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Chairman: Mr. Simon (Vice-Chairman) . . . . . (Hungary)

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04-59605 (E)

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In the absence of Mr. Bennouna (Morocco), Mr. Simon (Hungary), Vice-Chairman, took the Chair.

The meeting was called to order at 2.40 p.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Galvão Teles** (Portugal) said that her delegation agreed in general with the way that the International Law Commission was proceeding with its study of unilateral acts of States (A/59/10, chap. VIII) and trusted that the results would soon be ready for presentation.

2. With regard to reservations to treaties (A/59/10, chap. IX), her delegation would wait until a complete set of guidelines was ready for consideration before commenting at length. However, it held that the Commission should work on State practice, rather than try to codify a definition of "objections to reservations", as that was already provided for in the Vienna Convention on the Law of Treaties, of 1969. There was also concern as to whether it was worthwhile to qualify the reservations according to validity or invalidity. The Vienna Convention was also sufficient in that respect, and emphasis should instead be placed on the scope of effects of a reservation.

3. With respect to the fragmentation of international law (A/59/10, chap. X), her delegation shared the view that the Commission should not be limited to drafting conventions for the approval of States, but should also explore working methods that would advance the development of international law. Portugal looked forward to the opportunity for States to participate in discussions on that question, either in the Committee or in a panel or seminar, and would gladly cooperate in the organization of such an event.

4. With regard to new topics for inclusion in the Commission's current and long-term work programmes (A/59/10, chap. XI), the question of whether and under what conditions the international community and States had a responsibility to protect in cases of massive violations of human rights would be an appropriate item to add to the agenda.

5. Lastly, her delegation wished to see greater interaction between the Commission and the Committee, including the provision of verbatim records of statements in electronic format in the place of summary records.

6. **Mr. Rosand** (United States of America) said that his delegation recognized the particular challenges raised by the topic of unilateral acts of States, including disagreements among members of the Commission, which had slowed progress on the topic. While welcoming the decision to entrust a working group with the task of determining whether such acts had common characteristics or criteria, his delegation questioned the suitability of the topic for codification or progressive development.

7. With respect to the topic of reservations to treaties, his delegation was comfortable with the use of the concept of "validity", which was used in articles of the Vienna Convention on the Law of Treaties other than article 19. It did not appear to give rise to the disadvantages described in paragraph 35 of the Commission's report for other suggested terminology. "Validity" thus appeared to be the most appropriate way of addressing the issue.

8. With respect to the topic of fragmentation of international law, the work of the Study Group on the function and scope of *lex specialis* and the question of "self-contained regimes" appeared to be very interesting. However, fragmentation was a particularly broad and theoretical topic which, while interesting, did not lend itself to the development of draft articles or draft guidelines. A more useful product might be an expository study to provide information on possible approaches to the issues.

9. **Ms. Telalian** (Greece) noted that the Special Rapporteur, in his ninth report on reservations to treaties (A/CN.4/544), proposed new wording for the definition of the term "objection", to the effect that an objection purported "to modify the effects expected of the reservation". Since the proposed wording appeared to be based on a single example derived from actual practice, her delegation would find it hard to accept that it reflected a general rule on objections to reservations unless more practice were provided to defend that position. It would be more appropriate to retain the alternative definition proposed by the Special Rapporteur in his eighth report (A/CN.4/535) and revise it later, as necessary.

10. The definition of the term "objection" should be drafted in a general manner, so as to cover a broad range of cases corresponding to actual and well

developed practice. It would then be difficult to exclude from the scope of such a definition the intention of objecting States to consider the treaty binding in its entirety on the reserving State. That was the case with regard to objections against reservations incompatible with the object and purpose of a treaty, as set forth in article 19 of the Vienna Convention on the Law of Treaties. Such reservations were impermissible; they not only downgraded the normative provisions of such treaties and undermined their integrity, but also contravened the interest of the other States parties in preserving that integrity. Her delegation would prefer the term "impermissible" to qualify that category of reservations.

