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

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05-57895 (E)

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The meeting was called to order at 11.05 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. Kerezoue** (Togo) said that the subjects covered in the International Law Commission's report (A/60/10) were of cardinal importance in a world undergoing far-reaching changes. The Commission had achieved noteworthy progress on the topic, "Expulsion of aliens". The Special Rapporteur should retain that title while carefully delimiting the topic's scope. Questions regarding admission or refusal of admission of aliens, population movements and situations resulting from decolonization or connected with self-determination should be excluded. A comparative study of national law and of all regional and international instruments on the subject would be useful. Greater heed should, however, be paid to reconciling the right to expel with the requirements of international law. In that connection, while a distinction certainly had to be drawn between the expulsion of aliens who were lawfully present in a country and of those who were not, it was essential to allow any alien facing expulsion a reasonable period of time to put his or her personal affairs in order before leaving the country and it was equally vital to respect the dignity of that person and all of his or her rights. It might be possible to contemplate the formulation of a universally accepted provision governing the procedure for the expulsion of aliens.

2. Since the Special Rapporteur on the effects of armed conflicts on treaties had managed to produce a complete set of draft articles within record time, the Commission ought to be encouraged to adopt a draft instrument on the subject in the near future. A new wave of non-international armed conflicts necessitated further reflection on the impact of such conflicts on bilateral and multilateral treaties, in order to decide whether they should be included in the definition of the term "armed conflicts".

3. The Special Rapporteur on reservations to treaties, in his latest report (A/CN.4/558 and Add.1), had highlighted a patent contradiction in State practice with regard to reservations which were incompatible with the object and purpose of a treaty. It was difficult to understand why some States would, on the one hand, find that certain reservations were incompatible with the object and purpose of a treaty yet, on the other, assert their readiness to enter into a treaty-based relationship with the reserving State.

4. **Ms. Ünel** (Turkey) said that the title of the topic "Shared natural resources" was likely to cause misunderstandings and should therefore be amended. She questioned the wisdom of using the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as a model for the legal regime governing transboundary aquifers, because the Convention had not been adopted by consensus and had not entered into force. It did not, therefore, enjoy wide international support. Furthermore, since the paucity of State practice in respect of transboundary aquifers had been underlined in the Special Rapporteur's report (A/CN.4/551 and Corr.1 and Add.1), in pursuing its task of the progressive development of the law on aquifers, the Commission should be encouraged to explore divers approaches without forgetting customary law.

5. As the final form the draft articles would take would affect both their wording and their content, a choice should be made without delay. Her Government was in favour of a relatively flexible form, such as non-binding guidelines, which would be more effective in practice. States' permanent sovereignty over their natural resources should be the subject of a separate article, because it was a fundamental, well-established principle of international law. Her Government fully supported the Special Rapporteur's conclusions concerning a threshold of "significant harm".

6. **Ms. de Armas García** (Cuba) said that the proliferation of various kinds of unilateral acts of States and their different legal implications at the international level made their codification and progressive development essential. During that exercise, it would be vital to identify and define unilateral acts of States which were at odds with international law and the principles of the Charter of the United Nations and which, in fact, had adverse legal consequences for both the State performing such acts and other States. Such was the case of unilateral coercive measures which were extraterritorial in nature and which therefore had legal implications for a number of States. The use of unilateral economic, commercial and financial coercive measures of an extraterritorial nature in order to exert political and economic pressure on a State undermined the sovereign rights of other States. The blockade imposed on Cuba

by the United States of America, and more specifically the Helms-Burton Act, designed ultimately to engineer a change in Cuba's established institutional and political order, clearly constituted an example of such unilateral acts.

7. The Helms-Burton Act had all the characteristics of a unilateral act in international law in that it met the criteria of autonomy, publicity and production of legal effects. It was autonomous within both of the meanings given by the Special Rapporteur in his second report (A/CN.4/500 and Add.1), since its performance was not predicated on a pre-existing norm of international law and its formulation was exclusively an expression of the will of the United States Government. Its publicity had been ensured first by the publication formalities following its adoption and then by the ensuing wide international debate surrounding it.

