Document:-
A/CN.4/SR.2724

Summary record of the 2724th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
2002, vol. I

teur wished to propose a rule whose substance would be *acta sunt servanda*, a rule that seemed to him redolent of religious dogma. Positing such a principle would require the Commission to scrutinize every theoretical explanation as to the binding force of unilateral acts—a course to which he wished to voice his opposition at the outset. Reverting to the definition proposed by the Special Rapporteur in paragraph 81 of his report, he proposed that the Commission should adopt it provisionally as a working definition. It seemed to him correct to refer in the definition to the "intention" of the State to be bound, for such an intention clearly existed in the four types of unilateral act listed, namely, promise, protest, waiver and recognition; on the other hand, the word "unequivocal" seemed to him superfluous, for, if the expression of will was not "unequivocal", there was a strong presumption that there was no real intention to be bound.

34. As to the grounds for invalidity, the analogy with the Vienna regime made good sense, but the question whether and to what degree the rule could be transposed to the case of unilateral acts should be carefully studied. Thus, in draft article 5 (*a*), the bracketed reference to "consent", which suggested the law of treaties, should be eliminated. In article 5 (*c*), it was perhaps too restrictive to limit cases of corruption to corruption by another State. Article 5 (*f*) had been included by analogy with article 53 of the 1969 Vienna Convention; a reference to *jus cogens superveniens* should also be included, by analogy with article 64 of that Convention. Article 5 (*g*) might give rise to difficulties, for even though, in the event of a conflict of obligations, obligations under the Charter of the United Nations prevailed, that did not mean that a unilateral act contrary to a decision of the Security Council must necessarily be invalid. He proposed finding a formulation that would give full effect to the hierarchy of norms while avoiding the very dangerous term "invalidity". The formulation of article 5 (*h*) might be brought more closely into line with that of article 46 of the Convention; it would be useful to incorporate a reference to the "manifest" nature of the conflict with a norm of fundamental importance to the domestic law of the State. Furthermore, the notion of invalidity could lead to considerable difficulties in the case of collective unilateral acts. For instance, where the ground for invalidity was present only in the case of some of the author States, the question would arise whether the unilateral act was invalid for all the States collectively. As far as interpretation was concerned, he agreed with other members that the essential criterion was the author State's intention and that it might be useful to consult the *travaux préparatoires*, where these were available.

35. With regard to the best way of proceeding with the consideration of the topic, he had been interested to read the general comments by the United Kingdom, which were reproduced in the report of the Secretary-General containing the replies from Governments to the questionnaire on unilateral acts of States (A/CN.4/524) and also referred to in paragraph 27 of the fifth report, to the effect that any approach which sought to subject the very wide range of unilateral acts to a single set of general rules was not well-founded, but that the Commission might consider whether there were specific problems in relation to specific types of unilateral acts which might usefully be addressed in an expository study. Unfortunately, it was now too late for the Commission to change its method of work. He therefore proposed that it should try to complete the task of formulating the general part of the draft articles as quickly as possible, ending its consideration of the draft articles with the question of interpretation, without attempting to formulate an *acta sunt servanda* principle or considering the questions of suspension, termination and retroactivity, which could be considered in the context of the more specific work devoted to certain unilateral acts. Subsequently, the Commission might turn to specific types of unilateral act, namely, promise, waiver, recognition and protest. He was surprised to note how ready some members of the Commission were to engage in the consideration of recognition of States and Governments, for practice and doctrine in that area were notoriously divergent and it would be difficult to codify the law on that question. At a third stage in its work, the Commission should revisit the whole range of principles established in the light of particular cases, with a view to deciding whether the drafting of articles on the topic was the best way forward. Consideration should be given to using outside resources to conduct more systematic research into the practice of States in the area of unilateral acts, perhaps establishing a team for that purpose.

36. Mr. PAMBOU-TCHIVOUNDA said that he endorsed the idea of completing the exercise currently under way, but favoured extending it to include suspension and termination so as to have a comprehensive view of unilateral acts throughout their life cycle. Attempts at classification were doomed to failure because it was impossible to find criteria on the basis of which to establish a hierarchy, or affinities between different groups of acts; it would thus be more fruitful to examine the classic cases of promise, waiver, recognition and protest. The Commission would thus first consider the general rules before turning to the specific regimes. He supported Mr. Simma's proposal that systematic research should be conducted on State practice in that area.

The meeting rose at 12.55 p.m.

