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Chairman: Mr. Yáñez-Barnuevo . . . . . (Spain)

Contents

05-58184 (E)

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The meeting was called to order at 9.40 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Panahiazar** (Islamic Republic of Iran), referring to the topic "Effects of armed conflicts on treaties", welcomed the first report of the Special Rapporteur (A/CN.4/552) and noted with satisfaction that the Commission had endorsed the suggestion that a written request for information should be circulated to Member States. His delegation supported the basic policy underlying the draft articles presented by the Special Rapporteur, which was to clarify the legal position in respect of the effects of armed conflicts on treaties and to promote the security of legal relations between States. He also welcomed the approach of making the draft articles compatible with the Vienna Convention on the Law of Treaties. However, the subject was also closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility. He hoped that the Special Rapporteur would consider those relationships in his next report.

2. In draft article 2, paragraph (b), the definition of "armed conflict" referred simply to "a conflict" rather than an "international conflict". Internal armed conflicts would therefore be included in the scope of the term. However, an internal armed conflict should not have any effect on treaties concluded between the State in which the conflict was taking place and other States. If a State affected by internal armed conflict failed to fulfil its treaty obligations, such failure would be dealt with under the law of State responsibility: the conflict might well make it impossible for the State concerned to meet those obligations, a circumstance which clearly precluded its conduct from being characterized as wrongful. In addition, a broad definition of "armed conflict" was more likely to jeopardize than to strengthen treaty relations.

3. Under draft article 4, paragraph 2 (b), the "nature and extent of the armed conflict" was referred to as a sine qua non for determining the intention of the parties to a treaty relating to its susceptibility to termination or suspension. However, he questioned whether the nature and extent of an armed conflict should be a factor in determining the intention of the parties at the time of conclusion of the treaty, since such an intention would pre-date the conflict.

4. With regard to draft article 6, his delegation supported the Special Rapporteur's conclusions that the supposition that a treaty forming an element in a dispute was a nullity simply because it formed part of the "causes" of an armed conflict was unacceptable and that it was unreasonable to presume that a treaty which served as the basis of an armed conflict and which later was the subject of some process in accordance with law should be assumed to be annulled.

5. Draft article 7, paragraph 2, contained a set of categories of treaty whose object and purpose involved the necessary implication that they continued in operation during an armed conflict. However, paragraph 2 (b) referred simply to treaties declaring, creating or regulating permanent rights or a permanent regime or status. It would be preferable to list explicitly in that paragraph the types of agreement in the relevant category that were mentioned in the Special Rapporteur's report, in particular treaties creating or modifying boundaries, which played an essential role in the stability of international relations.

6. It went without saying that a State exercising the right of self-defence should not be placed on the same footing as a State committing an act of aggression. In State practice, an act of aggression, which was an unlawful act, could not produce legal effects. Draft article 10 in its current form might be interpreted as giving an aggressor State the right to suspend or terminate certain treaties, thereby assisting it in an unlawful act. The draft article should therefore be adjusted to bring it into line with the articles on Responsibility of States for Internationally Wrongful Acts, which were aimed precisely at putting an end to such acts.

7. The Islamic Republic of Iran could not condone any provision that might encourage an aggressor to pursue its aggressive purposes. However, it was quite logical for the victim State to be assisted in exercising its right of self-defence, including through the suspension or termination of treaties that were incompatible with or might impede the exercise of that right.

8. **Mr. Ma** Xinmin (China), referring to the topic "Effects of armed conflicts on treaties", welcomed the first report of the Special Rapporteur (A/CN.4/552) and the memorandum prepared by the Secretariat on

the topic (A/CN.4/550 and Corr.1). The scope of application of the draft articles was too narrow in that it was restricted to treaties between States. Some treaties entered into by international organizations were also affected by armed conflicts and should therefore be included in the scope of application. On the other hand, the definition of "armed conflict" was too broad. It should be strictly limited to international armed conflicts; otherwise, military action taken by a State internally against rebel groups might be inappropriately included in the scope of application of the draft articles.

9. His delegation agreed with the view that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. Compliance with that principle would contribute to the stability of treaty relations. His delegation also agreed that the intention of States parties was an important criterion in determining whether a treaty should be terminated or suspended at the outbreak of an armed conflict. However, when States concluded a treaty, they did not generally anticipate or make arrangements for the application of the treaty during armed conflicts. Their intention should therefore be determined on the basis not only of their intention at the time of concluding the treaty but also of their implementation of the treaty, including the situation after the outbreak of armed conflict. Furthermore, the nature, object and purpose of the treaty should also be taken into account when determining intention.

10. With regard to draft article 10, his delegation fully understood the Special Rapporteur's view that determining the illegality of the use of force was a highly political issue and that, in the absence of such a determination by an authoritative body, allowing a State to affect the validity of a treaty through a unilateral assertion of the illegality of the conduct of another State would be inimical to the stability of international relations. However, the legitimacy of the use of force did have a bearing on treaty relations. For example, since the Charter of the United Nations recognized a State's right to act in self-defence until the necessary measures had been taken by the Security Council, a State should be entitled, when it exercised that right in accordance with the Charter, to suspend in whole or in part the implementation of a treaty that conflicted with that right. Those issues should be studied in greater depth.

11. With regard to diplomatic protection, his delegation supported the Special Rapporteur's view that it was not necessary to include the clean hands doctrine in the draft articles on that topic.

12. Turning to the topic "Fragmentation of international law", he welcomed the initial results achieved by the Study Group. The study of the topic, in particular the issues of the *lex specialis* rule, self-contained regimes and hierarchy in international law, was not only of theoretical significance but also of major practical importance. It would facilitate international consensus on the issues involved, consolidate the supremacy of the basic principles of international law and promote the standardization of international practice, thereby helping to establish the rule of law throughout the international community.

13. **Ms. Lintonen** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) commended the Commission's decision to focus on the substantive aspects of the fragmentation of international law in the light of the Vienna Convention on the Law of Treaties and to leave aside institutional considerations pertaining to the proliferation of international tribunals and to forum shopping. Although the Vienna Convention offered a wealth of material which would be useful when grappling with the difficulties posed by the topic of fragmentation, it would nonetheless be helpful if the Commission were to elucidate the conflict rules contained in the Convention, as very little consideration had been given to them to date. She likewise welcomed the Study Group's interest in the various legal techniques that could be employed, and had been employed, by international judicial bodies to solve the normative conflicts that overlapping competence and scope of application tended to generate. Of course, it would be impossible to put a complete end to such conflicts in a globalizing world where legal writings should not only provide coherence and unity, but also outline clearly any difficulties encountered. Hence the outcome of the Commission's work was likely to be of great interest to practitioners of international law. It was certainly true that international law did not comprise a random collection of directives, but constituted a system which actually set out to establish the relationship between different rules by means of legal reasoning.

