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**A/CN.4/2844**

**Summary record of the 2844th meeting**

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committed a wrongful act. In any event, there would be no drawback in considering an international organization to be responsible under both draft article 13 and draft article 16.

48. Turning to article 16, paragraph 2, which had aroused most of the criticism, he reiterated that the reason for including that provision was to address cases in which an international organization used a recommendation or authorization directed at a member State to circumvent one of its own obligations. He hoped that some consensus could be reached on ways of restricting the responsibility of the organization to a limited number of cases, including those in which its authorization or recommendation had made a significant contribution to the conduct constituting an internationally wrongful act. It would still have to be decided whether a distinction needed to be made between authorizations and recommendations on the grounds that one category had a greater impact on unlawful conduct than the other.

49. In conclusion, he noted that it was generally accepted that draft articles 9–15 could be sent to the Drafting Committee, while draft articles 8 and 16 should be considered by a working group in order to resolve the outstanding problems.

50. Mr. PELLET said that he really must stress one point that seemed to him fundamental and on which he disagreed profoundly with the Special Rapporteur. No one was claiming that Community law was part of international law—it was a self-contained legal order, as were the rules of every international organization. However, unlike internal rules, Community law was derived from international law, which provided the basis for it. He was categorically opposed to including in the draft articles a specific exception for economic integration organizations since, just as States could not hide behind domestic law to justify a breach of an international obligation, organizations could not fall back on their internal rules to evade international law. The proposal to exclude economic integration organizations would be tantamount to according them the status of super-States, which was unacceptable.

51. Mr. GAJA (Special Rapporteur) replied that he had never suggested that Community law could justify non-compliance with an international obligation. The question was whether the rules of an organization were necessarily an integral part of international law and thus whether a breach of one of those rules amounted to a breach of international law.

52. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to send draft articles 9–15 to the Drafting Committee and draft articles 8 and 16 to an open-ended working group.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 2844th MEETING

*Wednesday, 25 May 2005, at 10.05 a.m.*

*Chairperson: Mr. Djamchid MOMTAZ*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.*

**Responsibility of international organizations (continued) (A/CN.4/549 and Add.1, sect. A, A/CN.4/547, A/CN.4/553, A/CN.4/556, A/CN.4/L.666/Rev.1)**

[Agenda item 3]

ORAL REPORT OF THE CHAIRPERSON OF THE WORKING GROUP

1. Mr. GAJA (Special Rapporteur) said that the Open-ended Working Group established to discuss some controversial aspects of draft articles 8 and 16 had met the previous afternoon and, after thorough discussion, had agreed to recommend that revised versions of those two draft articles should be referred to the Drafting Committee. The commentary would reflect the main differences of opinion expressed during the debate in the plenary and in the Working Group.

2. Draft article 8, paragraph 1, remained unchanged. Paragraph 2 had been revised to read: “The preceding paragraph also applies to the breach of an obligation under international law set by a rule of the organization.”

3. The Working Group had considered that it would be useful to point out that obligations under international law were also set by rules of the organization; in the absence of special rules the general rules on international responsibility currently being drafted would therefore also apply to breaches of those obligations. The question whether all the rules of the organization imposed obligations under international law had not been fully settled by the revised text. The Working Group had felt that the matter should be resolved at a later stage, taking into account the comments of Governments and international organizations.

4. Paragraph 3 of draft article 16 remained unchanged. Paragraphs 1 and 2 had been revised to read:

“1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful for the former organization.

2. An international organization incurs international responsibility if:

(a) it recommends or authorizes a member State or international organization to commit an act that would be internationally wrongful for the former organization; and

(b) that State or organization relies on the recommendation or authorization for the commission of the wrongful act.”

5. The Working Group had been of the view that a sharper distinction should be made between the case in which an international organization made a decision binding member States to engage in conduct designed to circumvent an obligation of the organization, on the one hand, and, on the other, the case of a recommendation or authorization to engage in that conduct.

6. Thus, paragraph 1 was categorical on the organization's responsibility in the first case, that of a binding decision, whereas paragraph 2 gave weight to the context and introduced the criterion of reliance on the part of the member State on the organization's recommendation or authorization. In the latter case, responsibility arose only when the act was committed, a requirement which had not been stated in paragraph 1. He noted that there had not been unanimity within the Working Group on this point.

7. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer the revised versions of draft articles 8 and 16 to the Drafting Committee.

*It was so agreed.*

**Diplomatic protection<sup>1</sup> (A/CN.4/549 and Add.1, sect. F and A/CN.4/546<sup>2</sup>)**

[Agenda item 2]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

8. The CHAIRPERSON invited the Special Rapporteur to introduce his sixth report on diplomatic protection (A/CN.4/546).

9. Mr. DUGARD (Special Rapporteur), introducing his sixth report, concerning the clean hands doctrine, said that while no one could deny the importance of that doctrine in international law, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant its inclusion in the draft articles on the topic. His conclusion, indicated in his sixth report (para. 18), was that the clean hands doctrine did not obviously belong to the field of diplomatic protection and that it should therefore not be included in the draft articles.

10. It had been argued that the clean hands doctrine should be included in the draft articles because it was invoked in the context of diplomatic protection in order to

preclude a State from exercising diplomatic protection if the national it was seeking to protect had suffered injury as a result of his own wrongful conduct.

11. Three main arguments were adduced in support of that position (para. 3 of the report). First, it was contended that the doctrine did not belong to the realm of inter-State disputes, i.e. those involving direct injury by one State to another rather than injury to a national. Second, it was suggested that if the individual seeking diplomatic protection had himself violated the domestic law of the respondent State or international law, then the State of nationality could not protect him. Third, it was contended that in a number of cases the clean hands doctrine had been applied in respect of diplomatic protection.

12. With regard to the first argument, the ICJ provided no real guidance because none of its decisions asserted that the doctrine belonged to the realm of a State claim either for direct or for indirect injury. The fact was, however, that the clean hands doctrine had most frequently been raised in the context of inter-State claims for direct injury. Several such cases were cited in paragraph 5 of his sixth report. In none of those cases had the Court dismissed the relevance of the clean hands argument; it had instead always found that the doctrine was inapplicable for some unrelated reason. In its advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which Israel had contended that Palestine bore the blame for the construction of the wall because of its responsibility for acts of violence against Israel, the Court had found that argument to be not pertinent on the ground that it was giving an advisory opinion, not a judgment in contentious proceedings (paras. 63–64 of the judgment). In the *Oil Platforms* case, the United States had raised the clean hands doctrine against the Islamic Republic of Iran, while the latter had argued that the clean hands doctrine applied to diplomatic protection only. The Court had dismissed the argument of the United States on the facts, but had not commented on the argument of the Islamic Republic of Iran that the clean hands doctrine applied to diplomatic protection only.