2724th MEETING

Thursday, 23 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa

Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Statement by the Legal Counsel

1. The CHAIR invited Mr. Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

2. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) congratulated all members of the new Commission on their recent election, and in particular those who had been elected for the first time. The Commission was also to be congratulated on completing its work on the two topics of State responsibility[1] and international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities).[2] The completion of the work on State responsibility was a truly historic event. The published articles now formed part of international law and a basis for decision-making by ICJ and other bodies throughout the world. Last but not least, the Commission was to be congratulated on having added three new topics to its agenda for the current session. He looked forward to seeing those topics developed by the Commission in its usual wise and expert manner.

3. It was his understanding that the Commission intended to continue to split its sessions. The Commission would of course be aware that split sessions entailed additional expenses. Consequently, he had been pleased to note that at its fifty-third session it had itself proposed cost-saving measures, an encouraging trend that he hoped would continue, since one of his major responsibilities was to ensure that sufficient financial and human resources were available for the Commission. In paragraph 10 of its resolution 56/82, the General Assembly had taken note of paragraph 260 of the Commission's report on its work at its fifty-third session[3] with regard to the cost-saving measures taken by the Commission in organizing its programme of work and had encouraged the Commission to continue taking such measures at future sessions. He could not emphasize strongly enough the importance of implementing paragraph 10 of that resolution, and also the need for continuous consideration of cost-saving measures. The Office of Legal Affairs was doing its best to defend the Commission's interests before the bodies responsible for the budget; but, given the financial constraints under which the United Nations now operated, any cost-saving measures initiated by the expert bodies themselves were more than welcome.

4. With regard to the Preparatory Commission for the International Criminal Court, the International Law Commission had of course been instrumental in bringing forward the preparatory work both for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and, ultimately, for the adoption of the Rome Statute of the International Criminal Court. The Rome Statute would enter into force on 1 July 2002. As of that date, crimes falling under the jurisdiction of the Court would be punishable and—although the Court would not be operational until sometime in 2003—also prosecutable. Consequently, the Preparatory Commission would meet for the last time in July 2002. Arrangements were being made for the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, to be held in September 2002. The Preparatory Commission had recently added to its collection of completed texts the basic principles governing a headquarters agreement and two draft resolutions intended for adoption by the Assembly of States Parties. It had also set up a trust fund to support the establishment of the Court. It was working closely with the authorities in the Netherlands and hoped to have an advance team in place within the next few weeks, to provide member States with support in setting up the Court and, in particular, to ensure that incoming mail was dealt with in a competent manner pending the election of senior administrators. The Preparatory Commission had also completed work on the First Year Budget, on the Trust Fund for Victims and on the remuneration of judges, the Prosecutor and the Registrar. The Preparatory Commission was also expected to make a recommendation regarding continuation of the work on the crime of aggression, a crime which had been left undefined in the Rome Statute. It had been a major concern for the Preparatory Commission, given the insistence by many States on the need to make progress on a definition and the close connection between the Rome Statute and Article 39 of the Charter of the United Nations. At its next session the Preparatory Commission would complete its work, including its consideration of the preparatory documents for the first meeting of the Assembly of States Parties.

5. Members would also recall that on 11 April 2002 the Office of Legal Affairs had received 10 further instruments of ratification, bringing the number of ratifications to a total of 66, six more than the figure of 60 required for the Rome Statute to enter into force. A sixty-seventh ratification had since been received at Headquarters.

6. With regard to the situation in Sierra Leone, in August 2000 the Security Council had decided to request the Secretary-General to negotiate an agreement with the Government of Sierra Leone to set up a special independent court in that country[4] to deal with the atrocities committed during the civil war. The Secretary-General had initially wished the court to be financed through assessed contributions, but in 2001 the Security Council had indicated that it was to be financed through voluntary contributions. That decision had had dramatic effects on the work of the Office of Legal Affairs, which had had to involve itself in the arduous task of fund-raising. The financial resources necessary to begin the task of setting up the court had become available as recently as November 2001. Funding

[1] See 2712th meeting, footnote 13.

[2] For the text of the draft articles adopted by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. V, p. 146 , para. 97.

[3] See *Yearbook ... 2001*, vol. II (Part Two).