14. The validity of the Study Group's postulate that the maxim *lex specialis derogat legi generali* would

not lead to the extinction or total replacement of general law had been confirmed by the advisory opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* case and by its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.

15. The Nordic countries appreciated the attention devoted to prohibited *lex specialis*, in other words, situations where there could be no derogations from general law because it took the form of *jus cogens*, or because it benefited third parties, including individuals. While complications might occur when multilateral treaties created an integral or independent regime, or when the subsequent practice of parties made it clear that contracting out was not allowed, article 311 of the United Nations Convention on the Law of the Sea was indicative of a general unwillingness to tamper with integral regimes which carefully balanced the rights and obligations of various States. Similarly, in negotiations concerning the revision of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, preserving the coherence of the law of the sea jurisdictional regime had been deemed too important to allow any exceptions to the principle that the flag State of a vessel retained exclusive jurisdiction over it while it was on the high seas, despite the fact that the majority of delegations had favoured the inclusion in the Convention of new provisions on the boarding and searching of a vessel on the high seas as a counter-terrorist measure. Stronger arguments in favour of the overall conclusion as to the omnipresence of general law might indeed be found through more thorough scrutiny of the concept of general law.

16. The Nordic countries welcomed the suggestion that the term “self-contained regimes” should be discarded as it was misleading. The less dramatic notion of “special regimes” would provide an adequate framework for dealing with the new issue of disconnection clauses. While the investigation of such clauses would not, in all probability, alter the main conclusion of the study, namely that the use of special treaty regimes had not seriously undermined legal security, predictability or the equality of legal subjects, the Nordic countries had noted the Commission’s concern that such clauses might sometimes erode the coherence of the treaty and that it was therefore important to ensure that they would not be used to defeat its object and purpose.

17. The study of the interpretation of treaties in the light of any relevant rules of international law applicable in the relations between parties (article 31, paragraph (3) (c), of the Vienna Convention on the Law of Treaties) offered valuable insight into the fairly frequent recourse to that course of action by judicial bodies in recent years. In essence, it could be held that no convention worked in a vacuum and that the general law continued to fill in aspects of a treaty regime for which no express provision had been made. As very few treaties were able to cover in an exhaustive manner all aspects of the area they regulated and as the problems and threats necessitating international cooperation were increasingly interdependent, the role of other rules in the interpretation and implementation of international instruments was growing in importance. At the same time, it was obvious that taking a broader view should not result in an attempt to rewrite the treaty in question and that adherence to the other rules of treaty interpretation was essential. The Nordic countries therefore welcomed the thought being given to the role of customary law and general legal principles. The examples of case law cited by the Commission in its report (A/60/10) gave the impression that international judicial bodies were, in fact, alive to the risks of fragmentation and that they strove to promote a consistent and coherent application of law. That had also been the message conveyed by the representative of the European Court of Justice, who had addressed the Council of Europe Committee of Legal Advisers on Public International Law in September.

18. The study on the hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules was not only of considerable theoretical value, but was also of practical interest, as recent controversy concerning the compatibility of counter-terrorism measures with human rights law had shown. According to the study, *jus cogens* was the only instance of a real hierarchy in international law, because the relationship between the obligations of States Members of the United Nations under the Charter and their other obligations was described as a quasi-hierarchy. The study contended that the concept of *erga omnes* was not concerned with a hierarchical relationship, but with the horizontal scope of the obligations in question. The study had

dealt with possible conflicts between various norms and obligations under international law and had seemed to accept the widely held view that the powers of the Security Council, albeit exceptionally wide, were limited by the peremptory norms of international law. A number of the observations made in the study were eminently practical, as was the decision to confine the study to the consideration of the three subjects as conflict rules. It might, however, be interesting to extend the scope of the study to take in the concept of normative conflict and to consider whether it covered both negative derogation from a given peremptory rule and positive derogation in the sense of creating particular rules that expanded the protection provided by the peremptory rule.

19. While the Nordic countries felt that the work on the topic of fragmentation was on the right track, it regretted that the Study Group's discussion papers had not been available on the Commission's website. They commended the Commission for focusing its attention on the clarification of the conflict rules to be found in the Vienna Convention on the Law of Treaties and for revisiting article 55 on *lex specialis* of the articles on Responsibility of States for Internationally Wrongful Acts. They appreciated the fact the Commission and its Study Group had interacted with international judicial institutions so as to gain an idea of the kind of difficulties caused by conflicts of norms and of the way such difficulties had been resolved in practice. The final outcome of the Commission's work on the topic should ideally reflect its practical orientation, while preserving the analysis provided in the background studies. A single document consisting of an analytical section and a condensed set of practical conclusions would seem to serve both purposes. The Nordic countries therefore welcomed the Study Group's intention to submit a draft of both documents for adoption by the Commission at its fifty-eighth session.

20. **Mr. Hernes** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that they would respond in writing to the request for comments on the draft articles on diplomatic protection before the deadline of 1 January 2006. Meanwhile, they were generally satisfied with the proposed thrust of the draft articles and the end product envisaged by the Special Rapporteur. They supported the premise that States had a right rather than a duty to exercise diplomatic protection. Moreover, they believed that the principles and rules of diplomatic protection were without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

21. Under draft article 5, a requirement for the exercise of diplomatic protection was continuous nationality. At issue was whether the requirement should apply until the resolution of the dispute or the date of an award or judgement, or only until the official presentation of the claim. In practice, it could be very difficult to establish the exact time of resolution of a dispute. The Nordic countries therefore supported the Commission's approach, whereby a State might exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim.

22. The Nordic countries strongly supported the Commission's approach in draft article 7. In cases of multiple nationality, the State of nationality that was predominant at the time both of the injury and of the official presentation of the claim should be entitled to exercise diplomatic protection against another State of nationality of the person concerned. The draft article constituted a codification of existing customary international law. It should be added, for clarity's sake, that the rule had no bearing on the possibility of providing consular assistance, which was not governed by the law pertaining to diplomatic protection. The Nordic countries were particularly pleased that the Commission had included a provision on the diplomatic protection of stateless persons and refugees in certain cases, thus rejecting earlier opinions that a State should exercise diplomatic protection only on behalf of its nationals. It was most important to be able to offer diplomatic protection to such vulnerable categories of persons.