13. In the *LaGrand* (paras. 61–63 of the judgment) and *Avena and other Mexican Nationals* (para. 45 of the judgment) cases, where the United States had objected to Germany's and Mexico's own treatment of aliens in criminal proceedings, the Court had not found that argument relevant. In the *Gabčíkovo–Nagymaros Project* case, the Court had held that both parties had unclean hands but that that did not affect the legal situation (para. 133). In the *Arrest Warrant* case, an inter-State case with undertones of diplomatic protection, Belgium had claimed that the Democratic Republic of the Congo had unclean hands in that its Minister for Foreign Affairs had incited sections of the community to commit genocide. The Court had made no comment, but in her dissenting opinion Judge *ad hoc* Van den Wyngaert had found that the Democratic Republic of Congo had not come to the Court with clean hands (para. 35). That case could be seen as akin to a case involving diplomatic protection in that the Democratic Republic of the Congo had been seeking to protect its Minister, who was at the same time its national. The conduct of the individual, however culpable, was deemed to be irrelevant by the Court (paras. 55–71). In

<sup>1</sup> For the text of draft articles 1–19 and the related commentary adopted on first reading by the Commission at its fifty-sixth session, see *Yearbook ... 2004*, vol. II (Part Two), chap. IV, sect. C, pp. 18 *et seq.*

<sup>2</sup> Reproduced in *Yearbook ... 2005*, vol. II (Part One).

the *Military and Paramilitary Activities in and against Nicaragua* case, the United States had argued that Nicaragua had unclean hands (paras. 89–98 of the judgment). The Court had not pronounced on that matter, although Judge Schwebel, in his dissenting opinion, had held that Nicaragua had unclean hands in an inter-State dispute (para. 268). In the *Legality of the Use of Force* cases, several respondents had argued that the Federal Republic of Yugoslavia did not have clean hands; however, the Court had found that it did not have jurisdiction so had not ruled on the matter.

14. That brief survey of the jurisprudence of the ICJ showed that the argument of clean hands was frequently raised in inter-State claims involving direct injury to a State. In no case had the Court relied on or upheld that doctrine, but in no case had it stated or suggested that the argument was inapplicable in inter-State claims and that it applied only to cases of diplomatic protection.

15. Turning to the argument that the clean hands doctrine applied to diplomatic protection claims only, and that the State of nationality could not protect a national who had himself committed a wrongful act in the host State, he noted that the State of nationality would seldom protect one of its nationals who had behaved improperly or illegally in a foreign State, because in most circumstances no internationally wrongful act would have been committed. If a national committed an act of fraud and was imprisoned after a fair trial, there was no violation of international law and the State of nationality would not exercise diplomatic protection; in that sense it was true that the clean hands doctrine served to preclude diplomatic protection. If, however, the foreign national was imprisoned for fraud and was tortured or denied a fair trial, then an internationally wrongful act had been committed and the national's own misconduct became irrelevant: the respondent State could not invoke the foreign national's fraudulent act as a defence in a claim based on torture.

16. In the *LaGrand* and *Avena* cases, for example, the foreign nationals had committed atrocious crimes but their misconduct had not been raised by the United States to defend itself against the charges of failure to grant them consular access. Once a State took up a claim of its national in relation to a violation of international law, the claim became that of the State, in accordance with the Vattelian fiction introduced in the *Mavrommatis* case, and the misconduct of the national ceased to be relevant; only the misconduct of the plaintiff State itself might then become relevant.

17. Relatively few cases were cited of applicability of the clean hands doctrine in the context of diplomatic protection, and, upon analysis, they did not support the case for its inclusion. In the *Ben Tillett* case, where Belgium had deported a British labour union activist, the arbitration tribunal had found that Belgium had acted correctly (see paragraph 12 of the report). The issue of whether Mr. Tillett had clean hands had not been raised. In the “*Virginius*” case, cited in paragraph 13 of the report, Spain had acknowledged that it had committed an internationally wrongful act in executing United States and United Kingdom nationals and had paid compensation to those States; the fact that those nationals had been supporting

rebels was deemed to be irrelevant. Although some writers nevertheless maintained that the clean hands doctrine belonged in the context of diplomatic protection, they offered no authority to support their views, and many writers, such as Salmon and Rousseau, were highly sceptical about the doctrine.

18. During consideration of the Special Rapporteur's sixth report by the Sixth Committee of the General Assembly at its fifty-ninth session, most delegations had made no comment whatsoever with regard to the clean hands doctrine and those that had commented had agreed that the clean hands doctrine should not be included in the draft articles on diplomatic protection (A/CN.4/549, paras. 127 and 128). Only one delegation, that of Nepal, had made a statement that might be construed as favouring inclusion of the doctrine.<sup>3</sup>

19. In conclusion he said that, while the issue of whether to include a provision on the clean hands doctrine in the draft articles on diplomatic protection was undoubtedly an important one which had warranted a full response, after considering it carefully he had concluded that the doctrine had no place in the draft articles on diplomatic protection.

20. Mr. ADDO said that, having considered the arguments for and against the applicability of the clean hands doctrine to the topic of diplomatic protection set forth in the report of the Special Rapporteur, he agreed that there were not sufficient grounds for inclusion of that doctrine in the draft articles. Although arguments based on the clean hands doctrine had been regularly raised in inter-State cases before the ICJ, none of those arguments had been upheld. Inclusion of a provision relating to the doctrine in the draft articles would not be an exercise in codification, nor could it be justified as an exercise in the progressive development of international law.

21. Mr. PELLET said he seemed to have detected a note of irritation in the Special Rapporteur's presentation of his sixth report. The Special Rapporteur evidently saw the production of the report as a needless imposition. He himself did not think that was the case, and he thanked the Special Rapporteur for providing a firm response to the question on which he had insisted at the previous session, namely, whether the absence of clean hands might constitute grounds for inadmissibility of a claim to exercise diplomatic protection, as might a failure to exhaust local remedies or the absence of nationality of the protecting State. Having read the Special Rapporteur's sixth report, he was ready to concede that he had been wrong in thinking that clean hands might constitute a requirement for the exercise of diplomatic protection. Although there were differences of opinion in the literature and the practice of the ICJ was not entirely conclusive, the Special Rapporteur's analysis of the *Ben Tillett*, *Clark v. Allen* and “*Virginius*” cases (paras. 11–15) was persuasive, and showed that the advocates of the clean hands doctrine put forward no decisive reasons for their thesis, which thus belonged to the realm of the progressive development rather than the codification of international law.