11. The Commission should focus its work on a thorough examination of those issues, as well as on whether the rules of the Vienna Convention concerning acceptances of and objections to reservations should also apply in the case of impermissible reservations (arts. 20-21 of the Convention). Only signatory States should be entitled to formulate an objection, since that possibility was closely linked to the obligation of signatory States not to defeat the purpose and object of the treaty before becoming parties to it. The objecting State should repeat its objection at the time of ratification.

12. **Mr. Makarowski** (Sweden), speaking also on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), invited delegations to review the working paper entitled "Reservations to human rights treaties" (E/CN.4/Sub.2/2004/42) and the Special Rapporteur's comments thereon. He also urged the Special Rapporteur to accord priority to the issue of reservations incompatible with the object and purpose of a treaty, a matter of special concern to the Nordic countries.

13. The delegations on whose behalf he spoke strongly supported widening the definition of the term "objection" to include the "super maximum effect", as reflected in paragraph 293 (e) of the Commission's report. They suggested, however, that some flexibility should be built into the definition, in accordance with article 21, paragraph 3, of the Vienna Convention on the Law of Treaties. Furthermore, they held that the word "modify" should be excluded from the definition, as it might introduce a new element. Objections by a State only to parts of a reservation should also be covered, and therefore "modify" should be replaced by "all or some of".

14. The Commission might wish to consider the term "impermissible reservations" in the light of article 19, paragraphs (a), (b) and (c), of the Vienna Convention on the Law of Treaties, and the term "invalid reservations" in the light of article 19, paragraph (c), of that Convention.

15. **Ms. Collet** (France) said that while it might appear redundant, draft guideline 2.6.2 (A/CN.4/544, para. 29) was undeniably useful because it cleared up the potential ambiguity of the term "objection" as used in the Guide to Practice, to mean either an objection to the late formulation or widening of the scope of a reservation or an objection to the reservation itself.

16. Her delegation was more concerned about the definition of objections to reservations set out in draft guideline 2.6.1 (ibid., para. 2). The Commission appeared to be seeking to broaden the definition provided in the Vienna Conventions on the Law of Treaties. The expression "purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection" appeared to be particularly ambiguous, and the arguments advanced in its favour were not convincing. According to the Commission, the proposed definition would not prejudge the validity or invalidity of the objection; like the definition of reservations, it was neutral. However, a reservation always had the same effect; as set out in draft guideline 1.1.1, it purported to exclude or modify the legal effect of certain provisions of a treaty. The incompatibility of a reservation with the object and purpose of the treaty stemmed not only from the effect of the reservation but also from the provision(s) to which it related. In the case of an objection, the very effect it sought to engender might render it invalid. Furthermore, the alleged invalidity of a reservation might be challenged by an objection, while the possibility of reacting to an objection, the effects of which might be considered as exceeding the right to object, appeared doubtful. The proposed definition could therefore not be construed as neutral. Only a strict definition of an objection, specifying exactly its effects, would remove all ambiguity with regard to the admissibility of an objection which might have other effects.

17. With regard to so-called objections with super maximum effect, whereby the State author of the objection sought to paralyse the effects of a reservation, the Special Rapporteur had recognized that such an objection would exceed the limits of the

consensual framework underlying the Vienna Conventions. Recognition of the super maximum effect would inevitably discourage States from participating in some of the most important agreements and treaties. In the view of her delegation, therefore, it was preferable not to suggest in the definition that an objection could have such an effect; however, the phrase "exclude or modify the effects of the reservation" allowed for that possibility.

18. A compromise between too broad or too narrow a definition might be one that defined an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the State author of the objection and the State author of the reservation. Such a definition would be flexible enough to meet the requirements of an "objection with intermediate effect". While not preventing the entry into force of the treaty between the parties, such an objection would render inapplicable between them not only the provision covered by the reservation but other treaty provisions as well. Such an effect would be within the maximum effect permissible under the Vienna Conventions and therefore appeared to raise no difficulties. A State might consider that the reservation affected other treaty provisions and accordingly, decide not to be bound by those other provisions. It was important to distinguish between "validity" and "opposability". In international law, a State's assessment of validity was subjective, and therefore the same reservation might be considered valid by some States and invalid by others. Nullity, which was the penalty for invalidity in domestic law, did not appear to be an appropriate outcome of the invalidity of a reservation in international law.

