comment on draft guideline 2.1.8. The guideline appeared to vest the depositary with a power going beyond the traditional "post office" role by enabling the depositary to draw the attention of the reserving State to what it regarded as a manifestly impermissible reservation. Her delegation was not convinced, however, that the draft article had much practical significance. States normally did not enter into a reservation without giving it serious consideration, making it highly unlikely that such a step by the depositary would lead to the withdrawal of the reservation. What was of greater concern was the possibility that the depositary would get involved in an unwarranted debate with the reserving State as to whether the reservation was compatible with the object and purpose of the treaty. Accordingly, her delegation considered that it would be better for the depositary to play a strictly procedural role in accordance with the relevant provisions of the 1969 and 1986 Vienna Conventions.

67. With regard to the question posed by the Commission concerning the possible communication of a reservation by electronic mail or facsimile and its subsequent confirmation in writing, those forms of communication were not the normal practice in her country. Her delegation acknowledged, however, that there might be circumstances in which such forms of communication might prove useful.

68. With regard to draft guideline 2.5.X, dealing with the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, it seemed that the draft guideline had caused some confusion by considering several legal issues together when they deserved separate treatment. It combined the question of who had the power to decide on the permissibility or impermissibility of reservations, the

question of what consequences should flow from that decision and the question of withdrawal of reservations as such. Each of those questions was important in its own right. Hence, it would be more appropriate to address them separately. In that regard, her delegation welcomed the Special Rapporteur's decision to withdraw draft guideline 2.5.X.

69. The meaning of the term "body monitoring the implementation of the treaty" called for clarification. It was insufficiently clear whether the term meant a treaty body only, with certain regulatory functions, or also implied all bodies having the competence to find a reservation impermissible, including an independent judicial body. A distinction should be drawn between a treaty body having judicial functions and one devoid of such power. Accordingly, her delegation believed that a treaty body should not be allowed to decide on the permissibility of reservations to the extent that the provisions of the treaty under which the treaty body was established had not granted it such a function. The power to decide on the permissibility of reservations to treaties should reside in the States or international organizations which were contracting parties to those treaties.

70. Turning to chapter VI of the report, the discussion on the topic had revealed that there was still no agreement on the approach to the topic and that its scope and content remained unclear. In order to facilitate work on the topic, it might be useful to study specific types of unilateral acts, such as promise, recognition, waiver or protest, before elaborating general rules on unilateral acts.

71. Her delegation welcomed the inclusion of new topics in the Commission's programme of work. With regard to questions raised by the Commission on the topic of responsibility of international organizations (A/57/10, chap. VIII), it would be desirable, at least at the initial stage, to limit the topic to issues relating to responsibility for international wrongful acts under general international law and to intergovernmental organizations.

72. **Mr. Uykur** (Turkey) said that his Government's written comments (A/CN.4/509) on international liability for injurious consequences arising out of acts not prohibited by international law set out the framework of his delegation's approach to the topic. Since the work on liability was still in progress, his comments would be subject to review. His delegation agreed with the Working Group regarding the principle that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control. It also shared the view that the activities covered should be the same as those included within the scope of the topic on prevention of transboundary harm from hazardous activities. It seemed to be a useful approach to cover the loss to persons, property and environment within the national jurisdiction, deferring the question of harm caused to areas beyond that jurisdiction to a later stage. Concerning the threshold to trigger the application of the regime on allocation of loss, it would seem preferable to set a threshold similar to that for prevention, provided it was sufficient to induce operators to follow best practice in prevention and response.

73. His delegation also agreed in general with the Working Group's ideas about the models and rationales for allocating loss, including the principles that the innocent victim should not be left to bear the entire loss; that there should be effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; and that any regime should cover all relevant actors, including operators, insurance companies and pools of industry funds.

74. It was clear that States had an indispensable role in designing appropriate liability schemes aimed at equitable loss allocation, particularly where private liability might be insufficient to cover the entire damage caused. His delegation inclined to the view that residual State liability should arise only in exceptional circumstances, as in the situation where the activities leading to transboundary harm emanated from a foreign ship. In such cases, the introduction of residual State liability might encourage closer supervision of preventive measures by the flag State, or possibly by the port State where the operator or owner of the ship actually conducted its activities, which might not be the State of registry in the case of a ship flying a flag of convenience. His delegation encouraged the Working Group to deal with that issue in more depth in its further work.