<sup>3</sup> Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee, 24th meeting (A/C.6/59/SR.24), para. 44.

22. He was not, however, entirely convinced by either of the two arguments put forward in paragraphs 8 and 9 of the report, although, taken together, they did justify the Special Rapporteur's decision not to contribute to the progressive development of international law in that regard. On the first argument, he was not convinced that the Special Rapporteur was correct in asserting in paragraph 8 that once a dispute had assumed the character of a dispute between States, the previous conduct of the individual involved was no longer of any importance. That by no means went without saying. While he would not presume, at the current stage, to question the sanctity of the fiction on which the *Mavrommatis* principle was based, the Commission should not make that principle say more than it actually did. While it was true that it resulted in a sort of "transubstantiation" of the injury initially caused to an individual by an internationally wrongful act of a State, the factor triggering diplomatic protection nevertheless remained, and there was nothing intrinsically incongruous in considering that the individual's having clean hands could constitute a precondition for the exercise of diplomatic protection, just as the exhaustion of domestic remedies was a requirement incumbent on the individual, not on the State exercising diplomatic protection.

23. The second argument put forward by the Special Rapporteur, relying on the *LaGrand* and *Avena* cases, was that if the individual committed an unlawful act in the host State and was tried and punished in accordance with due process of law, no internationally wrongful act occurred and the clean hands doctrine was irrelevant. Such a conception of the clean hands doctrine was far too vague. The Special Rapporteur took into account only cases of individuals with unclean hands under the domestic law of the State whose responsibility was invoked, without considering the relationship between the illegal act committed by the individual and the internationally wrongful act of the State. The Special Rapporteur's reasoning might be tenable in the cases cited, but did not represent the primary consideration behind the clean hands doctrine. In determining whether an individual's conduct was in some way related to diplomatic protection, it was necessary to ascertain whether the individual enjoying diplomatic protection had himself been responsible either for a breach of the rule of international law which he accused the State of breaching, or at least whether the breach of which he was accused was directly related to the internationally wrongful act of which the State was accused.

24. For example, in the *LaGrand* case, if the individual concerned had refused any form of communication with the United States judicial authorities, or had concealed his German nationality from them, the question would have arisen whether the requirement of clean hands would be grounds for inadmissibility of a claim to exercise diplomatic protection by Germany, not with respect to the murder committed by that individual, which was completely unrelated to the alleged internationally wrongful act, but with respect to the refusal to communicate with the judicial authorities or the concealment of his German nationality, since the individual would, through his unclean hands, have put himself in a position in which he was not entitled to the protection afforded by the 1963 Vienna Convention.

25. To take another example, if a transnational corporation concealed some of its profits and was expropriated without compensation, the question of unclean hands would arise because the company's attitude was directly related to the internationally wrongful act. However, although the Special Rapporteur implied otherwise, it was not enough for the individual simply to have breached the internal law of a State which had itself caused an injury to the individual by committing an internationally wrongful act unrelated to the original breach. Those two hypothetical cases illustrated that the examples chosen by the Special Rapporteur were ill-chosen. However, he acknowledged that the consequence of the illegal conduct was generally not to prevent the exercise of diplomatic protection, but rather to blot out the internationally wrongful act: either the exercise of protection by the State became impossible, as in his hypothetical case based on *LaGrand*, or else some other circumstance ruled out any wrongful act.

26. In other words, although he was prepared to go along with the position proposed by the Special Rapporteur, it was not for the oversimplistic reasons given by the Special Rapporteur in paragraphs 8 and 9 of his report, but for two other reasons. First, he was convinced that there were no true precedents to the contrary, so that if the clean hands doctrine was elevated to the status of a precondition for the exercise of diplomatic protection, the Commission would not be engaged in the codification of international law but in its progressive development. Second, it would not be helpful, in the case of what he considered to be the "true" clean hands doctrine, to stipulate in advance that the State of nationality could not exercise protection; it would be sufficient, as the Special Rapporteur said in paragraph 16, to state that the clean hands doctrine "would more appropriately be raised at the merits stage as it relate[d] to the attenuation or exoneration of responsibility".

27. He continued to disagree with another aspect of the report, though that disagreement did not concern diplomatic protection as such but rather the general framework of inter-State claims for direct harm caused to a State by the wrongful act of another State. In that respect, he found the Special Rapporteur's arguments in paragraphs 5 to 7 and 18 regrettably ambiguous. His own view, which was reflected in the introduction to the report, was that the clean hands doctrine had no effect on the admissibility of an inter-State claim, but that it might have an effect on the possibility of exercising diplomatic protection. The Special Rapporteur's arguments had persuaded him that he had been mistaken on the second point. However, on that second point, the Special Rapporteur's argument was rather weak, as it took an ambiguous assertion as its starting point. The Special Rapporteur stated in paragraph 5 of the report that it might—why "might"?—be correct that the clean hands doctrine did not apply to disputes involving inter-State relations, but then argued that it was in that area that the clean hands doctrine was most appropriate, as that was the area in which it was most frequently invoked. The examples cited by the Special Rapporteur were something of a hotchpotch: for example, he cited, *inter alia*, the *LaGrand* and *Avena* cases not only in support of the non-applicability of the clean hands doctrine to disputes involving inter-State relations but also in support of its

non-applicability in the context of diplomatic protection. He could not have it both ways. Moreover, one thing that all the examples showed was that the clean hands doctrine concerned the merits of a case, not its admissibility; either the State invoking the clean hands doctrine had itself argued the case on the basis of the merits, as in the *Gabčíkovo–Nagyymaros Project* case, or the Court had ruled that the doctrine applied only to the consideration of the merits. The clean hands doctrine, which was derived directly from the principle of good faith, therefore applied not to the admissibility of international claims but to their merits, exactly as in cases of diplomatic protection.