19. "Opposability", or more precisely "non-opposability", made for a more precise characterization of the penalty for such invalidity, as subjectively assessed. A State which deemed a reservation to be invalid could declare its effects non-opposable to that State. The terms "lawfulness" and "unlawfulness" should be avoided in any case.

20. **Ms. Escobar Hernández** (Spain) said that draft guideline 2.6.1 contained a valid concept of objections. Nevertheless, the central question of the effects of reservations in relation to objections remained unresolved. It was not possible to establish a complete analogy between the nature of reservations and that of objections, and the so-called "intermediate effect" therefore raised doubts, as it might leave a treaty permanently open, a result that would be hard to reconcile with the Vienna Conventions.

21. Furthermore, while it was preferable to exclude from the draft guidelines any element that might cause confusion with regard to the possibility of formulating extemporaneous reservations, such a risk was reduced by the unanimity reflected in draft guidelines 2.3.5, 2.4.9 and 2.4.10. Lastly, her delegation objected to the use of the term "admissible" and "opposable" to describe reservations that could not be formulated in accordance with article 19 of the 1969 Vienna Convention, because they had many different meanings in Spanish. On the other hand, "valid" was the most suitable term for describing the different categories of reservations permitted under the Vienna Conventions.

22. With regard to the topic of unilateral acts of States, her delegation found the proposals of the Working Group interesting and awaited the results of its review of practice and methodology.

23. **Mr. Makarewicz** (Poland) said that the draft guidelines on reservations to treaties provisionally adopted by the Commission during its recent session did not raise any major concerns and were generally acceptable. However, with respect to draft guideline 2.6.1 (Definition of objections to reservations), he noted that the most frequent objection, the minimum effect objection, might not be covered by the definition given in the ninth report of the Special Rapporteur (A/CN.4/544) because, in practice, the effects of a minimum effect objection were the same as the effects expected of the reservation. His delegation therefore suggested that the word "legal" should be added before the word "effects" in draft guideline 2.6.1. It also suggested that the words "even if, in a particular case, the ultimate effects of this statement are those of the reservation" should be added at the end of the draft guideline. Alternatively, the following definition of objections to reservations might be considered:

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby the State or organization purports to express an act of non-acceptance (or rejection) of the reservation, certain legal effects being attributable to this act".

In order to address concerns about the increasing number of draft guidelines, certain additional elements should be included in draft guideline 2.6.1, rather than

formulating them in separate guidelines, as suggested by the Special Rapporteur.

24. With regard to the question of validity of reservations raised by the Commission in chapter III of its report (A/59/10), his delegation agreed that the use of terms such as "validity"' and "lawfulness" in the context of article 19 of the Vienna Convention did have certain disadvantages. Poland therefore suggested the use of the term(s) "effectiveness" or "legal effectiveness" of reservations in that context. Ineffective reservations were excluded from the ordinary procedure concerning reservations to treaties.

25. While supporting the inclusion of the topic "Fragmentation of international law" in the Commission's current programme of work, his delegation urged the Commission to proceed with caution. While fragmentation was a natural consequence of the expansion of international law, it might result in conflicting jurisprudence. Accordingly, a series of studies on issues identified by the Commission and fully reflected in a final document might have considerable theoretical and practical significance.

26. **Mr. Lavalle** (Guatemala), referring to the draft guidelines on reservations to treaties provisionally adopted by the Commission, said that the second sentence of guideline 2.3.5 might be better rendered as follows: "However, an objection to such modification shall in no way affect the effects of the initial reservation". The proposed wording took into account the likelihood that the initial reservation did not have the same effect for all States parties to the treaty in question, and that some of those States might avail themselves of the possibility afforded by article 20, paragraph 4 (b), of the Vienna Convention on the Law of Treaties to preclude the treaty's entry into force between themselves and the reserving State.