[4] Security Council resolution 1315 (2000) of 14 August 2000, para. 1.

was available for the first year of a projected three-year period of operation, and pledges had been made to cover the second year and part of the third year. A planning mission had visited Sierra Leone in January 2002, and on 16 January 2002, together with the Minister of Justice, he had signed an Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Candidates for the post of judge were being interviewed. Mr. David Crane, a citizen of the United States, had been appointed Prosecutor, and Mr. Robin Vincent, a British citizen, appointed Registrar. It was hoped that the Court would be operational by late August or early September 2002, in parallel with the Truth and Reconciliation Commission set up under Sierra Leone's national legislation. It was of the utmost importance to demonstrate to the population that the two institutions were complementary.

7. Members would be aware that the Secretary-General had been engaged in negotiations with the Government of Cambodia since 1997. A proposal to establish an international tribunal had been shelved following a change of mind by the Government of Cambodia, which had decided instead to request an international presence in its national courts. The negotiations had been completed in July 2000, with very clear indications given as to the requirements concerning national law and the agreement to be concluded. The entire effort had been undertaken through the good offices of the Secretary-General and financed through voluntary contributions. Much time having elapsed without any tangible outcome, the Secretary-General had, after very careful consideration, concluded with great reluctance that the negotiations would have to be terminated. That decision had been based on three considerations: first, the Government's unwillingness to accept some of the standards laid down by the United Nations for the draft law and the agreement to be concluded; second, its unwillingness to allow the agreement to govern the entire operation; and, third and most important, a perceived lack of a sense of urgency on the part of the Government of Cambodia. In the Secretary-General's view, the matter was now firmly in the hands of Member States.

8. The events of 11 September 2001 had come as a great shock to members of the Secretariat at Headquarters, who, as New Yorkers, had felt deeply for others living in New York and elsewhere in the United States. Shortly thereafter, a Working Group of the Sixth Committee working within the framework of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 had resumed its work on three elements: a comprehensive convention against terrorism—a project in which one member of the Commission, Mr. Sreenivasa Rao, had played a leading role; a proposal by the Russian Federation for a convention against nuclear terrorism; and an older proposal to organize a high-level conference on terrorism. Work on the comprehensive convention against terrorism had been well advanced by the autumn of 2001. Sadly, however, obstacles in a few key areas had proved insurmountable. Those key issues were the definition of terrorism; the relationship of the draft convention to existing and future instruments on international terrorism; and the problem of differentiating between terrorism and the right of peoples to self-determination and to combat foreign occupation. The Ad Hoc Committee had continued its deliberations from 28 January to 1 February 2002, but agreement on those contentious issues had continued to elude it. It would be up to the Sixth Committee to continue work on the elaboration of the draft comprehensive convention as a matter of urgency in the autumn of 2002.

9. In an interesting development, the Secretary-General had requested the Office of Legal Affairs to identify any areas in which work could be done by the United Nations. As recently as 23 May 2002 the Senior Management Group chaired by the Secretary-General had discussed terrorism in that context, and a working group had been set up to look at civil aspects of the issue. The working group's report would be available in June 2002.

10. As to the law of the sea, on 23 April 2002 the twelfth Meeting of States Parties to the United Nations Convention on the Law of the Sea had elected 21 members of the Commission on the Limits of the Continental Shelf for a term of five years, commencing on 16 June 2002. The first application concerning the outer limits of the continental shelf had been received, and arrangements were being made to provide the capacity to deal with a potentially substantial flow of future applications. On 19 April 2002, the twelfth Meeting of States Parties had elected seven judges for a term of nine years, commencing on 1 October 2002. The Office of Legal Affairs had circulated a questionnaire to all States in connection with the twentieth anniversary of the Convention, which was to be celebrated in December 2002.

11. The regular informal meetings of legal advisers of ministries of foreign affairs in connection with the debate on the report of the Commission in the General Assembly were proving a very useful means of drawing attention at the highest levels to the work of the Sixth Committee and the report of the Commission. The next such meeting would take place on 28 and 29 October 2002.

12. Efforts had been made to build up the international law website and to make it more user-friendly. The treaty site, in particular, was very popular, with thousands of hits recorded every month. It was gratifying to learn that the teething problems encountered by some Commission members in accessing the website now appeared to have been overcome. The work of the Commission was now also available on the site.

13. Efforts were being made to speed up publications in general. Four volumes of the *United Nations Juridical Yearbook* had been published in the past year, the latest being the volume for 1996. The English version of the 1997 volume was expected to be released soon. The 1998 volume was already with the editors and the 1999 volume was about to be submitted to them. Work on the 2000 volume, for which contributions from States and international organizations had just been received, would be completed by the end of the year.