28. That said, he wished again to thank the Special Rapporteur for his willingness to engage in a debate he had regarded as futile from the outset. That discussion had enabled an important question to be clarified. He wished to stress once again his regret at the very premature transmission of the draft articles on diplomatic protection to the General Assembly on first reading. Although those articles were on the whole acceptable to him, despite their timidity—especially in relation to the *Mavrommatis* principle—the draft did not deal with diplomatic protection in general, despite its title, but rather with only one aspect of it, namely, the conditions for the exercise of diplomatic protection. States were given no guidance on questions such as who could exercise such protection, how it should be exercised and the consequences of its exercise. For example, there was no discussion of the effect of the exercise of diplomatic protection on other international proceedings open to injured individuals. The “without prejudice” clause in article 17 raised the question but, by definition, did not resolve it. Nor was the question of how to evaluate harm in cases involving the exercise of diplomatic protection addressed. According to the Vattelian fiction, harm should be evaluated on the basis of the injury suffered by the State, but in fact it was the injury suffered by the protected individual that was the basis for assessing compensation. It would not have been amiss to discuss that point in the report and to spell it out in the draft.

29. Another question that had not been addressed was the fact that, under article 2 of the draft articles, only a State had the right to exercise diplomatic protection, while an individual had no actual right to be compensated, even if the State responsible discharged its obligations in terms of compensation. The question of the justification for that rule should surely have been raised, with a view to abrogating or attenuating it in the context of the progressive development of international law. Such a rule was hard to countenance in the twenty-first century, and the failure to deal with that fundamental question was a major gap in the draft articles.

30. Those omissions were particularly regrettable in view of the Special Rapporteur’s usual concern for the protection of the rights of individuals. The debate on the clean hands doctrine was really of secondary importance in the context of the draft articles as a whole, but the Special Rapporteur had at least discussed it: it was highly regrettable that the Special Rapporteur had not been as open to discussion on other more fundamental aspects of the topic that he had raised some two years previously.

31. Mr. GAJA recalled that although the clean hands doctrine had been discussed in the *Barcelona Traction* case, the ICJ had not addressed the question, basing its decision on other considerations. He personally had never been convinced that the clean hands doctrine should apply in the case of diplomatic protection, since to deny the possibility of diplomatic protection on that basis would in practice exonerate a State from its responsibility for a breach of an international obligation relating to the treatment of aliens. Paragraph 16 of the report seemed to go too far in suggesting that there might be some exoneration from the consequences of responsibility.

32. Mr. DUGARD (Special Rapporteur) said he wished to dispel one misapprehension. Mr. Pellet had claimed to detect a certain annoyance on his part at having been obliged to prepare a report on the clean hands doctrine. That was not the case: he had found the whole exercise important and useful, and he was indebted to Mr. Pellet for having insisted that the matter be considered.

33. Mr. ECONOMIDES said that no conclusions could be drawn on the clean hands doctrine from the *LaGrand* and *Avena* cases, since the doctrine did not apply to consular assistance, which was provided to individuals in prison who almost all, by definition, had unclean hands. The key point with regard to diplomatic protection was that it was the State exercising such protection that decided on the amount of compensation, while individuals had no say in the matter. For example, when certain Greek assets had been nationalized, the decision had been a political one and the owners of the assets had often been very inadequately compensated for the injury suffered. For the moment, such matters were dealt with under States’ domestic law, while international law remained at the stage of the *Mavrommatis* fiction, and individuals were still not fully protected. That question should perhaps be considered at a later stage.

34. Mr. MATHESON said he agreed with the Special Rapporteur’s recommendation that the Commission should not take up the clean hands doctrine in the context of the draft articles on diplomatic protection. As mentioned in the report, the question of clean hands had been raised many times in the context of claims for direct State injury, but remained unresolved and was, in any case, outside the scope of diplomatic protection. As for the cases that were within the scope of diplomatic protection, the report showed that there was not enough practice to support codification, and he did not believe that the Commission should go beyond codification at the present juncture.

#### **Statement by the Under-Secretary-General of Legal Affairs, Legal Counsel**

35. The CHAIRPERSON invited Mr. Nicolas Michel, Under-Secretary-General of Legal Affairs, Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

36. Mr. MICHEL (Under-Secretary-General of Legal Affairs, Legal Counsel) said that it was an honour to address the International Law Commission for the first time as Legal Counsel and to provide an overview

of events and activities related to its work. The General Assembly, in its resolution 59/41 of 2 December 2004, had expressed its appreciation to the Commission for the work accomplished at its fifty-sixth session, in particular for the completion of the first reading of draft articles on diplomatic protection and of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. It had also endorsed the Commission's decision to include in its agenda the topics "Expulsion of aliens" and "Effects of armed conflicts on treaties" and had renewed its invitation to Governments to provide information on the draft articles and commentary on diplomatic protection and on the draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities. To that end, the Secretary-General had transmitted *notes verbales* to Governments and the Secretariat would submit the comments received to the Commission before the second reading of the draft articles.

37. In the same resolution, the General Assembly encouraged the Commission to continue taking cost-saving measures; he was therefore sure that the General Assembly would appreciate the Commission's decision to shorten the second part of its current session by one week. The Secretariat was in the process of preparing the budget for 2006–2007 and would make every effort to ensure that due provision was made for the Commission's future programme, in line with the approach outlined in paragraph 735 of the report on the work of its fifty-second session.<sup>4</sup> He was sure that the Commission, for its part, would decide on any appropriate cost-saving measures it could take at its next session.

38. In its resolution 59/38, the General Assembly had adopted the United Nations Convention on Jurisdictional Immunities of States and their Property, the draft articles of which had been prepared by the Commission in 1991.<sup>5</sup> Many of those articles had remained unchanged in the final version after long and difficult negotiations in the Sixth Committee, showing that the Convention struck a fine balance between the different viewpoints of States. The Convention, which had been opened for signature on 17 January 2005, had already been signed by Austria, Belgium, Morocco and Portugal. It would remain open for signature until 17 January 2007, and would enter into force following the deposit of the thirtieth instrument of ratification.