8. As for its legal effects, the Act violated universally recognized norms and principles of international law. Since its aim was to control the form of government and the economic, political and social system of Cuba, the United States Government was violating the principles of Chapter I of the Charter of the United Nations. The Act in question was distinctly extraterritorial in character. Through it, the United States Government arrogated to itself the right to pass judgement on the conduct of other States and their nationals in their relations with Cuba. The extraterritorial nature of the Act had been recognized, inter alia, in the Opinion of the Inter-American Juridical Committee in fulfilment of resolution AG/doc.3375/96 of the General Assembly of the Organization of American States, entitled "Freedom of trade and investment in the hemisphere".

9. By failing to recognize the process of perfectly lawful nationalization which had taken place in Cuba in the 1960s, the United States Government was violating Cuban law and national sovereignty over its natural resources. The Act also infringed several other internationally accepted norms, such as freedom of investment and the principle that subsidiary companies were subject to the law of the land in which they were located. The international community had on numerous occasions rejected the imposition by States of economic, commercial and financial unilateral coercive measures as a means of exerting political and economic pressure on the grounds that they breached international law, the Charter of the United Nations and the principles of the World Trade Organization and also because they impeded the full exercise of the right to development and hindered international economic cooperation for development. The General Assembly had repeatedly condemned the use of such measures inasmuch as they constituted interference in the domestic affairs of States and therefore amounted to a violation of their sovereignty. Hence they were incompatible with the Charter of Economic Rights and Duties of States.

10. It was to be hoped that the proposals and conclusions submitted by the Special Rapporteur and the Working Group on Unilateral Acts of States in the coming year would begin to cover the codification of such acts and thereby contribute to the discussion of that subject in the General Assembly. The International Law Commission's aim should be to arrive at a comprehensive approach to unilateral acts which would promote cooperation resting on the legality and legitimacy of relations between States.

11. **Mr. Kanu** (Sierra Leone) said that the responsibility of States members of an international organization for its conduct as a result of their membership, or for their conduct associated with membership, was of exceptional importance because of the challenges faced by the international legal order. Detailed consideration of that topic at the International Law Commission's next session would therefore be welcome. The approach and methodology adopted by the Special Rapporteur in his third report on the responsibility of international organizations (A/CN.4/553) might require rethinking because, although States and international organizations were both subjects of international law, they were different in character. The nine draft articles provisionally adopted by the Commission at its fifty-seventh session contained no new element of progressive development of law. His Government subscribed to some of the views expressed in that connection by the representatives of Portugal and Slovakia. Moreover he urged the Commission to re-examine the view that member States shared joint and several responsibility and consider the possibility that responsibility could be apportioned.

12. The expulsion of aliens was a very important topic which affected the lives of many people around the world. The movement of people had major ramifications for international relations. The lack of uniformity in State practice with regard to the expulsion of aliens meant that it warranted serious

consideration and possibly codification. There was no disputing the fact that States had an inherent right to expel aliens from their territory, above all when their presence was inimical to the State's security interests, but that right must be reconciled with the requirements of international law, in particular those relating to the protection of human rights. The challenges faced by the international legal order since 11 September 2001 and ongoing collective expulsions of national minorities, asylum-seekers and refugees made clarification of the topic and its bold treatment by the Special Rapporteur all the more necessary.

13. His Government reserved its position on the validity of reservations to treaties and the concept of the object and purpose of a treaty pending the outcome of the draft guidelines which the Special Rapporteur had sent to the Drafting Committee. The dilemma with the regime on reservations to treaties was rooted in the lack of consensus on who should determine whether a reservation was incompatible with the object and purpose of a treaty and therefore invalid. Perhaps the Sixth Committee and the International Law Commission should recommend that all authors of treaties ought to consider the possibility of establishing a final authority who would rule on the validity of reservations.

14. With regard to the fragmentation of international law, his delegation welcomed the Study Group's further discussion of the function and scope of the *lex specialis* rule and the question of self-contained regimes; the interpretation of treaties in the light of any relevant rules of international law applicable in the relations between the parties; the application of successive treaties relating to the same subject matter; the modification of multilateral treaties between certain of the parties only; and the hierarchy in international law of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules.

15. As far as the question of hierarchy in international law was concerned, "*erga omnes*" was really a concept about standing and could not therefore be regarded as a conflict rule in the same way as *jus cogens* norms, which related to the nature of rights and obligations. The decision of the International Court of Justice in the *Barcelona Traction* case suggested that the Court intended to limit *erga omnes* rights and obligations to those arising under *jus cogens* norms. Adding *erga omnes* obligations did not contribute anything new to the discussion. Treating both obligations *erga omnes* and *jus cogens* norms as conflict rules was incorrect.