27. With regard to draft guideline 2.5.12, his delegation foresaw a problem deriving from the reference to "the same procedure applicable to its formulation". The problem was related not to the formulation of the withdrawal but to its communication. The modalities for communicating a withdrawal were set out in the draft article, but the draft did not include a comparable provision on interpretative declarations, which might logically be called "Communication of interpretative declarations". It would seem appropriate to add a draft guideline with that title, whose text would be the same, mutatis mutandis, as the text of draft guideline 2.1.5. However, the matter was complicated by the existence not only of conditional interpretative declarations but also of simple interpretative declarations. Since a conditional interpretative declaration had the same effect as a reservation, it was quite natural that the draft articles should accord it the same treatment as a reservation.

28. The same could not be said, however, of a simple interpretative declaration, which could certainly produce legal effects, but only through estoppel. Since estoppel was entirely alien to the law of treaties, there was no justification for including simple interpretative declarations in the framework of the draft articles on reservations to treaties. It might be argued that their inclusion could do no harm; however, while the rule established in draft guideline 2.4.1 was justified in the case of conditional interpretative declarations, the same could not be said of simple interpretative declarations. He wondered, therefore, whether it would not be best to amend draft guideline 2.4.1 so that it applied only to conditional interpretative declarations, and to include in the draft article a guideline identical to draft guideline 2.1.5, except that it would apply only to conditional interpretative declarations.

29. His delegation was gravely concerned at the status of the work on the topic of unilateral actions of States (A/59/10, chap. VIII). It shared the opinion of the Working Group on the topic, as set out in paragraph 305 of the Commission's 2003 report (A/58/10), which appeared to imply that the work had become bogged down. There seemed to be no reason to take a less pessimistic view during the current session. It was a matter of particular concern that some members of the Commission and some States considered that the issue could not be addressed by a set of draft articles. Particularly significant in that regard was the opinion expressed by the United Kingdom in document A/CN.4/524. His delegation believed that it was not impossible to reach agreement on a set of draft articles, provided that the Commission began by agreeing on a specific definition of the acts to be regulated, as suggested by the Special Rapporteur in his first report. The resulting draft article would be based on article 3 of the Vienna Convention on the Law of Treaties, and would provide that the inapplicability of the draft to other unilateral acts or conduct of States would affect neither the validity of those acts nor the application to them of the rules contained in the draft articles.

30. **Mr. Romeiro** (Brazil), stressing the importance of the Commission's work on unilateral acts of States, said that it was necessary to identify general rules applicable to all unilateral acts in order to promote the stability and predictability of relations between States. Because it was important to define the scope of unilateral acts as precisely as possible, his delegation favoured a clear, precise determination as to which authorities could effectively engage the State's responsibility. His delegation supported the decision to draw up a general list of qualifying acts, but felt that specific rules should be adopted concerning legal effects.

31. With respect to the subject of reservations to treaties (A/59/10, chap. IX), Brazil welcomed the intention of the Special Rapporteur to address the question of the admissibility of reservations in his next report. The terminology to be used should reflect the concern that a reservation should not prejudice the integrity and spirit of the instrument in question. States parties must be the ultimate judges of the admissibility of a given reservation.

32. The fragmentation of international law (A/59/10, chap. X) was a relevant topic in view of the recent proliferation of new international norms, regimes and institutions. Brazil welcomed the Study Group's consideration of the preliminary report on related issues, including the function and scope of the *lex specialis* rule and the question of self-contained regimes, the modification of multilateral treaties between certain of the parties only, and the study on hierarchy in international law. The approach to those topics would help to identify existing structures and procedures for dealing with conflicts of norms and the issue of how they might be adapted to fill the existing void in the hierarchy of international norms.

33. **Mr. Braguglia** (Italy) said that the focus on practice in the seventh report of the Special Rapporteur on unilateral acts of States (A/CN.4/542) represented a positive development. The Commission should analyse those events from which useful consideration could be drawn and which could, in turn, be presented in the form of draft articles or in some other form.