39. On 13 April 2005, the General Assembly had adopted by consensus, in its resolution 59/290, the International Convention for the Suppression of Acts of Nuclear Terrorism, which was a significant addition to the 12 existing conventions relating to terrorism. The Convention encouraged States to collaborate closely and required them to extradite or prosecute criminals according to the *aut dedere aut judicare* principle, which the Commission had included in its long-term programme of work. The adoption of the Convention demonstrated how the General Assembly could make an effective contribution to the development of international legal norms even in the most politically sensitive fields. Member States would

now be focusing on the drafting of another important legal instrument, namely, a comprehensive convention on international terrorism. In his report *In Larger Freedom: Towards Development, Security and Human Rights for All*, the Secretary-General had urged world leaders to do their utmost to ensure that the convention was adopted at the sixtieth session of the General Assembly.<sup>6</sup>

40. An international convention against the reproductive cloning of human beings had been on the agenda of the Sixth Committee since 2001, and had been the source of much contention among Member States. The Sixth Committee had considered a compromise proposal for negotiating an international instrument other than a convention, and on 8 March 2005 the General Assembly, in its resolution 59/280, had adopted the United Nations Declaration on Human Cloning. The Declaration called on Member States to prohibit all forms of human cloning inasmuch as they were incompatible with human dignity and the protection of human life. The General Assembly had thus concluded its consideration of the topic.

41. Turning to developments in the field of international criminal jurisdiction, he said that by resolution 58/318 of 13 September 2004, the General Assembly had approved the Relationship Agreement between the United Nations and the International Criminal Court which had been approved by the Assembly of States Parties to the Rome Statute of the International Criminal Court on 7 September 2004. The Secretary-General and the President of the Court had then proceeded to sign the Agreement on 4 October 2004. It had entered into force that same day. Under the Agreement, the United Nations undertook to cooperate with the Court with due regard to its responsibilities and competence under the Charter and subject to its rules. At the request of the Court or the Prosecutor, the United Nations could provide information and documents relevant to the work of the Court. It could also agree to provide the Court with other forms of cooperation and assistance. The Relationship Agreement anticipated the conclusion of supplementary arrangements to implement its terms. On the basis of such arrangements, the United Nations had already rendered extensive logistical assistance to the Prosecutor, particularly in connection with his investigations in the Democratic Republic of the Congo. It had also provided access to information and documentation and facilitated the interviewing of witnesses.

42. Concerning the Khmer Rouge trials, work had continued over the past year to put in place the necessary arrangements for the entry into force of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea. In December 2004, a third planning mission had visited Phnom Penh to complete work on identifying the probable requirements of the Extraordinary Chambers and their related institutions in terms of personnel, equipment, furniture and supplies. It had proved possible to reach agreement with the Government of Cambodia on a complete budget and staffing table as well as to establish the basic outlines of the two ancillary arrangements

<sup>4</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 132.

<sup>5</sup> *Yearbook ... 1991*, vol. II (Part Two), pp. 12–62.

<sup>6</sup> A/59/2005.

provided for in the Agreement, on security and on utilities, facilities and services.

43. On 28 March 2005 the Secretary-General had convened a pledging conference with a view to seeking the US\$43 million needed to fund the assistance that the United Nations was committed to provide under the Agreement. He had received sufficient contributions and pledges to meet the Organization's obligations for nearly the whole of the Extraordinary Chambers' expected three-year lifespan. On 28 April 2005 the Secretary-General had notified the Cambodian Government that the United Nations had complied with the legal requirements for entry into force of the Agreement. The Agreement had accordingly entered into force the following day, Cambodia having already provided its corresponding notification on 16 November 2004. Steps were being taken to appoint key international personnel with a view to their early deployment to Phnom Penh. The Legal Counsel would shortly send a letter to all States inviting them to suggest individuals whom the Secretary-General might nominate for appointment as international judges, international prosecutor, international investigating judge or judges of the Pre-Trial Chamber.

44. The tenth anniversary of the entry into force of the United Nations Convention on the Law of the Sea had been celebrated in 2004. The year 2005 marked the tenth anniversary of the adoption of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. There were now almost 150 parties to the Convention and over 50 parties to the Fish Stocks Agreement.

45. Three important issues would hold centre stage in the next few years: first, international fisheries and how to deal with illegal fishing, destructive fishing practices and the depletion of fish stocks in many parts of the world; second, the conservation and sustainable use of marine biological resources beyond national jurisdiction; and third, the development of a regular process for global reporting and assessment of the state of the marine environment, including its social and economic dimensions. Aspects of the first issue would be discussed at the sixth meeting of the Open-ended informal consultative process on oceans and the law of the sea in June 2005. In addition, pursuant to article 36 of the Fish Stocks Agreement, the General Assembly had requested the Secretary-General to convene a review conference in the first part of 2006 in order to assess the effectiveness of the Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks.

46. With respect to marine biological resources, the General Assembly had established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, including the past and present activities of the United Nations and other relevant international organizations. In the light of its work on the fragmentation of international law, the Commission might be particularly interested in that issue, since it would require compiling and reconciling

a diverse body of law in different sectors so as to create new law consistent with the general principles contained in the Convention.

47. With regard to UNCITRAL, he noted that 2005 marked two important anniversaries: the twenty-fifth anniversary of the adoption of the United Nations Convention on Contracts for the International Sale of Goods and the twentieth anniversary of the adoption of the UNCITRAL Model Law on International Commercial Arbitration.<sup>7</sup> Conferences were being organized in various parts of the world to celebrate the anniversaries and to discuss the experience of courts and arbitral tribunals with those texts. In March 2005, two conferences dedicated to those anniversaries had been held in Vienna. The main topic on the UNCITRAL agenda at its thirty-eighth session, to take place in Vienna in July 2005, was the finalization of a draft convention on the use of electronic communications in international contracts. The draft convention reaffirmed the principle of functional equivalence between paper documents and electronic communications, as well as between electronic authentication methods and handwritten signatures. It established uniform rules for substantive contractual issues where needed to ensure the effectiveness of electronic communications. It was hoped that the draft convention would facilitate the use of electronic communications exchanged in connection with contracts covered by other international instruments, some of which presently created legal obstacles to electronic commerce.

48. Among the activities undertaken by the Treaty Section to promote greater participation in treaties, treaty events had been organized to coincide with the high-level segment of the General Assembly. In September 2004, in the context of the treaty signature and deposit ceremony, Focus 2004: Treaties on the Protection of Civilians had resulted in 101 treaty actions by 34 States. Focus 2005: Responding to Global Challenges was scheduled to be held from 14 to 16 September 2005 during the high-level summit of the sixtieth session of the General Assembly. As a lead-up to Focus 2005, a high-level panel of experts was planned for 9 June 2005 on the theme *Terrorism: A Challenge to Civilized Society*. Treaty events since—and including—the United Nations Millennium Summit had resulted in 927 treaty actions.<sup>8</sup>

49. Turning to information on other activities that might be of interest to the Commission, he said that an important part of the mandate of the Office of Legal Affairs was to organize courses and seminars, prepare publications and keep numerous websites on international law constantly updated. The Codification Division, in cooperation with the United Nations Institute for Training and Research (UNITAR), continued to organize courses and seminars for young professionals, government officials and teachers of international law, in particular from developing countries. The courses were held in The Hague concurrently

<sup>7</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session", annex I, p. 81.