23. The Nordic countries supported the flexible approach in the commentary to draft article 8, which established that the term "refugee" was not necessarily restricted to persons falling within the definition contained in the Refugee Convention and its Protocol. They considered that a State might extend diplomatic protection to persons who fulfilled the requirements of territorial connection to that State and who, in the State's judgement, were clearly in need of protection, without necessarily formally qualifying for refugee status. As for the suggestion that, to qualify for diplomatic protection, the stateless person or refugee must have lawful and habitual residence in the State

exercising diplomatic protection at the time of the injury and at the date of the official presentation of the claim, the Nordic countries considered the requirement too onerous. In many cases where effective diplomatic protection was needed, the injury would have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection. The suggested criterion should therefore be modified. The Commission should consider replacing the phrase "lawfully and habitually resident" in draft article 8 by the phrase "lawfully staying", which was the wording used in article 28 of the Refugee Convention in relation to the issuing of travel documents to refugees.

24. With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries welcomed the fact that the Commission had ensured overall consistency with the case law of the International Court of Justice, on the basis of the *Barcelona Traction* case. The Nordic countries also fully supported the approach in draft article 19, whereby a flag State's right to exercise diplomatic protection did not exclude the possibility of the same right being exercised by the State of nationality of the crew members of a ship, and vice versa. That was a solution that ensured that important protective measures established by the law of the sea were not undermined. As for the clean hands doctrine, the Nordic countries shared the view that it should not be included in the draft articles.

25. He urged the Commission to proceed swiftly to the adoption of the articles on second reading. The Nordic countries believed, moreover, that the provisions on diplomatic protection should, in the not too distant future, be adopted in the form of a convention, thus enhancing clarity and predictability in an important field of law.

26. **Mr. Bühler** (Austria) said that his delegation concurred with the Special Rapporteur's view that the draft articles on the effects of armed conflicts on treaties should not deal with the legality of armed conflicts. It did not, however, share the view that the draft articles should also apply to non-international armed conflicts. Although it was often difficult to distinguish between international and non-international armed conflicts, with the latter by far outnumbering the former, the draft articles should regulate the legal effects of international armed conflicts only, given the fact that, according to draft article 2 (a), treaties were by definition international agreements. Extending the scope of the draft articles to non-international conflicts would inevitably raise the question of how such conflicts should be defined and how the other State party to a treaty could ascertain whether or not such a conflict existed. The resulting uncertainty would run counter to the objective of stability and predictability in international relations.

27. The underlying concept of draft article 3 constituted the point of departure of the whole set of draft articles. It should therefore be retained. Draft article 4, by contrast, prompted a number of questions. The text suggested that the intention of the parties was to be determined primarily from the text of the treaty. If that was the case, it might be asked why the text should not contain a direct reference to the content of the treaty, and to its object and purpose, rather than going the long way round by referring to the parties' intention. A further question related to the basic effects of armed conflicts on treaties. Although the draft article referred to susceptibility to suspension or termination, none of the subsequent provisions explicitly defined the legal consequences thereof. For clarity's sake, the draft article needed further elaboration. Given the complexity of the issue, the draft article might even be split into several provisions.

28. His delegation would submit written comments on the topic "Diplomatic protection". Meanwhile, it concurred with the view that the clean hands doctrine should not be included in the draft articles. Apart from the complex theoretical questions involved, it was undoubtedly not sufficiently anchored in general international law to be considered an established customary rule. None of the judicial bodies of global significance had ever referred to the doctrine affirmatively, although it had been invoked by several States. It was also questionable whether the doctrine, if it existed as a generally applicable rule of customary international law, would fall within the purview of diplomatic protection. As stated in the Special Rapporteur's sixth report (A/CN.4/546), it could be considered a bar to the admissibility of a claim; and that was certainly outside the scope of the matter under consideration.

29. With regard to the topic "Fragmentation of international law", his delegation was most appreciative of the work of the Study Group. The individual items, and the form of the final report, were well chosen. The discussions had revealed the existence of conflicting norms in the international legal

order and a lack of instruments to resolve possible conflict. His delegation also concurred with the view that regionalism was only a specific sub-item of the general issue of *lex specialis*. As for the study on the interpretation of treaties in the light of "any rules of international law applicable in the relations between the parties", in accordance with article 31, paragraph 3 (c), of the Vienna Convention, his delegation concurred with the view that article 31 referred not only to treaty law but also to customary law and general principles of law. The latter two categories, however, had a limited effect. Since their purpose was the interpretation of treaty provisions, they could neither diminish the scope nor change the legal substance of such provisions. The objective of "systemic integration" endorsed by the Study Group seemed a viable compromise for overcoming problems arising in that context.

30. With regard to the question of hierarchy in international law, his delegation welcomed the Study Group's approach, especially its insistence on the need to distinguish clearly between the effect of Article 103 of the Charter of the United Nations and that of peremptory norms. As for obligations *erga omnes*, his delegation shared the view that the issue fell outside the question of hierarchies. On the other hand, it wondered whether the relation between the primary and the secondary rules of an international organization would fall within the ambit of the topic.

31. **Mr. Kim** Sun-pyo (Republic of Korea), responding to the questions posed by the Commission concerning the topic "Effects of armed conflicts on treaties", said that the Commission should, for the time being, restrict the scope of its work to agreements between States. To reflect the legal effects of armed conflicts between States on the operation of agreements between organizations or between organizations and States in the draft articles would make them more complicated and perhaps unmanageable. Further study should be made of the practice in that regard.

32. With regard to the definition of "armed conflict", it would suffice if the Commission simply indicated the main features of armed conflicts, where necessary for the context. Defining the concept would involve two different branches of law — the law of treaties and international humanitarian law — and it would be superfluous for the Commission, in dealing with the topic under the law of treaties, to try to codify a concept that would be further developed by international humanitarian law. The definition of armed conflict had been developed by the relevant jurisprudence, including the *Tadić* Appeals Chamber judgement by the International Tribunal for the Former Yugoslavia and the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) judgment by the International Court of Justice. As for the continuity of treaties, the Commission's questions were based on the assumption that such continuity had been consolidated as a principle of international law. For his delegation, further clarification was required as to whether or not that was the case.