16. It would be worth the Commission's while to formulate a set of rule-of-law principles, since the difficulties associated with the fragmentation of international law might significantly impinge on the rule of law. A set of rule-of-law principles would serve as a guide for further law-making activities and would ensure that the latter did not conflict with any of those principles.

17. His delegation welcomed the Commission's decision to consider the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), but believed that it should also include in its work programme the topics of the pre-emptive use of force in international law with particular reference to Article 51 of the Charter of the United Nations and that of the doctrine of responsibility to protect.

18. **Ms. Escobar Hernández** (Spain), referring to the topic of reservations to treaties, welcomed the Special Rapporteur's focus in his tenth report (A/CN.4/558 and Add.1 and 2) on the conditions for the formulation of valid reservations and the definition and scope of the object and purpose of a treaty. Her delegation supported the approach of basing the relevant provisions on article 19 of the Vienna Convention on the Law of Treaties and endorsed the use of the term "validity". Her delegation concurred with the general spirit of the draft guidelines and with the specific provisions for particular types of treaty or particular clauses contained in treaties. In that context, she expressed support for the current wording of draft guideline 3.1.12, which would ensure that essential human rights principles were protected. The provisions of draft guideline 3.1.13 also represented a good balance between preservation of the object and purpose of a treaty and the principle of free choice of means of dispute settlement, thereby preserving the practice, essential in her delegation's view, of including dispute settlement clauses in multilateral international treaties.

19. However, some of the draft guidelines required further thought. Draft guideline 3.1.1, which spelled out categories of prohibited reservations, was inconsistent with draft guidelines 3.1.3 and 3.1.4 in that it did not refer to implicit prohibition. Implicit prohibition should be mentioned, at least with regard to cases in which the treaty contained a clause authorizing

only specified reservations, which would have the effect of prohibiting all other reservations and precluding reference to the object and purpose of the treaty as a criterion for determining the validity of the reservation.

20. Draft guideline 3.1.11 should be redrafted to take into account not only the object and purpose of the treaty but also article 27 of the Vienna Convention on the Law of Treaties, to which it was closely related, particularly since States often used reservations relating to the application of domestic law as a way of avoiding the obligation to comply with the object and purpose of the treaty. In that context, it might be useful to link draft guideline 3.1.11 with draft guideline 3.1.7 on vague, general reservations.

21. Her delegation naturally agreed with the substance of draft guideline 3.1.9 on reservations to provisions setting forth a rule of *jus cogens*, but considered the provision superfluous. Moreover, it could be prejudicial to *jus cogens* itself to refer to the issue in draft guidelines whose sole object was to provide practical guidance on the application of a consensus-based system like the system of reservations to treaties.

22. With regard to draft guideline 2.6.1, her delegation had some concerns about the expression "whereby the former State or organization purports to exclude or to modify the legal effects of the reservation". It was not certain, in the light of the Vienna Convention on the Law of Treaties, whether the objective in question could always be achieved. Given that the effect of the objection was at issue rather than the concept of objection itself, it might be useful for the Commission to consider the question further in the future.

23. Draft guideline 2.6.2 on objections to the late formulation or widening of the scope of a reservation also required further analysis. Providing for the possibility of late reservations, even with the restrictions and cautions provided for, risked establishing a model whereby a treaty could be left permanently open.

24. With regard to the specific information requested by the Commission in paragraph 29 of its report, she said that Spain was not opposed, in general, to the entry into force of a treaty between itself and a third State that had formulated reservations to which Spain had objected on the grounds that they were contrary to the object and purpose of the treaty. Such a practice was permitted under the Vienna Convention on the Law of Treaties, with a view to ensuring the broadest possible participation in treaties. The question of the intended effects of such a practice was closely connected with the question of the effects of the objection itself. Her delegation took the view that the type of objection referred to, despite its particular significance, was subject to the same regime as other objections, irrespective of the reasons put forward for the objection. Therefore, the question was surrounded by the same ambiguity that had already been noted during the Commission's work.