<sup>8</sup> The list of the events, publications and reports published parallel to the treaty ceremonies is available in English and in French on the website of the United Nations Treaty Collection (<http://treaties.un.org/>).

with The Hague Academy courses so as to enable participants to benefit from the latter. Another component of the programme was the organization of regional courses, which had been facilitated in recent years through cost-saving measures taken by the International Fellowship Programme and through contributions from States, particularly those that had agreed to host such events. Negotiations were currently under way with a view to organizing, in cooperation with UNITAR, a course in Thailand for countries of South-East Asia. The International Law Seminar organized in conjunction with the Commission's own session would be held from 11 to 29 July 2005, bringing together 24 participants.

50. The Division for Ocean Affairs and the Law of the Sea had organized two training courses for developing countries on the very topical issue of the establishment of the outer limits of the continental shelf. The first course had been held in Fiji for developing countries of the South Pacific and East Asia. The second course had taken place in Sri Lanka for countries in the Indian Ocean region. Similar courses were planned for December 2005 in Ghana, for the West African region and for Latin American and Caribbean countries in early 2006. The courses covered both scientific and legal aspects of implementation of article 76 of the United Nations Convention on the Law of the Sea. Courses on treaty law and practice were likewise offered twice a year at United Nations Headquarters. Regional seminars had been organized in 2004 for the Caribbean Community (CARICOM) and in Viet Nam for over 100 participants from ministries of various countries.

51. With regard to publications, the volume of the *United Nations Juridical Yearbook* for 1998 would be issued in October 2005, while the volumes for 1999, 2000 and 2001 had already been edited and were in the process of publication. A number of volumes of the *Yearbook of the International Law Commission*, spanning the years 1993 to 2000, had been published in Arabic, Chinese, English, French and Russian. The Commission had already received the most recent publications prepared by the Codification Division, particularly the English version of the second edition of *International Instruments related to the Prevention and Suppression of International Terrorism*, with the French soon to be issued; Volume XXIII of the Reports of International Arbitral Awards; and the sixth edition of *The Work of the International Law Commission* in English, French and Spanish. The other language versions were still being translated. The Division for Ocean Affairs and the Law of the Sea was completing work on a new publication on the settlement of disputes, entitled *Digest of International Cases of the Law of the Sea*. In order to assist States in preparing their submissions to the Commission on the Limits of the Continental Shelf, the Division had drafted a manual on the preparation of submissions. The Treaty Section had prepared thematic publications giving an overview of treaties of particular relevance to events held concurrently with the General Assembly.

52. The Information Technology Project undertaken by the Office of Legal Affairs involved the conversion of several United Nations legal publications into electronic format with a view to making them available on

the Internet. Various volumes of the *Repertory of Practice of United Nations Organs* were already available on the Internet, organized by study. Work had also been undertaken on the *Yearbook of the International Law Commission*, both the English and French versions of which had been converted into electronic format in their entirety. Work had progressed on the conversion into electronic format of the *United Nations Juridical Yearbook* and some other publications. The Office of Legal Affairs also maintained a number of websites covering the areas for which it was responsible, which, it was to be hoped, provided information useful to Commission members in their work. The Legal Counsel was pleased to announce that the Secretariat intended to hold presentations on using the electronic version of the *Yearbook of the International Law Commission*.

53. Having completed the formal part of his statement, and since he was meeting the Commission for the first time in his capacity as Legal Counsel, he wished to conclude by sharing some of his personal views on the major challenges facing international law. First, his experience of the past few months prompted him to mention the complex debate on the nature and role of international law. International law was a set of binding rules, not simply a set of political commitments. It must be seen as a decisive factor in international relations and not as simply one among many instruments determining international relations, to be taken up when useful and ignored when at variance with national interests.

54. The second challenge was ensuring respect for the rule of law, which should be seen as a priority by States and international organizations, particularly the United Nations, in their activities aimed at achieving a more just and more peaceful international community. He was thinking in particular of the rule of law within the international community as a whole, and in that connection he recalled the package of reforms contained in the report of the Secretary-General entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*,<sup>9</sup> and the Secretary-General's report of August 2004 on "the rule of law and transitional justice in conflict and post-conflict societies".<sup>10</sup>

55. The third challenge was to achieve effective implementation of international law, something that required particular attention to be paid to the international and domestic machinery for its implementation. In that connection, parliaments had an essential role to play through the adoption of legislation for implementing the international obligations of States. The United Nations could and should make special efforts to provide States with appropriate assistance when they requested it. Domestic courts must also play a role in that field.

56. The CHAIRPERSON thanked the Legal Counsel for his valuable report on legal developments in the United Nations over the past year, and invited members to make comments and put questions.

<sup>9</sup> See footnote 6 above.

<sup>10</sup> S/2004/616.

57. Mr. GALICKI said it was a source of great satisfaction for all international lawyers that, after protracted negotiations, the International Convention for the Suppression of Acts of Nuclear Terrorism had recently been adopted. The Secretary-General had urged States to continue their efforts to complete the work on another long-standing task, namely, a comprehensive convention on international terrorism. The obstacles to the completion of that task were well known, but the issue was an important one because other, regional, bodies dealing with international terrorism, such as the Council of Europe, could not go forward with their work while the work of the Ad Hoc Committee on International Terrorism remained incomplete. He would accordingly like to know the Legal Counsel's views as to the likelihood of finalizing the work on the comprehensive convention on international terrorism.

58. Ms. ESCARAMEIA noted that the Legal Counsel had not mentioned the report of the High-level Panel on Threats, Challenges and Change.<sup>11</sup> Some subjects covered in that report, for example terrorism and the responsibility to protect, related to international law. She asked how the negotiations between States were progressing and whether it was intended that the Sixth Committee might become involved in future work in that area. She would also welcome further information on the presentations to be held on using the electronic version of the *Yearbook of the International Law Commission*.