33. With regard to the draft articles, his delegation wondered whether, in draft articles 1 and 2, the term "armed conflict" fully covered all the possibilities. It should first be determined whether the scope of the topic would cover all the situations coming under international humanitarian law. The term "armed conflict" might not accurately reflect the situation, given that other forms of hostilities — ranging from traditional declared war to occupation with no armed resistance or the struggle against colonial domination, alien occupation or racist regimes — could also affect the operation of treaties. If the draft articles were supposed to cover all such circumstances, the term "hostilities", which appeared in article 73 of the Vienna Convention on the Law of Treaties, might be a better option. Moreover, the definition of armed conflict in draft article 2 (b) overlooked the fact that belligerents were frequently reluctant to recognize a state of war.

34. Draft article 3 need not feature as a separate article, since its stipulation that an armed conflict did not ipso facto terminate or suspend the operation of treaties was implied by draft articles 4 to 7. In that context, he pointed out that the intention of the parties to a treaty was often ambiguous or impossible to prove. To use such intention as a criterion might therefore not be enough to determine the termination or suspension of treaties. Article 4 could thus be improved by incorporating features of draft articles 5 and 7, such as express provisions and the object and purpose of treaties.

35. Draft article 5, paragraph 2, concerning the competence of States during an armed conflict, did not seem to belong within that article. For the sake of

greater clarity, the paragraph should become a separate article.

36. With regard to draft article 7, paragraph 2, the list of treaties that continued in operation during an armed conflict needed further consideration. A clearer indication of State practice and case law was required to support the inclusion of most of the categories of treaty mentioned in the paragraph. For instance, the applicability of human rights or environmental protection treaties during an armed conflict should be balanced against that of international humanitarian law. It had not been established that such treaties continued to operate fully during an armed conflict, while international humanitarian law also bound belligerents with provisions on the protection of human rights and the environment. It was noteworthy in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case the International Court of Justice had held that the question whether the use of certain weapons in warfare constituted a breach of human rights instruments could be decided only by reference to the law applicable in armed conflict and could not be deduced from the terms of the human rights instruments themselves.

37. Draft article 10 and draft article 6, paragraph 1, should be revisited. The former suggested equal treatment for the parties to an armed conflict, regardless of the legality of the use of force, as in the case of international humanitarian law, while the latter implied that a dispute concerning the interpretation or status of a treaty could constitute the basis of an armed conflict, without passing judgement of the legality of such a conflict. A consensus should be reached as to whether States having recourse to the illegal use of force should be differentiated from other States and whether the armed conflicts concerned should conform to international law.

38. With regard to the topic "Diplomatic protection", the significance of the clean hands doctrine was that, where it was applied, a State could not exercise the right of diplomatic protection on behalf of its national if that national had committed a wrongful act. Some commentators had argued that the doctrine was not very different from the general principle of good faith in the context of international relations between States. Moreover, they claimed that the doctrine had little practical effect on the general rules of international responsibility. That argument, however, overlooked the basic nature and function of diplomatic protection. First, the legal fiction of the doctrine was that an injury to a national was an injury to the State itself. The State's exercise of the right of diplomatic protection therefore arose from its inherent right as a State and not its status as an agent of the national. It was thus irrelevant to modern international law to prevent the State from exercising its right owing to a fault of its national. Secondly, there was no clear authority to support the applicability of the clean hands doctrine to cases of diplomatic protection. International courts, including the International Court of Justice, had asserted that the doctrine had no special place in claims involving diplomatic protection. Lastly, the doctrine might be inconsistent with *jus cogens* norms of international law set forth in the Vienna Convention on Consular Relations. If the draft article endorsed the clean hands doctrine, the State's right of consular representation of nationals who suffered injuries in a foreign country might be threatened. The Special Rapporteur had therefore been right to conclude that the doctrine was not applicable because it was not relevant in the context of diplomatic protection and because there was no authority or precedent to support it.

39. **Ms. Schwachöfer** (Netherlands), referring to the topic "Effects of armed conflicts on treaties", said her Government agreed that it would be premature to submit the draft articles to a drafting committee or to establish a working group. It supported the proposition that continuity of treaty obligations in armed conflict should be encouraged in cases where there was no genuine need for suspension or termination, and that, in formulating the draft articles, a pragmatic approach should be taken towards determining whether suspension or termination was actually necessary.

40. With regard to the question whether the draft articles should cover solely treaties in force at the time of the armed conflict or also treaties that had not yet entered into force, since article 25 of the Vienna Convention on the Law of Treaties allowed for the provisional application of treaties, it would seem advisable that the draft articles should apply to treaties that were being provisionally applied.

41. As to the scope of the draft articles, and in particular whether treaties that became operative during an armed conflict should be included, she said that although draft article 7, paragraph 1, was inaccurate because such treaties did not continue in operation during an armed conflict but rather became

operative during such a conflict, it was nevertheless useful to include such treaties within the scope of the draft articles. International humanitarian law treaties covered a wide variety of topics and their provisions should be enforced unless it was genuinely impossible to do so.

42. Further consideration should perhaps be given to the suggestion that the definition of armed conflict contained in draft article 2 (b) should be deleted. States were sometimes reluctant to admit that they were engaged in an armed conflict. Therefore, the existence of an armed conflict should be determined by a legal test applied to the factual situation, and should not be dependent on recognition thereof by the participants. For that reason, it would be useful to include a definition of armed conflict in the draft articles.

43. If the draft articles did include a definition of armed conflict, that definition should also cover non-international armed conflicts, because such conflicts could also affect the ability of a State to fulfil its treaty obligations. The vast majority of armed conflicts were non-international in character, and the draft articles should be drafted in such a way as to foster their applicability. It might be suitable to use the definition formulated by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case, which was reproduced in paragraph 140 of the Commission's report and had the advantage of covering international as well as non-international conflicts.

44. Since international and non-international armed conflicts tended no longer to be considered fundamentally different, and since many of the norms developed to address international armed conflicts were applicable to non-international armed conflicts, no distinction should perhaps be made between those two types of conflict. Military occupations should be included in the definition, even if they were not accompanied by protracted armed violence or armed operations, because a State under occupation could not always fulfil its treaty obligations. Moreover, such an approach was in keeping with the relevant provisions of international humanitarian law, and in particular the common article 2 of the four Geneva Conventions of 1949, which was *lex specialis* in that field. If such an occupation was sufficient to entail the applicability of the norms relating to armed conflicts, then it would also entail that of the draft articles on the effect of armed conflicts on treaties. In that regard, the Special Rapporteur's decision to invoke international humanitarian law as *lex specialis* in article 5, paragraph 1, was worthy of support.