14. In the category of non-recurrent publications, he pointed to the publication of a compendium of international instruments related to the prevention and suppres-

sion of international terrorism.[5] The Committee established to monitor the implementation of Security Council resolution 1373 (2001) of 28 September 2001 was extremely active, and a tremendous amount of information was being published in response to requests from Member States, which were also receiving technical assistance to help them live up to their responsibilities under that resolution.

15. The Secretary-General was not a lawyer, but he had taken an intense interest in legal issues. References to the rule of law in international relations came up repeatedly in his addresses. He had launched a project, called An Era of Application of International Law, under which some successes had been scored. Hundreds of events relating to the signature or ratification of treaties had been organized during General Assembly sessions, bringing together very high-level delegations and attracting the attention of the general public to law-making efforts. As an outgrowth of those events, the Secretary-General had asked him to organize technical assistance in the signature or ratification of international instruments using the website of the Office of Legal Affairs,[6] where one could find a description of United Nations work in that field and names and addresses of contact persons.

16. Areas in which additional activities could be undertaken were to be discussed. The Office of Legal Affairs was cooperating with non-governmental organizations that could provide assistance through field work in the drafting of national legislation. The possibility that the United Nations Development Programme might create projects for that purpose was also being explored. A training programme on treaty law and practice had recently been launched and the feedback had been extremely positive. A handbook was available on the Internet. He was aware of apprehensions in developing countries about increased Internet use, to the detriment of printed material, but the day when the printed medium would be abandoned had not yet come.

17. An in-depth evaluation had been carried out of five of the six subprogrammes of the Office of Legal Affairs. A report by the Office of Internal Oversight Services on the in-depth evaluation of legal affairs (E/AC.51/2002/5) had been issued and was to be considered by the Committee for Programme and Coordination in June–July 2002. Several paragraphs related to the Commission, and he wished to draw attention in particular to paragraph 48. It referred to the problem of the late submission of the Commission's annual report, caused by the fact that the Commission's session closed barely five weeks before the Sixth Committee met. The problem was indeed a recurring one and increased the pressure on printing services at a time when a massive volume of material was already being prepared for the General Assembly in the autumn. He would welcome a discussion on the subject with members of the Commission in closed session.

18. On the whole, the outcome of the in-depth evaluation had been very positive, and he was truly proud of the staff of the Office of Legal Affairs.

19. The CHAIR thanked the Legal Counsel for his informative statement. It was extremely helpful to receive such reports, and he welcomed the opportunity given to the Commission to comment on it.

20. Mr. PELLET said he shared the Chair's view. It was indeed a useful exercise, and the Legal Counsel's willingness to engage in it was welcome. It was no secret that he himself found the discussions in the Sixth Committee unhelpful, cacophonous and repetitive. Relations between the Sixth Committee and the Commission, both institutionally and individually, were unduly formal and unproductive, yielding precious little guidance for the Commission. For several years the Commission had been endeavouring to improve its working methods, but the ball was now in the Sixth Committee's court, and it should do the same.

21. Some progress, it must be said, had been made. At the informal meetings of legal advisers of ministries of foreign affairs, spearheaded by Mr. Sreenivasa Rao, real exchanges of views took place, but the meetings were very short, and many matters, not just those that concerned the Commission, had to be discussed. A welcome opportunity had been provided for all Special Rapporteurs present in New York, not just the one who was officially representing the Commission, to speak before the Sixth Committee. On the whole, however, he had a very negative impression of the proceedings in the Sixth Committee and thought that something must be done to ensure more productive exchanges between the two bodies. States would be receptive to such an idea. The Secretariat too could, he was sure, help to create the conditions for a more fruitful dialogue.

22. It was gratifying that members of the Commission now had access to the *United Nations Treaty Series* free of charge, but he wished to protest at the fact that the general public, especially students, were required to pay for that privilege. The *Treaty Series* should be an international public service, not a money-making proposition. The progress made in publishing the *United Nations Juridical Yearbook* was welcome, but the publication of the *Yearbook of the International Law Commission* was lagging seriously behind and caused him serious inconvenience in his teaching.

23. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said the first problem raised by Mr. Pellet had been under discussion for some time and the Commission had indeed taken steps to respond. Its reports were now structured differently, focusing on certain issues and articulating questions on which it would like to hear the views of members of the Sixth Committee. The Sixth Committee's response to such questions was often inadequate, and consideration could be given to how the situation could be improved. In general, however, he thought the atmosphere in the Sixth Committee had improved in the past few years. It was particularly helpful that the debate was now structured topic by topic. Discus-

[5] *International Instruments Related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

[6] http://untreaty.un.org/ola.

sion at the informal meetings of Legal Advisers spanned a broader range of subjects than did the Commission's report, and he was not sure if there was anything the Secretariat could do about that.

24. He, too, regretted the fact that the General Assembly had decided to institute a fee for access to the *United Nations Treaty Series*. Students, however, were among certain categories identified some time ago as eligible for access free of charge. He hoped that one day access would be provided as a public service, free of charge for all.

25. Prompt publication of the *Yearbook of the International Law Commission* was certainly desirable, but he had been informed that the necessary resources had been cut by half. In 1994, there had been an 11-year backlog in treaty publication: it had now been reduced to one and a half years, a tremendous effort on the part of the staff. In general, the rate of publication had vastly improved, and every effort would be made to continue to increase rapidity. He was contemplating greater use of electronic media, but how far and how fast progress would be made on that front remained to be seen. The General Assembly had requested the Secretary-General to undertake a review of publications as a whole. He himself had recently been interviewed by a consultant and had strongly defended publications like those of the Commission, which constituted the history of legislative work in the Organization.

26. Mr. DUGARD pointed out that 30 years had passed since the first attempt to draft a comprehensive treaty outlawing international terrorism. It should have become apparent by now that it simply could not be done, because of disagreements over how to handle wars of national liberation, State terrorism, and so on. Most people believed, in his opinion, that the events of 11 September 2001 were covered by existing agreements. Would it not be more productive to attempt to achieve agreement on particular areas of terrorism rather than on a comprehensive anti-terrorism treaty, an effort that simply highlighted the divisions among nations?

27. Mr. Sreenivasa RAO thanked the Legal Counsel for his willingness to interact with members of the Commission on a wide variety of issues.

28. He had participated in the recent negotiations on a comprehensive convention on international terrorism and, in its defence, he would say that the sectoral conventions were useful in their way but focused on specific elements of the problem. The comprehensive convention, on the other hand, brought together the fine points incorporated separately in the 12 sectoral conventions, and that was the first advantage of the exercise. The second advantage was that the exercise had come quite close to completion. Article 2 of the draft, which was not in dispute, defined terrorism in a very comprehensive manner, something that had defied consensus in previous attempts. The dialogue, the efforts and the progress made represented an important achievement in the history of addressing terrorism in a legal framework. The only difficulty had arisen with the distinction between military acts and State acts, between humanitarian law and the need to control terrorism. Even on those points, a core of consensus existed, however, and the negotiators had been convinced that with only a little more political will, the obstacles could have been overcome. It would have been a marvellous day, but it was worth waiting for another chance for it to dawn.

29. Mr. PAMBOU-TCHIVOUNDA said that he was pleased to learn about the Legal Counsel's commitment to an evaluation effort, but he was also sceptical. The idea was courageous and promising, but it might not go beyond certain limits. The evaluation would certainly touch upon very sensitive areas, including their legal aspects. But the opposite was also true: if he addressed a particular question from the legal point of view, he would automatically be compelled to consider its political aspects. Systematically evaluating the work done in the area of the law of international legality was fascinating, but the United Nations must make widely known, within a reasonable time period, the results of that exercise, which was not only of great interest but also quite complex.

30. As an illustration of the difficulties facing an evaluation exercise, he referred to the criminal courts created at the initiative of the Security Council or in the framework of an arrangement between a particular country and the United Nations. If he wanted to be provocative, he could say that Cambodia had been a failure; it sounded a warning for the future of the International Tribunal for Rwanda. Why had the United Nations been so set on having a tribunal for Sierra Leone? Had there been a prior evaluation of what the United Nations had or had not done before taking the decision to establish a criminal court for that country? Who would be arrested? Who would be tried? He had misgivings in that regard. The evaluation method, as relevant as it might be in principle, would have to be on a case-by-case basis. To that end, all countries would have to be informed of the premises upon which the evaluation would be carried out, as well as results attained and limits encountered.

31. He also sought clarification as to how the Legal Counsel would undertake work on areas of application of international law. The survey to be conducted would mobilize expert resources. Would the Commission be involved? What form would the results of the work on areas of application of international law take?