34. With respect to the subject of reservations to treaties, his delegation urged the Commission to address the most important aspect of the question, namely, the definition of reservations that were impermissible and objections to such reservations. The Vienna Convention did not regulate the question clearly. To state that a reservation was impermissible or invalid, or even inadmissible, reflected the notion that it was not a reservation that the State party was entitled to make. However, a reservation that was not considered permissible by one State party might be deemed so by another State party, and should therefore be deemed permissible with respect to the latter. The expression "unlawful reservation" would be more appropriate when drawing a distinction between States, although it did have the disadvantage of suggesting that the State making the reservation would be responsible under international law, as a result, and that was clearly not the case. The Commission had not yet concluded its discussion of the draft guideline concerning the definition of objections to reservations. His delegation reiterated its wish that the Commission should adopt a broad definition, which would facilitate the inclusion of all criticisms that a State might make of a reservation.

35. With regard to the fragmentation of international law, his delegation welcomed the progress made by the Study Group. The analysis of *lex specialis* and of "self-contained regimes" seemed important, not just from the theoretical point of view, but also in order to clarify certain practical questions. However, some aspects of the analysis might benefit from more in-depth consideration, notably the hypothesis concerning the failure of such regimes. In pursuing its analysis of fragmentation, the Commission should recall that the benefits of its analysis should be easily accessible to States, and that it should begin by submitting certain specific proposals that might offer practical guidance.

36. **Mr. Dolatyar** (Islamic Republic of Iran), speaking on the topic of reservations to treaties, agreed with the Special Rapporteur that a definition of objections should precede consideration of their legal effects. The term "objection" should be defined in the light of established principles of international law, including the principle of State sovereignty; that principle, which was the basis of the Vienna Conventions, ensured that no State could bind another to a treaty obligation against its will. Thus, objections with super maximum effect had no place in international law because they would constitute the imposition of treaty obligations on a State without its prior consent.

37. Only parties to a treaty were entitled to formulate objections to that treaty because reservations and

objections thereto created bilateral legal relations between the reserving State and the objecting State, an argument based on the principle that there should be a balance between the rights and obligations of the parties. Furthermore, signatories should not have the right to object to reservations in situations where their overall obligation towards the parties was limited to refraining from acts which would defeat the object and purpose of the treaty; at most, they might be entitled to object to reservations which they considered to be contrary to that object and purpose.

38. **Ms. McIver** (New Zealand) reiterated her delegation's view that a study of the fragmentation of international law was timely and that the Commission was the ideal body to conduct such a study. She welcomed the Commission's decision not to focus on the final form of its work; the exercise would be useful whether or not it gave rise to normative results, as seen from the study on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" and from the outlines prepared on other subjects. However, she was pleased that the Commission's Study Group had taken note of the Committee's interest in a result that would have practical value and that it planned to produce a concise summary of its larger substantive work; such a summary would be a valuable day-to-day resource document for dealing with international legal issues.

39. The conclusion that general international law functioned in an omnipresent manner behind special rules and regimes, that no special rules could be isolated from general international law and that the term "self-contained regime" was a misnomer was significant, because it established that the emergence of special treaty regimes in such areas as trade, human rights and the environment did not mean that the international legal regime was losing coherence and was in crisis. It also suggested techniques for dealing with the existence of apparently conflicting rules in a given situation and emphasized the importance of the rules contained in the Vienna Convention on the Law of Treaties for reconciling conflicting norms. Treaties were themselves a product of international law; they derived their legitimacy from an international legal system and must be interpreted against that background.

40. **Mr. Pandit** (Nepal) referred to the draft articles on diplomatic protection adopted by the Commission on first reading (A/59/10, chap. IV). Draft article 2 affirmed the discretionary right (but not the obligation) of the State to exercise diplomatic protection on behalf of its nationals, while draft article 3 emphasized that the State entitled to exercise diplomatic protection was the State of nationality. Two exceptions to the nationality principle were provided for in draft article 8, namely, in the cases of refugees and stateless persons. There was a close relationship between the draft articles on State responsibility and those on diplomatic protection.

41. Draft article 9 extended diplomatic protection to corporations provided that certain conditions were met. A corporation must be a profit-making enterprise with limited liability whose capital was represented by shares. In accordance with the *Barcelona Traction* case, international law attributed the right of diplomatic protection of a corporation to the State under the laws of which it was incorporated and in whose territory it had its registered office. However, the draft article did not deal with a corporation that had the nationality of more than one State.

42. As to the protection of shareholders, it seemed that the Commission had developed draft articles along the lines of the *Barcelona Traction* case.