25. However, her delegation strongly believed that the Commission's work should not remain in the realm of theory, but should be aimed at achieving practical impact. In that context, the formulation of objections to a reservation on the grounds that it was contrary to the object and purpose of the treaty, and the maintenance in force of a treaty between a reserving State and an objecting State, had a positive effect in that reservations detrimental to the core content of a treaty were identified and denounced, making it possible to open a "reservations dialogue" and, where appropriate, to induce the withdrawal of the reservation or to place acceptable limits on it. In addition, the interplay between the reservation and the objection could have consequences in the event of a dispute as to the provision or provisions affected by the reservation and the objection. There were practical examples of such cases and Spain therefore considered that it would be useful to retain the option of objecting to the reservation and maintaining the treaty in force between the States parties concerned.

26. **Mr. Hmoud** (Jordan), referring to the topic "Shared natural resources", said that there was currently no special legal regime governing transboundary aquifers and that the general rules on the issue did not provide sufficient guidance for States. His delegation therefore welcomed the Commission's efforts to develop a relevant set of draft articles. Although the Convention on the Law of the Non-navigational Uses of International Watercourses was a useful starting point in some respects, a somewhat different legal framework was required for groundwaters. Guiding principles for bilateral and regional cooperation in the use and management of transboundary groundwaters should be explored, without prejudice to the final form of the draft articles.

27. Groundwaters were a natural resource that was subject to the jurisdiction of the State that had sovereign rights associated with it. It was therefore important to include in the draft articles an explicit reference to General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources. It should be made clear that groundwaters were not a common heritage of humankind.

28. The utilization of transboundary aquifers was the core issue with regard to the scope of the draft articles. It would be sufficient in draft article 1, subparagraph (b), to provide that other activities as described by the draft articles fell within the scope of the draft articles, without introducing the concepts of "impact" and "likely impact", which would also raise questions about the relationship between such activities and the term "significant harm". Measures of protection, preservation and management should fall within the scope of the draft articles only insofar as they were related to other aquifer States' rights to utilization.

29. The list of definitions in draft article 2 was not exhaustive, and additional definitions might be required at a later stage. However, he welcomed the distinction drawn between recharging and non-recharging aquifers, both in draft article 2 and in draft article 5, a distinction which was justified, given the difference between the two types of aquifer in terms of sustainability. The distinction should also be carried over to the factors relevant to equitable and reasonable utilization set out in draft article 6, although some factors were applicable to both types of aquifers.

30. His delegation supported the approach of encouraging bilateral and regional arrangements among aquifer States, as set out in draft article 3, paragraph 1. Such arrangements could be binding or non-binding; there was no need to adopt more definitive language. His delegation also supported the inclusion of all relevant aquifer States in the negotiation and conclusion of management arrangements. However, the failure of one or more States to participate in good faith in such negotiations should not prevent the others from concluding the necessary arrangements among themselves. Draft article 3, paragraph 3, should make it clearer that an agreement among aquifer States prevailed over the provisions of the draft articles in cases of conflict between the two. The same applied to the provisions on protection and preservation, such as draft articles 12 and 14. The purpose of the draft articles was not to set universal environmental standards.

31. Draft article 5 rightly drew a distinction between reasonable and equitable utilization. Draft article 6 should therefore indicate which factors applied to equitable utilization and which applied to reasonable utilization. It should also be noted that an aquifer State's non-exercise of its right to utilize the aquifer should not prejudice the right of the other aquifer States to utilize it on the grounds that such utilization would be inequitable. Utilization should be considered equitable as long as the former State was not prevented from exercising its right by the other aquifer States.

32. Similarly, draft article 7 should make it clear that an aquifer State which exercised its right to utilize the aquifer without taking any other measures that had adverse effects should not be regarded as causing significant harm to the other aquifer States, even if the other aquifer States were not exercising their rights. In draft article 7, paragraph 2, the word "impact" was both unnecessary and confusing. It was sufficient to refer to "other activities", especially as the paragraph went on to provide for appropriate measures to prevent significant harm to other aquifer States. The issue of liability should be left to other rules and instruments of international law. The reference to compensation in draft article 7, paragraph 3, should therefore be deleted.