45. With regard to draft article 3 on ipso facto termination or suspension, her Government supported the suggestion that the position of third parties should be clarified in the text by noting that the ordinary rules of the Vienna Convention on the Law of Treaties such as those relating to fundamental change of circumstance and supervening impossibility of performance would apply. In that regard, the suggestion that the list of treaties expressly applicable in case of an armed conflict should be included in the commentary was worth exploring. Her Government awaited with interest the Special Rapporteur's proposals for redrafting article 10 on the legality of the conduct of the parties.

46. Turning to "Diplomatic protection", she said that her Government generally supported the draft articles on the topic. It had noted that the matter of consular assistance had been excluded from the draft articles, and believed that should be stated explicitly in the commentary, for the sake of clarity. It also fully endorsed the position expressed by the Special Rapporteur in his fifth report, that customary international law rules on diplomatic protection and more recent principles governing the protection of human rights complemented each other and ultimately served a common goal, the protection of human rights (A/CN.4/538, para. 37).

47. In draft article 1, the words "its national" on definition and scope, were restrictive, because the scope was widened in later articles, such as draft article 8 on stateless persons and refugees. Article 3, paragraph 1, might therefore be reformulated in the following way in order to place greater emphasis on the individual: "The State of nationality is the State entitled to exercise diplomatic protection." The position of the individual was also at stake in draft article 5, on continuous nationality. Her Government supported the idea underlying that article, which was to protect the individual against any unfairness that might otherwise occur, and therefore believed that in paragraph 3, "Diplomatic protection shall not be exercised" should be replaced by "Diplomatic protection may not be exercised", since that wording was more in keeping with the discretionary authority of the State with respect to the exercise of diplomatic protection, and with the terminology used in draft articles 7 and 14.

48. Her Government welcomed the inclusion of draft article 8 on diplomatic protection for stateless persons and refugees. Paragraph two of the commentary, concerning the diplomatic protection of refugees, was of particular importance, since protection by the State of residence was crucial for persons who could not or did not want to avail themselves of the protection of the State of nationality, or risked losing refugee status in the State of residence if they did so.

49. Concerning diplomatic protection for legal persons such as corporations, the draft articles might gain from a fresh look at comparative corporate law and current global economic developments. Draft article 9 on the State of nationality of a corporation, as it stood, ruled out the possibility of dual nationality for corporations, but such corporations existed in the Netherlands. Much has been said regarding the extent to which local remedies must be exhausted before diplomatic protection could be exercised. No codification, however, could succeed in providing an absolute rule governing all situations. Her Government therefore suggested adding the following passage in the commentary to article 14: "No Prior exhaustion of local remedies is required for diplomatic action stopping short of bringing an international claim. See Restatement (Third) of the Foreign Relations Law of the United States (1987), paragraph 703, comment d: 'The individual's failure to exhaust domestic remedies is not an obstacle to informal intercession by a state on behalf of an individual.'" With regard to local remedies, no distinction should be made between legal and factual denial.

50. With regard to draft article 17, the words "under international law" should be deleted and the draft article reformulated to read: "The right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles."

51. She agreed with the Special Rapporteur on the issue of the clean hands doctrine. The few cases that fell within the scope of diplomatic protection did not constitute sufficient practice to warrant codification, nor could its inclusion be justified as an exercise in the progressive development of international law.

52. **Mr. González-Campos** (Spain) said that the topic "Fragmentation of international law" was, as the Commission itself had admitted, very different from the other topics that the Commission had considered to date. Whereas in the past the Commission had dealt with the codification and progressive development of international law by formulating draft articles on specific areas, under the heading of fragmentation it proposed to undertake an analysis of the international legal system as a whole and to consider the relationship between the various categories of international law. Although the resulting studies would certainly be of great theoretical interest from the standpoint of doctrine, to which it owed its inspiration in any case, the inclusion of such a general and theoretical topic would place the Commission in a complicated position. That was why some members of the Commission and the Sixth Committee had expressed doubts in previous years about the wisdom of taking up the topic.

53. His delegation had reservations both about the choice of the aspects to be studied and about the proposed outcome of the Commission's work. There could be no objection in principle to a study of the relations between general international norms and *lex specialis*, since that issue went to the heart of the problem of the expansion of the international legal system and its consequent potential for "fragmentation". However, the study on hierarchy in international law, or the superior status of certain international rules of law, specifically, *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, raised problems. The norms mentioned were not homogeneous; obligations *erga omnes* had specific characteristics relating to their function in the international legal system. Although most of the legal literature was in agreement that hierarchy in international law was insufficient, it was doubtful that the Commission could reach satisfactory and generally acceptable results in that area.

54. In addition, the Study Group had decided to examine three aspects of fragmentation related to certain provisions of the Vienna Convention on the Law of Treaties, namely, article 30, article 31, paragraph 3 (c), and article 41. His delegation had serious reservations about the wisdom of addressing those aspects when there were many other questions about the relationship of rules in the international legal system that merited consideration, such as integration, complementarity, substitution or conflict of rules. Moreover, the choice entailed certain risks.

55. His delegation also had reservations about the proposed scope of the outcome of the Commission's work. The intention of the Study Group was to attain an outcome that would be of practical value for legal practitioners and would take the form of a series of studies and a set of conclusions to serve as practical guidelines. The root of the problem for his delegation was the potential scope or effects of the practical guidelines. In order to be of practical value, the guidelines would have to be complete, a goal that would be very difficult to achieve, both with respect to the relationship of general legal norms and *lex specialis* and with respect to the hierarchy of legal norms. If the guidelines turned out to be incomplete, the question arose whether it would be desirable for the General Assembly to recommend them, or whether it would have to limit itself to merely taking note of the Commission's work on the topic.

56. Furthermore, if the practical guidelines were to be an interpretation by the Commission of the aforementioned provisions of the Convention, no doubt a sound one, they might nevertheless fall afoul of article 31, paragraphs 2 and 3, on interpretation of a treaty. They would not be part of the context of the treaty (paragraph 2) or any of the supplementary means of interpretation indicated in paragraph 3, being neither a subsequent agreement between the parties regarding the interpretation of the treaty, nor subsequent practice in the application of the treaty, nor yet relevant rules of international law applicable in the relations between the parties. To put it simply, the practical guidelines would have nothing to do with the parties and would have a very uncertain status.