75. His delegation would like to caution against taking legal instruments not generally accepted by the international community as reference points. In particular, the Convention on the Law of the Non-Navigational Uses of International Watercourses should not be taken as a basis for the Commission's work

either on international liability or on shared natural resources. Moreover, his delegation found the title of the latter new topic problematic.

76. **Mr. Bocalandro** (Argentina) said that his delegation supported the view that violation of the norms of prevention in relation to hazardous activities entailed State responsibility. It also favoured clarifying the consequences in cases in which significant transboundary harm was caused even though the State of origin had taken the measures of prevention incumbent on it. The allocation of loss approach appeared to be a fruitful one.

77. The Commission needed to pay more attention to consistency between its various sets of draft articles. The interesting debate on the concept of voluntary link in relation to diplomatic protection had revealed the risks of overlap among the topics of State responsibility, diplomatic protection, prevention and liability in relation to transboundary harm, and even jurisdictional immunities. The Commission must be extremely careful in formulating solutions to those issues, which often involved rules of private international law.

78. With regard to diplomatic protection, his delegation shared the view that the Commission should not diverge from the clear criteria stated by the International Court of Justice in the *Barcelona Traction* case. It should be recalled that the Court had recognized the right of the State of nationality of the shareholders to exercise diplomatic protection but only when the rights of those shareholders had been directly injured or when the company had ceased to exist in its place of incorporation. Moreover, according to paragraph 36 of its decision, the rules of diplomatic protection applied residually, “in the absence of any treaty on the subject between the Parties”. The Court, drawing its famous distinction between rights and interests, had pointed out that the mere fact that damage had been sustained by both company and shareholder did not imply that both were entitled to claim compensation.

79. His delegation warmly welcomed the inclusion of the new topics of shared natural resources (beginning with groundwater), fragmentation of international law and responsibility of international organizations. With regard to the latter, in earlier conventions based on the work of the Commission, notably the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the term international organization meant an intergovernmental organization, and his delegation saw no reason to enlarge the definition to include non-governmental organizations or other legal persons not constituted under international law. His delegation also wished to reiterate its support for the efforts of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, in the hope that the draft articles adopted by the Commission in 1991 on the topic could be fashioned into a universal and binding instrument.

80. **Mr. Ndekhedehe** (Nigeria), referring to the topic of reservations to treaties, said the Guide to Practice should continue to be seen as a guide and not as a body of binding rules. The guidance it provided would be useful to States, particularly on the crucial issues of withdrawal and modification of reservations. The Guide should embody the relevant customary rules pertaining to treaties.

81. It was an accepted rule that reservations must not be incompatible with the object and purpose of the treaty. His delegation welcomed the trend towards decreasing use of reservations to human rights treaties. However, it agreed that it was uncertain whether any treaty-monitoring body had the power to decide if and when a reservation was impermissible or inadmissible, or whether such a finding would be binding on States without their consent or could be acted upon by States. Accordingly, his delegation felt that the proposal in that regard should be excluded from the Guide.

82. With respect to guideline 2.1.8 on the procedure in case of manifestly impermissible reservations, the provisions of the 1969 Vienna Convention, particularly article 77, were adequate and unambiguous. To ensure the depositary’s neutrality and impartiality, the functions of the depositary should not go beyond the transmission of reservations to the parties to the treaty.

83. His delegation supported the wording of draft guideline 2.1.6 on the procedure for communication of reservations, and in particular the proposal that where a reservation to a treaty was communicated by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. However, a provision should be added to the effect that the communication would only be considered as having been made by electronic mail or facsimile if there was

no dispute as to the authenticity of the electronic mail or the facsimile.

84. On the topic of fragmentation of international law, such fragmentation was a natural consequence of the expansion of international law in a fragmented world. So far from being unhealthy, the proliferation of international legal judicial institutions, rules and regimes was an indication of the vitality and versatility of international law. The Commission's work would assist international judges and practitioners to cope with the consequences.

Agenda item 162: International convention against the reproductive cloning of human beings (*continued*) (A/C.6/57/L.24)

85. **The Chairman**, introducing draft decision A/C.6/57/L.24 on behalf of the Bureau said that it had been drafted following consultations with the sponsors of draft resolutions A/C.6/57/L.3/Rev.1 and A/C.6/57/L.8. According to the draft decision the General Assembly would welcome the report of the Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings, decide that a working group of the Sixth Committee should be convened during the fifty-eighth session of the General Assembly to continue the work undertaken during the fifty-seventh session and decide also to include in the provisional agenda of its fifty-eighth session the item entitled "International convention against the reproductive cloning of human beings".

The meeting rose at 12.55 p.m.