33. The general obligation for aquifer States to cooperate with each other should be reconsidered because it had legal consequences for States which would otherwise have unqualified sovereign rights to utilize the aquifer. It should also be noted that the aim of "adequate protection" of a non-recharging aquifer might be unrealistic, as utilization could eventually result in consumption of the whole of such an aquifer. A distinction should therefore be made in draft article 8, paragraph 1, between the protection of recharging aquifers and that of non-recharging aquifers.

34. **Mr. Momtaz** (Chairman of the International Law Commission), introducing chapters V, VII and XI of the Commission's report (A/60/10), said that chapter V dealt with the effects of armed conflicts on treaties, one of the two new topics taken up by the Commission in the current year. Though new to the Commission, the topic had been the subject of State practice and theoretical development since at least the turn of the previous century. Indeed, the Commission at its fifty-

seventh session had had before it a useful study prepared by the Secretariat containing a comprehensive review of past consideration of the topic and a discussion of the different issues involved (A/CN.4/550 and Corr.1).

35. The Commission had also had before it the first report of the Special Rapporteur on the topic (A/CN.4/552), which contained a set of 14 draft articles establishing a basic framework for the organization of the Commission's work on the topic and for the provision by Governments of comments and examples of relevant State practice. The basic policy underlying the draft articles was to promote and enhance the security and stability of the legal relationships between States by minimizing the number of occasions on which the outbreak of armed conflict might have an effect on treaty relations. The Special Rapporteur had also taken the approach of drafting articles compatible with the Vienna Convention on the Law of Treaties of 1969; in other words, he had viewed the subject matter as part of the law of treaties rather than as a development of the law relating to the use of force.

36. One of the difficulties in considering the topic was that it was dominated by doctrine, and practice was sparse, with much of it being old. The key policy change had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable.

37. Draft article 1 dealt with the scope of the draft articles and was based on the equivalent provision of the Vienna Convention on the Law of Treaties. The Commission's discussions had centred on proposals either to extend the scope of the draft articles — for example, to include treaties entered into by international organizations — or to restrict the scope so as to exclude certain categories of treaty.

38. Draft article 2 set out definitions of the terms "treaty" and "armed conflict". The definition of "treaty" was based on that of the Vienna Convention, and had therefore caused little controversy. However, the definition of "armed conflict" was based on that adopted by the Institute of International Law in 1985 and had been the subject of more lengthy discussion. While the Commission had supported, in principle, the Special Rapporteur's suggestion that it should not attempt to achieve a comprehensive definition of armed conflict for the purposes of the draft articles, a number of questions had been raised in that regard, for example, whether the effects of non-international armed conflicts on treaties should be included in the scope of the topic. Other questions had concerned whether the definition of armed conflict should include blockades or military occupation not accompanied by protracted armed violence or armed operations.

39. Draft article 3 established the basic principle that the mere outbreak of armed conflict, whether or not the conflict was a declared war, did not ipso facto terminate or suspend treaties in force between parties to the conflict. The Commission had supported the basic thrust of the proposed draft article; most of its comments had been aimed at making the wording more precise. For example, it had been suggested that there might exist categories of treaty that were automatically terminated or suspended in the event of armed conflict between parties; that a distinction might usefully be made between termination and suspension; and that the position of third parties should be clarified.

40. Draft article 4 dealt with the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict. Having reviewed the various approaches taken in the past regarding the effects of armed conflicts on treaties, the Special Rapporteur had suggested that the criterion most representative of existing international law was that of the intention of the parties at the time they had concluded the treaty in question. Paragraph 2 of the draft article established that the relevant intention of the parties to a treaty would be determined in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties and the nature and extent of the armed conflict in question. During the Commission's discussions, some members had expressed doubts about the criterion of intention, given the difficulty of determining the intention of States parties at the time of conclusion of a treaty as to the effect that armed conflict between those parties would have on the obligations under the treaty. It had also been suggested that, although intention might be an important factor, it was not necessarily the sole relevant criterion, and that other criteria, such as compatibility with the armed conflict, might also be applicable.

41. Draft article 5 dealt with the situation in which treaties expressly applicable to armed conflict remained operative in the event of an armed conflict and the outbreak of such a conflict did not affect the

competence of the parties to the conflict to conclude treaties. The provision had enjoyed general support in the Commission. However, it had also been suggested that the draft article should be further refined by, for example, including in it the principle enunciated in the 1996 Advisory Opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons* that, while certain human rights and environmental principles did not cease to apply in time of armed conflict, their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which [was] designed to regulate the conduct of hostilities".