57. There was also a risk that the practical guidelines as applied by States after their adoption could result in subsequent practice that might lead to a partial modification of the rules contained in the Vienna Convention, a result that did not appear desirable. The possibility of the modification of treaties by subsequent practice had been proposed in article 38 of the draft articles on the law of treaties adopted by the Commission, but had been rejected by the United Nations Conference on the Law of Treaties as creating uncertainty in treaty relations. That danger might not have been taken into account by the Study Group, since it was proposing to supplement the provisions of the Vienna Convention on the issue of "inter-temporality" with reference to article 31, paragraph 3 (c), and with respect to cases not contemplated in article 30. The question should be asked whether the practical guidelines, if States applied them, would not modify the provisions of the Vienna Convention, even if only by way of supplementation.

58. Those were his delegation's chief reservations as the Commission entered into the *terra incognita* of formulating "practical guidelines" rather than draft articles, and it would be looking closely at the outcome of the Commission's work when it was presented the following year to see whether its concerns had been addressed.

59. **Mr. G. P. Singh** (India) commended the Commission's progress on the topic "Responsibility of international organizations" and concurred with the Special Rapporteur that a wrongful act of an international organization could consist of either an act or an omission. Article 8, paragraph 2, raised the controversial issue of whether all obligations originating in the rules of an organization were to be deemed international obligations. His Government took the view that the paragraph in question would not apply to rules which were merely procedural or administrative in nature. In some cases, determination of the responsibility of the organization on the basis of its own rules would lead to the conclusion that the member States which established the organization's policy bore collective responsibility.

60. Article 15 covered some complex and overlapping issues. It would be necessary to study precedents carefully when deciding whether to pin responsibility on an international organization if it required its member States to commit an internationally wrongful act. Article 15, paragraph 1, posed the question whether a decision of an international organization binding a member State to commit an act that would be internationally wrongful if committed by the organization itself would completely exonerate that State. That was a matter which required further in-depth examination. Logically, action taken by a State at the behest of an international organization that breached the international legal obligations of the State and the organization should attract the responsibility under international law of both the organization and the State. Article 15, paragraph 2, also necessitated much reflection owing to the diversity of international organizations and their mandates.

61. Furthermore, the complex nature of international organizations and their differing mandates made

generalization impossible. It might be wise for the General Assembly to follow the course of action it had pursued in respect of the articles on Responsibility of States for Internationally Wrongful Acts, in other words it could take note of the draft articles on the responsibility of international organizations, but not adopt them as a binding legal instrument. The Commission should be wary about drawing inappropriate analogies with State responsibility in an effort to develop principles applicable to international organizations.

62. With regard to the topic "Shared natural resources" one of the difficulties inherent in the draft articles on transboundary aquifers proposed by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1 and Add.1) was that they were modelled on the provisions of the 1977 Convention on the Non-navigable Uses of International Watercourses, which dealt with surface waters and not groundwaters. Moreover, the draft articles were not supported by sufficient State practice. It would be inappropriate to apply the principle of equitable use, which was embodied in the 1977 Convention when devising a groundwater regime, because riparian rights played a less pronounced role as far as water utilization was concerned.

63. Draft article 5 appeared to be similar to article 5 of the 1977 Convention, which had posed problems during the negotiation of the Convention on account of the twin principles of equitable utilization and reasonable utilization. It might therefore be inadvisable to apply those two principles to groundwaters. Since much still needed to be learned about transboundary aquifers, their widely differing characteristics and variations in State practice, context-specific agreements and arrangements would be the best way to handle questions related to transboundary aquifer systems. Such an approach would enable the States concerned to take appropriate account of any other relevant factors. For that reason, it would be preferable to draw up guidelines which could be used during the negotiation of bilateral or regional arrangements, rather than drafting a universally binding legal instrument.

64. Concerning the topic "Effects of armed conflicts on treaties", the Special Rapporteur had been right to seek, through the draft articles he had produced (A/CN.4/552), to foster the security and stability of legal relationships between States thereby limiting the occasions on which the incidence of armed conflicts had an effect on treaty relations. Nevertheless, since the subject was dominated by doctrine and practice was sparse, it would be necessary to study State practice in a variety of legal systems before any acceptable standards could be identified. The definition of "armed conflict" in draft article 2 called for careful examination. Draft article 7 was likewise controversial and not rooted in State practice. It would be difficult to reach consensus on the indicative list of treaties which would remain in operation during an armed conflict; moreover, no such list was necessary. The whole topic was still at a formative stage. Hence more research and analysis were required in order to grasp the full import of the subject matter.

65. **Ms. Kamenkova** (Belarus), welcoming the work of the Commission and the Special Rapporteur on the topic "Effects of armed conflicts on treaties", said that her delegation agreed that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. At the same time, the nature and extent of an armed conflict often made the implementation of such treaties impossible in practice. However, that fact should not create legal grounds for a decision to suspend or terminate a treaty during an armed conflict.

66. Her delegation favoured using the criterion of the intention of the parties at the time a treaty was concluded to determine the susceptibility of the treaty to termination during an armed conflict. However, the criterion should be less subjective and should be based on the express intention of the parties.

67. In its work on the topic, the Commission should adhere to the basic principle *pacta sunt servanda*. States generally had an interest in maintaining the stability of treaty relations. Therefore, the effects of armed conflicts on treaty relations, particularly those between the parties to an armed conflict and third States, should be minimized.

68. Her delegation welcomed draft article 7, which related to categories of treaty whose object and purpose involved the necessary implication that they continued in operation during an armed conflict. She proposed that the Commission should consider including the Charter of the United Nations, in particular Article 103 thereof, in the list contained in paragraph 2 of the draft article. Such a reference would emphasize the Charter's special status as a fundamental international legal instrument.

69. With a view to gathering information from a majority of States about their practices and opinions with regard to the topic, it would be useful for the Commission to circulate a questionnaire on the main aspects of the draft articles so as to improve the quality and universality of its codification work.

70. Turning to the topic "Diplomatic protection", she welcomed the progress made but said that the Commission should not limit itself to consideration of the conditions for the exercise of diplomatic protection, specifically the nationality of claims and the exhaustion of local remedies. It would be appropriate to analyse the practical issues of ways of exercising diplomatic protection and principles for the distribution among injured individuals of compensation received by States as a result of the settlement of mass claims. The further codification and development of the rules on diplomatic protection should be aimed at making the relevant provisions of the articles on Responsibility of States for Internationally Wrongful Acts specifically applicable to diplomatic protection.