59. Mr. Sreenivasa RAO said that one highly important issue mentioned by the Legal Counsel was the elaboration of a comprehensive convention on international terrorism. In the aftermath of the events of 11 September 2001, considerable progress had been made, and only three provisions had been left in abeyance because of lack of agreement on article 18 and on the article concerning the convention's relations with other instruments.<sup>12</sup>

60. Article 18 raised fundamental issues such as humanitarian law, the role of the military and the role of armed forces in occupied territories. Other conventions concluded on terrorism under United Nations auspices had sought to avoid clear-cut positions or the resolution of issues that should be dealt with in a broader political context. The formulas currently proposed did not take account of that requirement. However, the successful conclusion of the negotiations on the International Convention for the Suppression of Acts of Nuclear Terrorism in a spirit of good will and common sense seemed to augur well for completion of the work on the draft comprehensive convention on international terrorism,<sup>13</sup> and he would like to hear the Legal Counsel's views on the prospects for a successful outcome.

<sup>11</sup> See 2835th meeting, footnote 8.

<sup>12</sup> See, on this subject, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 37 (A/57/37)*, annexes I–III, and annex IV for the texts related to article 18. For the rest of the work on the draft general convention, see the reports of the special Committee created by General Assembly resolution 51/210 of 17 December 1996 at the fifty-eighth, fifty-ninth and sixtieth sessions of the General Assembly (A/58/37, A/59/37, A/60/37).

<sup>13</sup> *Ibid.*, *Sixtieth Session, Supplement No. 37 (A/60/37)*, chaps. II–III, annex I, paras. 24–29 and annex II, sect. A.

61. Mr. KOSKENNIEMI said that the Study Group on fragmentation of international law would finalize its work in 2006,<sup>14</sup> in all probability in the form of a comprehensive report on the question, together with guidelines or recommendations. During the years in which the Commission had dealt with the subject, considerable uncertainty had persisted as to its content. As the topical summary of the discussion of the Commission's work held in the Sixth Committee (A/CN.4/549 and Add.1) showed, delegations were not always sure where the work was heading. The suggestion had been made in the Study Group as well as at the fifty-ninth session of the General Assembly that the results of the Study Group's work should be disseminated as widely as possible, and a more specific proposal had been made that the Office of Legal Affairs should organize a panel discussion or seminar on the issue in 2006, perhaps in the Sixth Committee to explain the content of the topic to delegations in an informal setting. He asked whether the Office of Legal Affairs would be willing to help to organize such an event.

62. Mr. PELLET said it was fitting to pay tribute to the Secretariat in the Legal Counsel's presence for the services it rendered not only in ensuring the smooth functioning of the Commission, but also in advancing the development of international law in general. He noted the Secretariat's excellent studies on such questions as liability, the effect of armed conflict on treaties and the responsibility to protect in the context of natural disasters, all of which had been highly useful to the Commission. International legal experts were also most grateful to the Office of Legal Affairs and the Codification Division for their publications, such as the *Reports of International Arbitral Awards*, which were of constant usefulness. It was, however, unfortunate that the older volumes seemed to be out of print, and he asked whether they could be re-issued. It was also absolutely essential to make the *Repertory of Practice of United Nations Organs* available for online access, and he greatly hoped that that project would be continued and completed for the benefit of researchers and practitioners of international law. While he was pleased that the Office of Legal Affairs had been placing an increasing number of documents on the Internet, that did not mean that printed publications could be dispensed with. It was most regrettable that the volumes of the *Yearbook of the International Law Commission* were published so late; in particular, the enormous delay in the publication of Volume II (Part One), containing the reports of the Special Rapporteurs, was becoming totally unacceptable.

63. As he had pointed out at the previous session, it was also totally unacceptable that, while the members of the Commission had free online access to the United Nations *Treaty Series*, researchers and doctoral students should have to pay for access to an international public service. He urged the Legal Counsel to reconsider a decision that had been taken without giving any thought to its implications. Law was not just a commodity.

64. As Special Rapporteur on the topic of reservations to treaties, he hoped that in 2006 a joint seminar could be convened involving the Commission and the human

<sup>14</sup> See *Yearbook ... 2004*, vol. II (Part Two), chap. X, para. 302.

rights treaty monitoring bodies and that some financially acceptable arrangement could be found for carrying out an exercise that would be beneficial in the areas both of general international law and of international human rights law.

65. Mr. MANSFIELD noted that the Legal Counsel had made reference to an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, which might be of interest to the Commission because of the importance of coordinating different areas of law and the relevance for fragmentation, noting that that might involve the harmonization of different elements in international law. He asked the Legal Counsel to expand upon those remarks and also to comment on progress made in coordinating the work of the various international bodies with responsibility for oceans. Such activities had not been properly coordinated in the past, because they operated in different areas, over some of which the Secretary-General himself did not have authority. The Legal Office in the Division for Ocean Affairs and the Law of the Sea had a key role to play, but a high level of coordination was needed, and he wondered whether the Legal Counsel could play a personal part in that effort.

66. Mr. MICHEL (Under-Secretary-General of Legal Affairs, Legal Counsel) thanked members of the Commission for their positive comments and welcomed the opportunity to discuss areas in which progress could be made.

67. He shared the Commission's satisfaction with the outcome of negotiations on the International Convention for the Suppression of Acts of Nuclear Terrorism; the lessons to be learned might be useful in bringing work on the draft comprehensive convention to a successful conclusion. It was, however, important to avoid false analogies, because there were major differences between the two instruments with regard both to the subject and to the political context. The successful conclusion of work on the Nuclear Terrorism Convention was attributable to a number of reasons: the quality of the work done, especially by the coordinator; universal agreement about extent of the danger; and also, perhaps, the unvoiced desire on the part of many delegations to prove that the Organization's ordinary legislative mechanisms were able to function. Indeed, the Sixth Committee and its subsidiary bodies had achieved results on a politically sensitive matter, thereby illustrating the General Assembly's role and responsibility in that area. The Security Council had recently adopted provisions which had been perceived by the Sixth Committee and its subsidiary bodies, as well as by the General Assembly, as an expression of very wide-ranging legislative activity.