42. Draft article 6 dealt with the more specialized question of treaties relating to the occasion for resort to armed conflict. The Special Rapporteur was of the view that, under contemporary international law, there was a presumption in favour of the continuation of existing obligations under such treaties, unless the contracting parties decided otherwise. While there had been some support for the Special Rapporteur's proposed text, the provision was problematic, particularly as it had become largely redundant in the light of draft article 3. Doubts had also been expressed as to the Special Rapporteur's view of the contemporary position under international law.

43. Draft article 7 dealt with treaties the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict. Paragraph 1 reiterated the basic principle that the incidence of an armed conflict would not as such inhibit their operation. Paragraph 2 contained a non-exhaustive list of categories of such treaties. The Special Rapporteur had kept an open mind when preparing the list, which therefore included categories that he himself did not support. Differing views had been expressed as to the appropriateness of the criterion of object and purpose. It had been pointed out that the applicable considerations might be primarily contextual in nature. Doubts had also been expressed as to the viability of including an indicative list.

44. Draft articles 8 and 9 dealt with some of the mechanics of the topic. Draft article 8 concerned the way in which a treaty might be suspended or terminated in the case of an armed conflict between the parties. The provision, which simply referred the reader to articles 42 to 45 of the Vienna Convention, had proved largely uncontroversial. Draft article 9 dealt with the possibility of the resumption of a treaty following the conclusion of the armed conflict, provided that such resumption was in accordance with the intention of the parties at the time that the treaty had been concluded. General support had been expressed for the provision, subject to some refinements.

45. Draft article 10 dealt with the question of the legality of the conduct of the parties to an armed conflict. In line with his overall principle of avoiding issues relating to the legality of the use of force, the Special Rapporteur had proposed a text that simply made it clear that the legality of the conduct of the parties to the conflict had no bearing on the termination or suspension of a treaty. Some members of the Commission had favoured the inclusion of provisions similar to those contained in articles 7, 8 and 9 of the Institute of International Law resolution II of 1985, which would distinguish between States acting in individual or collective self-defence, or in compliance with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, and those of the aggressor State. Others had opposed the introduction of references to the inequality of belligerent parties in the draft articles.

46. Draft articles 11 to 14 contained a series of "without-prejudice" clauses dealing with the legal effects of decisions by the Security Council under Chapter VII of the Charter; the status of third States as neutrals, the overlap with other aspects of the law of treaties; and the question of the revival of terminated or suspended treaties. The draft articles had enjoyed general support.

47. There had been general agreement in the Commission that its work would benefit from information provided by Governments as to their practice and any other relevant information. He understood that, at the Special Rapporteur's request, the Secretariat had circulated a request to Governments for information in August 2005. He trusted that Governments would be able to reply before the end of February 2006, so that the Special Rapporteur could take any information into account when preparing his next report.

48. Chapter VII of the report dealt with the topic "Diplomatic protection". On completing the first reading of the draft articles at its fifty-sixth session, the Commission had requested the Special Rapporteur to consider the possible relationship between the "clean

hands" doctrine and diplomatic protection. The Special Rapporteur's memorandum on the subject had subsequently been issued as his sixth report (A/CN.4/546). The Special Rapporteur had taken the position that, notwithstanding the importance of the clean hands doctrine in international law, it was not sufficiently closely linked to the topic of diplomatic protection to warrant inclusion in the draft articles because: it had most often been raised in the context of inter-State claims for direct injury by a State to another; once a State took up its national's claim concerning a violation of international law, the claim became that of the State, so that the misconduct of the national ceased to be relevant; and there was little authority for the applicability of the doctrine in the context of diplomatic protection. Indeed, the Special Rapporteur had recalled that there had been almost no support within the Sixth Committee during the fifty-ninth session for including the doctrine. The Commission had generally supported the Special Rapporteur's view that it was more appropriate for the clean hands doctrine to be invoked during the examination of the merits, since it related to the attenuation or exoneration of responsibility rather than admissibility. Lastly, he recalled that the Secretary-General's letter of 19 October 2004 had requested written comments from Governments to be received by 1 January 2006. To date, very few such comments had been received, and he wished to reiterate the importance attached by the Commission to receiving comments and observations in writing. Appropriate guidance from Governments was crucial to the next report on the topic and to the achievement of the Commission's goal of completing the second reading at its fifty-eighth session.