71. Her delegation supported the proposal of the Special Rapporteur in his sixth report (A/CN.4/546) that no provision dealing with the clean hands doctrine should be included in the draft articles, since the doctrine was not directly linked to the topic of diplomatic protection. The Commission should also reject the dogmatic use of the *Mavrommatis* principle as a basis for the clean hands doctrine. That principle was not fully consistent with contemporary international law, which focused on protection by the State of its nationals and legal persons rather than on the restoration, by means of diplomatic protection, of a right of the State that had been violated by another State through improper treatment of such nationals or legal persons. The State should have unlimited freedom to exercise its discretionary right to exercise diplomatic protection.

72. Her delegation also opposed the inclusion of the clean hands criterion on the grounds that, in many cases, it could not be established prima facie. The permissibility of exercising diplomatic protection should not depend on circumstances that could be objectively established only at the stage of examination of the merits. Moreover, it was unlikely that the clean hands criterion could be objectively applied in bilateral relations between States in all cases. Abuse of the criterion might result in the exercise of diplomatic protection becoming impossible in cases involving a reaction to violations of the Vienna Convention on Consular Relations.

73. In addition, the significance of clean hands criterion lay in the fact that it was a circumstance which attenuated or aggravated international legal responsibility. It was only indirectly related to diplomatic protection. The possibility of a State defending the interests of one of its own nationals or legal persons should not be linked to the absolute irreproachability of the conduct of that natural or legal person. Legal disputes usually arose from situations in which both parties had caused each other harm and it was unclear which party bore the greater legal responsibility. Lastly, for some States, recognition of the applicability of the clean hands doctrine in the context of diplomatic protection could mean restriction of the constitutional right of their nationals to protection in a foreign State. Belarus was among those countries that guaranteed protection for its nationals in foreign States under the Constitution.

74. With regard to the topic "Unilateral acts of States", she welcomed the fact that the Commission, after a long period of doubt as to the possibility of effective codification of the rules on such acts, had embarked on an in-depth analysis of the topic. In its future work, the Commission should ensure that a clear distinction was drawn between unilateral legal acts and political statements. Her delegation agreed that the freedom of States to make political statements without legal consequences should be preserved.

75. The Commission should not, at the current stage, concern itself with conduct of a State that might produce legal effects, but rather should focus on unilateral acts *stricto sensu*, i.e. written or oral statements expressing the intent of a State. Her delegation endorsed the view that unilateral legal acts should be performed in good faith by the States that formulated them. Such acts could be terminated by States only by agreement with subjects of international law that had taken note of them and modified their conduct accordingly.

76. **Mr. Nesi** (Italy), noting that the Special Rapporteur for the topic "Effects of armed conflicts on treaties" had concluded, with a somewhat abstract reference to the intention of the parties, that as a general rule armed conflict did not have the consequence of terminating or suspending the operation of a treaty, said that a more nuanced

approach should be taken to the question of the suspension of the operation of a treaty. The implementation of a number of categories of treaty was often rendered difficult when there was armed conflict between the parties.

77. A clear distinction should be drawn between the effects of armed conflict on relations between States that were parties to the conflict and on relations with a third State. Although article 73 of the Vienna Convention on the Law of Treaties used the term "outbreak of hostilities between States", which might cover both those cases, the question of the effects of hostilities with regard to a third State not a party to the conflict probably did not call for special rules, since the law of treaties already provided grounds for termination or suspension of the operation of a treaty, such as a supervening impossibility of performance or a fundamental change of circumstances. With respect to the effects as between States parties to a conflict, the Commission should examine State practice thoroughly, including practice during the Second World War, and should analyse the jurisprudence of a large number of countries.

78. **Mr. Tavares** (Portugal) said that his delegation appreciated the efforts of the Special Rapporteur to present a full picture of the topic "Effects of armed conflicts on treaties" in 14 draft articles. Draft article 1 posed no problems, but the definitions of the terms "treaty" and "armed conflict" in draft article 2 called for comment. Draft article 1 limited the sense of "treaty" to an agreement between States, whereas that question was not prejudged in the 1969 and 1986 Vienna Conventions. His delegation therefore questioned whether a broader definition could not be used or, more pragmatically, whether a definition was really necessary.

79. With regard to the proposed definition of "armed conflict", he pointed out that the Vienna Conventions referred to the "outbreak of hostilities". Moreover, the definition proposed seemed somewhat out-of-date; it did not reflect, for example, the broader notion of conflict reflected in chapter IV of the report of the High-level Panel on Threats, Challenges and Change (A/59/565). If a definition was necessary, and it might not be the best option, a broader definition might be better, so that the party applying the draft articles might determine on a case-by-case basis the kind of hostilities that could have an effect on a given treaty. Moreover, it was yet to be determined whether the draft articles fell under the general heading of the law of treaties or the law on the use of force. Careful consideration would have to be given to which set of general principles of law would inform the draft articles and the role of customary law in each field.

80. In draft article 3, the Special Rapporteur proposed to replace the earlier position, according to which armed conflict automatically abrogated treaty relations, by a more contemporary view, according to which the outbreak of armed conflict did not ipso facto terminate or suspend treaties in force between the parties to the conflict. His delegation was yet to be convinced that such a change had taken place in the views of the international community. The parties to an armed conflict were obviously not in a position to comply with the rules of a treaty concluded with the enemy. Even if there were convincing practice as to the continuity of treaties, a general principle of continuity in such cases seemed unrealistic. As the Special Rapporteur himself recognized, draft article 3 might not be strictly necessary.

81. The first three draft articles alone raised three questions of major importance. The first, already mentioned, was whether the topic belonged under the law of treaties or the law of armed conflict; that decision was crucial. The second concerned the traditional idea that, since resort to war between States, being illegal, fell outside an international law framework, treaties were excluded from armed conflict discussions; hence, any attempt to move into new fields required a cautious approach. Third, his delegation had doubts concerning the utility of the topic. It seemed that the 14 draft articles represented, not codification or even progressive development of international law, but outright innovation.

82. The text of the draft articles on diplomatic protection adopted on first reading in 2004 would serve as an excellent basis for the further work of the Commission on the topic. His delegation intended to submit written comments as the Commission had requested. It agreed with the approach taken by the Special Rapporteur with regard to the clean hands doctrine.