43. Part Three of the draft articles dealt with the exhaustion of local remedies rule. The Commission had replaced the existing reference, in article 14, paragraph 2, to remedies "as of right" with "legal remedies". His delegation was of the view that draft article 14 was in line with the customary rule of international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. The International Court of Justice had recognized that rule in the *Interhandel* case.

44. His delegation welcomed the Commission's proposal to discuss the clean hands doctrine in relation to the topic of diplomatic protection at its next session.

45. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/59/10, chap. VII) provided a sound basis for the Commission's future work on the topic. The legal regime contemplated by the draft principles should take into account economic development and potential benefits to society, without prejudice to the rules relating to State responsibility.

46. During its second reading, the Commission should consider the feasibility of combining the draft

articles on the prevention of transboundary harm from hazardous activities and the draft principles on allocation of loss into a single draft instrument, the final form of which could be determined on the basis of the integrated text.

47. His delegation supported the view that the question of the responsibility of organizations established under municipal law and non-governmental organizations should be excluded from the study on responsibility of international organizations (A/59/10, chap. V). With respect to the issues on which the Commission had sought the views of governments (A/59/10, para. 25), Nepal believed that a compilation of the practices of international organizations would be helpful.

48. The topic of shared natural resources (A/59/10, chap. VI) should include matters relating to groundwater, oil and gas. The Commission's work on that topic would both codify international rules and help alleviate the suffering of millions of people with water-borne diseases in developing countries. Studies should be conducted on State practice with respect to use and management, including pollution prevention; cases of conflict; and domestic and international rules concerning groundwater.

49. He commended the Commission for its decision to conduct studies on the topic of the fragmentation of international law (A/59/10, chap. X). His delegation also believed that the new topics, "Effects of armed conflicts on treaties", "Expulsion of aliens" and "The obligation to extradite or prosecute", would promote the development of a legal framework for international cooperation in addressing the contemporary problems that States faced in those areas.

50. His delegation attached importance to the International Law Seminar; he thanked donor countries for their financial contributions and urged them to continue their support for the Seminar.

51. Lastly, Member States should revisit the question of honoraria and ensure that the work of the Special Rapporteurs, in particular those from developing countries, was not adversely affected by budget cuts. The Commission should also endeavour to make technical assistance available to developing countries so that they could improve their capacity to submit information in response to the Commission's queries and annual reports.

Agenda item 147: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/59/L.17 and L.18)

Draft resolution A/C.6/59/L.17

52. **Mr. Samy** (Egypt) introducing the draft resolution on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (A/C.6/59/L.17), said that its language built on the previous year's resolution on the same subject in order to reflect both the developments in the work of the Special Committee and the proposals under consideration by it. Paragraph 9 of the draft resolution, which concerned the establishment of a trust fund to eliminate the backlog of the *Repertory of Practice of United Nations Organs*, had been newly added in accordance with the recommendations contained in the Special Committee's report (A/59/33). After drawing attention to the dates of the next session of the Special Committee set out in paragraph 2, he expressed the hope that the draft resolution would be adopted by consensus.

Draft resolution A/C.6/59/L.18

53. **Mr. Ilnytskyi** (Ukraine) introduced the draft resolution on implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions (A/C.6/59/L.18) on behalf of the sponsors. The text, which was based largely on the previous year's resolution, took into account the results of the Security Council Working Group on general issues relating to sanctions, the relevant provisions of the reports of the Secretary-General (A/59/1 and A/59/334) and of the Special Committee (A/59/33), and the Sixth Committee's discussion of the question of sanctions. In view of the importance which delegations attached to the question of implementing Article 50 of the Charter, as well as the wide range of views expressed regarding ways and means of doing so, the sponsors had attempted to reflect in the text ideas which would receive general support. Drawing attention to paragraph 10, he said that it had been slightly rephrased as compared with the previous year's resolution to take into account the recommendation contained in paragraph 27 of document A/59/33. The sponsors believed that the text had been drafted in a balanced and non-controversial manner and therefore hoped that it would be adopted by consensus.

The meeting rose at 4.40 p.m.