32. Mr. DAOUDI said he did not share Mr. Sreenivasa Rao's optimism on reaching consensus shortly on a global project to combat terrorism. He had been present in the Sixth Committee when the subject had arisen; there had been considerable difference of opinion among countries, and for the time being, he was not optimistic overall, since it might be difficult to reach a consensus currently.

33. With regard to the Legal Counsel's reference to a group to combat terrorism, on which a report was to be submitted in June, how that did group tie in with the comprehensive convention to combat terrorism? Was it a group of experts?

34. Mr. GALICKI said he agreed with Mr. Sreenivasa Rao about the importance of the work on a comprehensive United Nations convention against terrorism. There had not yet been any spectacular success, but the Ad Hoc

Committee and the Working Group had made considerable progress towards completing the convention. Only a few important problems remained, but they had been isolated from the rest of the text. It would be a mistake to stop now. Moreover, the work had had a major impact on regional efforts, such as in the Council of Europe, to develop regional anti-terrorism measures and instruments. Participating in a special body of the Council of Europe, he had sought to win acceptance for the Ad Hoc Committee's proposals. Sectoral conventions had their importance, but they were closely tied to the comprehensive convention. The finalization of the draft international convention on the suppression of acts of nuclear terrorism depended on the positive results of the work on the comprehensive convention. He agreed that the United Nations must fight the phenomenon of terrorism in various ways, and he noted with satisfaction that States had responded to the Security Council resolution on that subject. It was very useful to consult national reports on the fight against terrorism as a comparative approach. He looked forward to taking part in the finalization of the comprehensive convention.

35. He agreed with the Legal Counsel on the need to define aggression; that was essential for the proper operation of the International Criminal Court. Without it, the Court was like a crippled giant. But was the Commission the right body for such a task? The problem was of such political importance that it might better be resolved elsewhere.

36. Mr. KOSKENNIEMI noted that during its current session the Commission had embarked upon the topic of the fragmentation of international law, a subject of great importance and complexity, and that a study group had been set up to consider its exact scope. Many members believed that it covered two areas. First, there was the procedural issue of the proliferation of international tribunals, an aspect to which the Legal Counsel had himself referred. Another, more substantive aspect had to do with the diversification of law-making, in other words, the emergence of informal ways of creating international law not only through regular diplomatic means or the classical subject of international law but through various types of normative practice undertaken by representatives of civil society. That seemed to be where the future of international law lay, and the topic of fragmentation sought to address that issue.

37. The topic tied in with concerns raised over the years by the Secretary-General, who had repeatedly highlighted the need for the United Nations to engage in a dialogue with civil society and involve its various informal and non-diplomatic representatives. He had in mind in particular the Secretary-General's Global Compact initiative, in which United Nations bodies were encouraged to cooperate with private companies to promote understanding and enlist support for the Organization and its work.

38. Inasmuch as the codification of international law by such bodies as the Commission was beginning to look like an archaic relic, it was increasingly necessary to involve representatives of civil society, such as international companies, non-governmental organizations and their networks. In autumn 2001, he had met with a number of United Nations bodies in Geneva and inquired what the Commission should do to help them in their activities in the field of refugee protection, human rights or international trade. Their reply: the Commission should not become involved! He urged the Legal Counsel to consider how the Office of Legal Affairs might cooperate with the Commission to devise programmes that reached out to civil society, which had not shown any interest in the Commission's codification work either. One way would be by assisting the Commission in its study on the fragmentation of international law.

39. The CHAIR recalled that the Commission had produced a draft for the International Criminal Court in very short time. This draft had formed the basis for future work, and many problems which some thought were contained in it had actually arisen later, not at the time of the Commission's work.

40. Mr. TOMKA said that he had closely followed the work of the United Nations in the legal area over the past 10 years. There had been an enormous increase in its involvement in international law-making. Revolutionary steps had been taken, and the Office of Legal Affairs had played an active part in drafting the statutes of the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia, in preparing for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and the subsequent process, and in many other areas. The Legal Counsel and his staff had worked on those issues with great dedication, for which he expressed his appreciation.

41. In his view, there should be a division of labour in international law-making. Human rights should be left to the treaty bodies and to States, whereas the Commission should continue to focus on issues originally meant for it.

42. The events of 11 September 2001 showed that the sectoral conventions were not enough to cover all aspects of the problem of terrorism. For example, acts of hijacking could be prosecuted under the appropriate convention. If the hijackers died, those who had assisted them in committing their crimes could be prosecuted. But what convention would be applied in response to the destruction of the World Trade Center? Not the International Convention for the Suppression of Terrorist Bombings: since civilian aircraft were not an explosive or other lethal device, he doubted whether that convention was applicable. Hence the need for a comprehensive convention against terrorism.