83. His delegation welcomed the innovative approach the Commission was taking to the topic "Fragmentation of international law", which could result in a significant contribution to the progressive development of international law. It looked forward to

the presentation in 2006 of a consolidated study accompanied by a set of conclusions, guidelines and principles.

84. **Mr. Fitschen** (Germany), referring to the topic "Fragmentation of international law", said that the studies the Commission had already considered and those to be taken up by the Study Group in 2006 presented a thought-provoking assessment of current legal thinking on the topic. His delegation commended the Commission for its intention to conclude work on that topic at its next session, and to achieve a concrete outcome of practical value for practitioners and legal experts; it looked forward to receiving the envisaged set of practical guidelines.

85. With respect to the report of the Study Group, and in particular the question of the "disconnection clause" his delegation did not agree that the effect of both the European Community and its member States becoming parties to the same international treaty was a negative phenomenon or that it led to the fragmentation of international law. As the example given in paragraph 463, footnote 373 of the Commission's report clearly showed, such a clause applied only in cases where the scope of application of the treaty provisions coincided with that of the relevant Community law. From the point of view of third States, it might, admittedly, be difficult in practice to determine whether the European Community was applying the treaty or the applicable Community law. But in legal terms that did not call into question the scope or applicability of the treaty as such, and therefore should not be a cause of concern to the other parties to that treaty. His delegation saw no legal reason why the European Community and its member States should be precluded legally from proposing such a clause for inclusion in a treaty, or why third parties should object to its inclusion.

86. **Mr. Peh** (Malaysia), referring to the topic "Reservations to treaties", said that his Government favoured the practice whereby a State objected to a reservation that it considered incompatible with the object and purpose of the treaty, but did not oppose the entry into force of the treaty between it and the reserving State. The objecting State would thus notify the reserving State of its position in relation to the legal status of the reservation. If the reservation was incompatible with the object and purpose of the treaty, it would be ineffective irrespective of whether a State objected to it. A reservation would, however, be effective vis-à-vis the objecting State if it was not incompatible with the object and purpose of the treaty and was permitted or not prohibited by the treaty.

87. Turning to the draft guidelines, he proposed that the title of draft guideline 3.1 should be changed to "Formulation of reservations" in order to conform to article 19 of the Vienna Convention on the Law of Treaties. Paragraph 39 of the Special Rapporteur's report (A/CN.4/558) cited a statement by Sir Ian Sinclair to the effect that article 12 of the Geneva Convention on the Continental Shelf did not provide for specified reservations, even though it might have specified articles to which reservations might be made. Malaysia considered, however, that that article was an example of a specified reservation in conformity with draft guideline 3.1.2 on definition of specified reservations, since it expressly authorized reservations to specific provisions and stipulated the conditions that had to be met for the formulation of a reservation. His Government therefore sought further clarification as to the distinction between "specified reservations", mentioned in draft guideline 3.1.2, and "non-specified reservations authorized by the treaty", mentioned in draft guideline 3.1.4.

88. Draft guideline 3.1.7 was an unacceptable extension of article 19 (c) of the Vienna Convention: a reservation worded in vague, general language which did not allow its scope to be determined was not necessarily incompatible with the object and purpose of the treaty.

89. In draft guideline 3.1.10, the words "essential rights and obligations arising out of that provision", should be replaced by the words "object and purpose of the treaty", and the word "provision" in the second sentence should be replaced by the word "treaty", in order to conform to article 19 (c) of the Vienna Convention. Draft guideline 3.1.12 could be deleted on the ground that there should be no distinction between reservations to non-human rights treaties and human rights treaties. Such a distinction would not promote clarity in that area of law but would instead cause further confusion by offering different standards of compliance for reservations to different types of treaty.

90. Draft guideline 3.1.13 should be amended by deleting paragraphs (i) and (ii), since reservations to dispute settlement clauses had consistently been found not to be contrary to the object and purpose of a treaty within the case law of the International Court of

Justice. Furthermore, the meaning of paragraphs (i) and (ii) was unclear. His Government therefore proposed that the draft guideline should be revised to read as follows: "A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not incompatible with the object and purpose of the treaty."

91. Although the draft guidelines were a step towards clarifying the concept of reservations to treaties, they required further discussion and comments from Member States and additional in-depth analysis from the Commission before adoption would be possible.

92. Turning to the topic "Unilateral acts of States", he said that his Government wished to reiterate its support for the continuing efforts of the Commission to identify principles or guidelines on unilateral acts of States that created legal obligations. Malaysia had taken note of the diverse views expressed on the feasibility of establishing a regime governing universal acts. It would be beneficial to establish such principles or guidelines prior to embarking on an ambitious endeavour to codify such acts. On the issue of whether a statement created legal obligations or was merely political in nature, his Government agreed that the intention of the State was an important determining factor, alongside purpose, context, circumstances, and content and form. With regard to form, both written and oral statements could entail legal obligations.

93. While recognizing the difficulty of the task that lay ahead, Malaysia valued the concerted effort the Commission had been making to obtain and analyse State practice in that area. The Commission should formulate concrete principles and guidelines on unilateral acts of States that created legal obligations before looking into the possibility of drafting legal rules for such acts.

94. **Mr. Currie** (Canada) said that his Government agreed with the Special Rapporteur for the topic "Diplomatic protection" that the clean hands doctrine should not be included in the draft articles approved by the Commission in 2004. The status of that doctrine in relation to diplomatic protection was at best inconclusive in customary law. From a practical point of view, moreover, its application in relation to the admissibility of diplomatic protection would weaken the universal application of human rights protection. Diplomatic protection was an important instrument in the protection of human rights, and making it dependent on the conduct of a particular State or individual would be detrimental. The doctrine should more appropriately be raised at the merits stage, since it related to attenuation or exoneration of responsibility rather than to admissibility. Canada therefore supported the approach taken by the Special Rapporteur in his report (A/CN.4/546).

95. Canada's policy was to provide diplomatic protection to Canadian citizens regardless of any other nationalities they might possess. Canada rejected the notion that a State of nationality could not exercise diplomatic protection for a person in respect of a State of which that person was also a national. It therefore welcomed draft article 7, which correctly moved away from that notion and provided for the exercise of diplomatic protection when the nationality of the individual was predominant in relation to the State invoking such protection. That policy was in step with contemporary reality: many individuals possessed multiple nationalities and their human rights were given legal protection against the State of which they were nationals.

The meeting rose at 12.15 p.m.