68. Similar considerations applied to the draft comprehensive convention, but only to a certain extent. In adopting the International Convention for the Suppression of Acts of Nuclear Terrorism, the participants had shown that the process was no longer completely deadlocked, and had disproved the conventional wisdom that no progress could be made until certain urgent political questions were resolved. Thus, some momentum had begun to develop, although that did not mean that there were

grounds for undue optimism with regard to the draft comprehensive convention. There were still substantial obstacles concerning the substance and in connection with the general climate of the negotiations. It was unfortunate that the political discussion had sometimes focused on problems that were not really relevant. Mr. Sreenivasa Rao had drawn attention to the obstacles that still had to be overcome. It was to be hoped that at the High-level Plenary Meeting in September 2005, Heads of State would show the political will needed to make headway on the draft. Meanwhile, the Office of Legal Affairs would do its utmost to encourage that outcome. The oral report presented by the coordinator of negotiations, Mr. Díaz Paníagua, had provided a useful account of the state of negotiations and outstanding issues and was included in the report of the Ad Hoc Committee.<sup>15</sup> Both conventions were instruments of criminal law whose aim was to prohibit, prevent and punish certain conduct by establishing rules of criminal law, not to produce a general political condemnation of terrorism. He shared the eagerness of the Commission to see the work completed during the sixtieth session of the General Assembly.

69. With regard to Ms. Escarameia's comments on the work of the High-level Panel on Threats, Challenges and Change, he said that the main points regarding follow-up by the Secretariat were contained in the report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*;<sup>16</sup> it was now for the General Assembly to take up that work in accordance with the working method established by the President of the General Assembly, so that various questions could be addressed in greater depth before the debate in the General Assembly itself. Thus, by following the work of the General Assembly, it would be possible to see which questions raised in the report of the High-level Panel and reflected in the report of the Secretary-General had subsequently been debated in the General Assembly. With specific regard to terrorism in that context, he had nothing to add to what he had already said about the work in the Sixth Committee or the Ad Hoc Committee on Terrorism.

70. Indirect reference had been made to the proposal to adopt guidelines on the use of force. While he did not wish to prejudge the final outcome of the current discussions on the matter, the general perception seemed to be that it was not at all certain that such guidelines would be adopted. Those discussions were helping to clarify the concept of "responsibility to protect". Until now, the question had been posed in such a politically sensitive context that the reactions had been based to a large extent either on instinctively positive or instinctively negative perceptions; a rational, in-depth discussion of the concepts at issue would be most welcome, if only to prevent the idea from taking hold that the concept of responsibility to protect would automatically result in the recognition of a new criterion for legality of the use of force, additional to those set forth in the Charter of the United Nations.

71. A presentation on access to the electronic versions of the *Yearbook of the International Law Commission* and documentation sources would be held the following week.

<sup>15</sup> See footnote 13 above.

<sup>16</sup> See footnote 6 above.

72. As to Mr. Koskenniemi's remarks, it was his experience that seminars held at Headquarters involving academics, United Nations officials and representatives of non-governmental organizations were an excellent way of reflecting on problems that merited the attention of the international community. Thus, he was open to Mr. Koskenniemi's proposal and was prepared to consider with him how it could be given concrete form. Resourcefulness and a search for potential partners should make it possible to find funding for those activities. He would not wish to see financial issues place undue constraints on progress in the field of international law, and he would make that issue a focal point of his future activities. If the rule of law was really a priority for the international community, then it required a corresponding financial commitment.

73. He thanked Mr. Pellet for his kind words addressed to the Secretariat. He was proud of the quality of its work. With regard to the question of reprinting old volumes, he hoped that, with the introduction of new information technologies, documents that had been out of print could be made available on websites. He shared Mr. Pellet's concern about the lateness of publications. He was trying to find a solution to the question of Internet access, although he was cautious about the outcome, since he had no personal control over the matter. He took note of the proposal for a joint seminar involving the Commission and human rights treaty monitoring bodies and was grateful for all such suggestions.

74. On the question raised by Mr. Mansfield on fragmentation, he said that was an area with which he was as yet unfamiliar. He had noted with interest that colleagues closely involved in that area had stressed the importance of the law of the sea in the context of the subject of fragmentation. In recent months, he had learned that the resources earmarked for coordination were manifestly insufficient. Every effort must be made to obtain such funding, but increased attention should also be given to coordinating the resources currently available, and not only in the area of the law of the sea. Every year, two meetings of legal experts were held, one for United Nations funds, programmes and departments and another for the various entities of the system. The Office of Legal Affairs at Headquarters must work to improve all such coordination efforts. He had no illusions at the current stage: the system was complicated and cumbersome, and the various entities had their own rules, but much could be achieved on the basis of good faith. He had been reminded of the issue of fragmentation during the presentation of a report in New York by the Chairperson of the Study Group, who had noted that institutional fragmentation had not been addressed.<sup>17</sup> Thus, the question remained at the centre of attention. If, for understandable reasons, the Study Group could not take up the question, ways must be found of overcoming the most important obstacles in that area. While he was not very optimistic as to the short-term results, in the longer run, the problem could not be disregarded: the credibility and effectiveness of the system were at stake.

<sup>17</sup> See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee, 20th meeting (A/C.6./58/SR.20)*, statement of Mr. Candioti, Chairperson of the Commission, paras. 5–8.

75. The CHAIRPERSON thanked the Legal Counsel for his comments and clarifications.

#### Organization of work of the session (*continued*)\*

[Agenda item 1]

76. Mr. MANSFIELD (Chairperson of the Drafting Committee) announced that the Drafting Committee on responsibility of international organizations would be composed of Mr. Comissário Afonso, Mr. Chee, Ms. Escarameia, Mr. Economides, Mr. Gaja (Special Rapporteur), Mr. Kolodkin, Mr. Matheson, Mr. Sreenivasa Rao, Ms. Xue, Mr. Yamada, and Mr. Niehaus (Rapporteur, *ex officio*).

*The meeting rose at 1 p.m.*

### 2845th MEETING

*Friday, 27 May 2005, at 10.10 a.m.*

*Chairperson:* Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

#### Diplomatic protection (*continued*) (A/CN.4/549 and Add.1, sect. F and A/CN.4/546)

[Agenda item 2]

SIXTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. AL-BAHARNA commended the Special Rapporteur and recalled that his report had been submitted in response to a request from the Commission to consider the advisability of including a provision reflecting the clean hands doctrine in the draft articles. He agreed with the Special Rapporteur's findings that such an inclusion would be unwarranted and noted that the debates on that doctrine in the Sixth Committee had reached a similar conclusion. In the *LaGrand* and *Avena* cases, to which reference had been made in the report, the plaintiff States, whose nationals had been tried and sentenced in accordance with due process of law for the serious crimes they had committed under the domestic law of the respondent State, had based their claims on the wrongful conduct of the respondent State in respect of the crimes committed. In both cases the Court had refuted the arguments of the United States and rejected the applicability of the

\* Resumed from the 2840th meeting.