43. Those in favour of such a convention should also help resolve certain long-standing political problems in various parts of the world, which, although not directly linked to the convention as such, might have repercussions on the pace of negotiations.

44. Mr. MOMTAZ said that the United Nations was to a large extent responsible for the success of the previous week's elections in Sierra Leone. However, he was concerned that the Special Court was responsible for addressing the problem of impunity, whereas the Truth and

Reconciliation Commission had the task of ensuring national reconciliation. He foresaw a conflict between those two approaches and wondered whether the United Nations had established a mechanism to prevent such situations from arising after other armed conflicts in the future.

45. Mr. YAMADA said that his country, Japan, and other Asian States considered it extremely important for the United Nations to be involved in bringing to justice those responsible for gross violations of humanitarian law in Cambodia and had been discussing the matter with the Office of Legal Affairs. In a recent conversation with the Japanese ambassador, the Prime Minister of Cambodia, Mr. Hun Sen, had confirmed that he still hoped to receive United Nations assistance, and the Japanese Government was prepared to facilitate that process.

46. Mr. COMISSÁRIO AFONSO said he joined Mr. Galicki in stressing the important role that the Commission could play in the essential task of defining the crime of aggression. Resolutions of United Nations bodies and other documents could provide a basis for that work. He wondered whether the International Criminal Court had the necessary financial resources to begin to fulfil its functions in the very near future. Last, the United Nations could do more to assist national legal departments in the harmonization of practice, particularly in the case of countries in need of institution-building.

47. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that it was for Member States to decide whether to move forward on matters relating to terrorism, which had political ramifications. The Secretary-General had been involved in efforts to facilitate agreement among States during the period between the autumn meetings of the Working Group on measures to eliminate international terrorism and the beginning of the Sixth Committee's plenary meetings. In that context, he himself had been asked to give presentations to various groups, including the Organization of the Islamic Conference, and believed that a solution was within reach but that it might depend on the resolution of current problems in the Middle East.

48. The sectoral approach had proven very useful. However, as Mr. Comissário Afonso had pointed out, not all national legal departments were well-equipped, and it would be far easier for States to adopt a single comprehensive convention on terrorism than a series of instruments dealing with various aspects of the problem.

49. Mr. Pambou-Tchivounda's comments lay outside his Office's area of responsibility and concerned decisions to be taken by political bodies. The report of OIOS on the in-depth evaluation of legal affairs to which he had referred (para. 17 above) concerned an evaluation that was carried out at specific intervals by OIOS using a highly methodological approach, including examination of his Office's website and determination of whether its publications were being cited in other studies.

50. The Commission was a body of independent experts which had been established by the General Assembly to develop international law. However, the Sixth Committee was giving increasingly frequent indications of the areas on which Member States wished the Commission to focus. Some had maintained that the Commission was free to take up whatever topic it saw fit, but its work would be of little use if delegations had no interest in the final product. His Office was part of the Secretariat and, as such, could engage in dialogue with the Commission, but any decisions must be taken by the Sixth Committee.

51. Mr. Daoudi had enquired as to the relationship between the work of the Secretariat and the development of a comprehensive convention on terrorism. His Office did not involve itself in the preparation of the draft convention as such; rather, it concentrated on learning what the Secretary-General could accomplish, either on his own initiative or by encouraging other bodies working in the field of terrorism. The report of the Policy Working Group on the United Nations and Terrorism[7] would soon be submitted to the Secretary-General, who would then take a decision on the matter. The Secretariat was working in various ways not only with legal experts but also with academics and the media. In particular, it was seeking to determine the root causes of terrorist acts, since conventions came into play only after a crime had been committed. However, it would not address the sensitive issue of a definition of terrorism.