49. With regard to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", which appeared in Chapter XI of the report, the Commission had established a Study Group in 2002 and had agreed on five studies to be conducted. Substantive consideration of the various studies had begun in 2004, with the focus on the substantive aspects of fragmentation rather than the institutional aspects, such as conflict of jurisdiction between one body and another. More generally, the Study Group had elected to adopt an approach emphasizing international law was a legal system, with constituent rules operating in relation to other rules and principles. No regime was self-contained, in the sense that it could operate in a vacuum. The various rules existed at different hierarchical levels; their formulation might involve greater or lesser specificity; and their validity might be contingent upon dates earlier or later in time. To resolve conflicts between rules, articles 30, 31, 32, 41 and 53 of the Vienna Convention on the Law of Treaties were often applied, along with general principles of treaty interpretation such as harmonization, integration and *lex specialis*, *lex posterior* and *lex superior*.

50. The Study Group had considered three substantive issues at the fifty-seventh session. The first related to regionalism, following on the interest aroused by the study at the previous session of the function and scope of the *lex specialis* rule and the question of "self-contained regimes". A memorandum by the Chairman of the Study Group had noted that the expression "regionalism" did not feature prominently in the literature of international law. Where it did, it seldom took the form of a "rule" or "principle". The term was understood in at least three different ways: as a set of approaches and methods for examining international law; as a technique for international law-making; and as the pursuit of geographical exceptions to universal rules of international law. The first two meanings given to the term had been adequately covered in the study entitled "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'". only the third use of the term offered possibilities for fruitful further consideration.

51. Regional *lex specialis* seldom arose as an application or modification of a general rule or a deviation from such a rule. It might refer, in a positive sense, to a rule or principle with a regional sphere of validity in relation to a universal rule or principle or, in a negative sense, to a rule or principle that imposed a limitation on the validity of a universal rule or principle. The memorandum also addressed two additional features associated with regionalism: the question of universalism and regionalism in the context of human rights law and the relationship between universalism and regionalism in the context of the collective security system under the Charter of the United Nations.

52. The second substantive issue considered by the Study Group related to the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31, paragraph 3 (c), of the Vienna Convention on the

Law of Treaties), to which recourse had been made with increasing frequency over the recent years, as evidenced by the decisions of a number of judicial bodies. In their discussions, the Study Group had stressed the need to operationalize article 31, paragraph 1 (c). In the interpretation of a treaty, the "other relevant rules" to be taken into account included customary law and general principles, as well as other treaties. Custom and general principles took on particular importance when the wording of a treaty was imprecise or unclear or when there was a recognized meaning in customary law or general principles for the terminology used in the treaty. The Group endorsed the presumption that parties did not intend to act inconsistently with their other obligations and that they intended to refer to general principles of international law for all questions that the treaty itself did not resolve in a different way. While "other obligations" were generally assumed to be obligations in force at the time of the conclusion of the treaty, there were also situations where subsequent events could also be relevant.

53. Lastly, the Study Group had reviewed a report entitled "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules". It was generally understood that there was no general hierarchy of sources in international law. The notions of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter as conflict rules operated largely independently of each other. Only *jus cogens* and Article 103 related, strictly speaking, to normative hierarchy, while obligations *erga omnes* were concerned more with the scope of application of the relevant norms. The Study Group did not intend to catalogue such norms but rather to emphasize their use as conflict rules in dealing with fragmentation. The Study Group had noted that the issue of normative hierarchy was closely linked to other topics, in that it governed the permissibility of particular agreements as *leges specialis*, as subsequent agreements or as *inter se* modification of multilateral treaties.

54. It was envisaged that the Study Group would submit a consolidated study to the Commission at the fifty-eighth session. The study would be largely analytical, describing the phenomenon of fragmentation and offering legal analyses on the basis of the five studies, with particular reference to the Vienna Convention on the Law of Treaties and general international law. The remainder of the study would bring together a set of conclusions, guidelines or principles that emerged from the Group's studies and discussions which would serve as both the Group's conclusions and as practical guidelines for practitioners to assist them in issues relating to fragmentation in the international legal system.

The meeting rose at 12.45 p.m.