52. Mr. Koskenniemi's comments were very thought-provoking. In many countries, including Australia, Finland and New Zealand, the work of preparing draft legislation for submission to Parliament by the Government had been handled by law commissions. Most of those bodies had subsequently been replaced by specialized commissions responsible for making proposals on different topics. Similarly, legal developments in some areas of United Nations activity, such as human rights, were addressed by bodies other than the Commission, and various bodies engaged in treaty-making as well. Rule No. 97 of the Rules of Procedure of the General Assembly stated that items relating to the same category of subjects should be referred to the committee or committees dealing with that category of subjects. However, that practice had not been followed for years and would cause considerable consternation if it were reintroduced. It would be difficult and perhaps unwise to rein in the current process. In the past, the Commission had asked his Office to assist it by preparing documents and engaging in research, and that possibility could be discussed. But the Secretariat was in the service of the Organization's legislative bodies and should not act without their mandate. He was very interested in pursuing such a dialogue and suggested that he might raise the issue during the discussion of the budget or the next medium-term plan, pointing out that the Secretariat had included presentations by experts from civil society in another new area, that of the reproductive cloning of human beings.

53. Mr. Momtaz had raised a classic question. In the past, States such as South Africa had set up their own institutions designed to heal the nation's wounds. In the case of Sierra Leone, the decision had been taken by the Security Council after consultation with the Government. The relationship between the Special Court and the Truth and

[7] A/57/273-S/2002/875, annex.

Reconciliation Commission was a very important one; they had both been established under domestic law, pursuant to Security Council resolution 1315 (2000) and by agreement between the United Nations and the Government, but it would be for the two institutions to develop their relationship. To assist them in that task, his Office had sponsored three seminars, two in New York and one in Freetown. There was no lack of material for the Prosecutor of the Special Court and the President of the Truth and Reconciliation Commission to study. Moreover, the Special Court's activities would focus on a relatively small number of people: those who bore the greatest responsibility for the atrocities committed.

54. He was well aware of the Japanese Government's interest in the situation in Cambodia and could only regret the inevitable turn that events had taken there. However, the matter was a political one and was now in the hands of Member States.

55. The budget for the International Criminal Court had been prepared and was expected to be adopted in September 2002. Member States would then pay their contributions into a central fund, which would be administered by the Registrar of the Court; a similar procedure had been followed in setting up ITLOS.

56. Having cooperated with legal departments in many countries, including countries in Africa, he had the greatest respect for what they accomplished with extremely limited resources. In some cases, they lacked even the paper on which to print proposals for the ratification of treaties to be placed before their national parliaments. However, his Office could not cooperate directly with such departments without a direct mandate from the General Assembly. He provided a list of useful names and addresses to legal departments throughout the world, helped to organize informal meetings of legal advisers and encouraged colleagues in developed countries to provide assistance by, for example, making contributions to the legal libraries of developing countries. However, much more could be done. The Secretary-General had noted in his report "We the peoples: The role of the United Nations in the twenty-first century" (Millennium Report)[8] that many countries declined to sign or ratify international treaties and conventions because they lacked the necessary expertise and resources; bilateral cooperation could help with that problem.

57. Mr. DUGARD asked the Legal Counsel, in his capacity as Under-Secretary-General of the United Nations, to inform his superiors and colleagues at Headquarters of his concern, and that of the other members of the Commission, at the fact that their honoraria had been reduced to the princely sum of one dollar and to convey their hope that those honoraria would soon be restored to an appropriate level.

The meeting rose at 11.50 a.m.

[8] A/54/2000.

2725th MEETING

Friday, 24 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Diplomatic protection[1] (*continued*)* (A/CN.4/514,[2] A/CN.4/521, sect. C, A/CN.4/523 and Add.1,[3] A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. DUGARD (Special Rapporteur), introducing section C of his third report (A/CN.4/523 and Add.1), said that, unlike some members of the Commission, who saw the Calvo clause as a relic of a bygone era of Western intervention in Latin America, he saw that procedure as an integral part of the history and development of the rule on the exhaustion of local remedies and as one that remained relevant. That was why he was submitting draft article 16, on that issue, to the Commission.

2. The Calvo clause was a contractual undertaking whereby a person voluntarily linked with a State of which he was not a national agreed to waive the right to claim diplomatic protection by his State of nationality and to confine himself exclusively to local remedies relating to the performance of the contract. The scheme had been devised by the Argentine jurist Carlos Calvo to prevent nationals of the Western imperialist powers doing business in Latin America from immediately taking their contractual disputes with the host Government to the international plane, instead of first seeking to exhaust local remedies. From the outset, the Calvo clause had been controversial. Latin American States had seen it as a rule of general international law, and certainly as a regional rule of international law, and many of them, notably Mexico, had incorporated it into their constitutions. On the other hand, Western States had seen it as contrary to interna-

* Resumed from the 2719th meeting.

[1] For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

[2] See *Yearbook ... 2001*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 2002*, vol. II (Part One).