

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

## 2003

*Volume I*

*Summary records  
of the meetings  
of the fifty-fourth session  
5 May–6 June and  
7 July–8 August 2003*

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UNITED NATIONS  
New York and Geneva, 2009



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2002*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the fifty-fifth session of the Commission (A/CN.4/SR.2751–A/CN.4/SR.2790), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2003
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UNITED NATIONS PUBLICATION
<i>Sales No.:</i> E.09.V.2 ISBN 978-92-1-133786-0
ISSN 0082-8289

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## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
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		Mr. Chusei YAMADA	Japan

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## OFFICERS

*Chair:* Mr. Enrique CANDIOTI  
*First Vice-Chair:* Mr. Teodor Viorel MELESCANU  
*Second Vice-Chair:* Mr. Choung Il CHEE  
*Chair of the Drafting Committee:* Mr. James KATEKA  
*Rapporteur:* Mr. William MANSFIELD

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*



## **AGENDA**

The Commission adopted the following agenda at its 2751st meeting, held on 5 May 2003:

1. Filling of casual vacancies in the Commission (article 11 of the statute).
2. Organization of work of the session.
3. Diplomatic protection.
4. Reservations to treaties.
5. Unilateral acts of States.
6. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities).
7. The responsibility of international organizations.
8. The fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Shared natural resources.
10. Programme, procedures and working methods of the Commission, and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-sixth session.
13. Other business.



## ABBREVIATIONS

BIS	Bank for International Settlements
ECOWAS	Economic Community of West African States
EBRD	European Bank for Reconstruction and Development
FAO	Food and Agriculture Organization of the United Nations
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
MERCOSUR	South American Common Market
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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<i>AJIL</i>	<i>American Journal of International Law</i>
<i>BYBIL</i>	<i>British Year Book of International Law</i>
<i>ICJ Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
<i>ILM</i>	<i>International Legal Materials</i> (Washington, D.C.)
<i>ILR</i>	<i>International Law Reports</i>
<i>ITLOS Reports</i>	<i>ITLOS, Reports of Judgments, Advisory Opinions and Orders</i>
<i>PCIJ, Series A</i>	<i>PCIJ, Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>PCIJ, Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>UNRIAA</i>	<i>United Nations, Reports of International Arbitral Awards</i>

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is [www.un.org/law/ilc/index.htm](http://www.un.org/law/ilc/index.htm).

## CASES CITED IN THE PRESENT VOLUME

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Aerial Incident of 3 July 1988</i>	( <i>Islamic Republic of Iran v. United States of America</i> ), <i>Preliminary Objections, ICJ Pleadings</i> , vol. II, pp. 3 <i>et seq.</i>
<i>Aerial Incident of 10 August 1999</i>	( <i>Pakistan v. India</i> ), <i>Jurisdiction, Judgment, ICJ Reports</i> 2000, p. 12.
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<i>Arbitral Award Made by the King of Spain on 23 December 1906</i>	<i>Judgment, ICJ Reports</i> 1960, p. 192.
<i>Asylum</i>	( <i>Colombia/Peru</i> ), <i>Judgment, ICJ Reports</i> 1950, p. 266.
<i>Avena and Other Mexican Nationals</i>	( <i>Mexico v. United States of America</i> ), <i>Provisional Measures, Order of 5 February 2003, ICJ Reports</i> 2003, p. 77.
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports</i> 1970, p. 3.
<i>Belilos</i>	European Court of Human Rights, <i>Series A: Judgments and Decisions</i> , vol. 132, <i>Belilos v. Switzerland</i> , judgment of 29 April 1988.
<i>Bhopal</i>	<i>Union Carbide Corporation gas plant disaster at Bhopal, India in December, 1984</i> , opinion and order, 12 May 1986, U.S. District Court, New York. Opinion reproduced in <i>ILM</i> , vol. 25, no. 4 (July 1986), p. 771.
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<i>Case</i>	<i>Nature and source of the decision</i>
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<i>Certain German Interests in Polish Upper Silesia</i>	<i>Merits, Judgment No. 7, 1926, PCIJ, Series A, No. 7.</i>
<i>Certain Phosphate Lands in Nauru</i>	( <i>Nauru v. Australia</i> ), <i>Order of 13 September 1993</i> , ICJ Reports 1993, p. 322.
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<i>Delimitation of the Marine Boundary in the Gulf of Maine Area</i>	<i>Judgment</i> , ICJ Reports 1984, p. 246.
<i>Diallo</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> , <i>Order of 7 November 2002</i> , ICJ Reports 2002, p. 607.
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<i>Frontier Dispute</i>	( <i>Burkina Faso/Republic of Mali</i> ), <i>Judgment</i> , ICJ Reports 1986, p. 554.

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<i>Mavrommatis</i>	<i>Mavrommatis Palestine Concessions</i> , <i>Judgment No. 2</i> , 1924, <i>PCIJ, Series A</i> , No. 2.
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<i>Military and Paramilitary Activities in and against Nicaragua</i>	(Nicaragua v. United States of America), <i>Jurisdiction and Admissibility</i> , <i>Judgment</i> , ICJ Reports 1984, p. 392. <i>Merits</i> , <i>Judgment</i> , ICJ Reports 1986, p. 14.
<i>Mines de Potasse d'Alsace</i>	<i>Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace S.A.</i> (case 21/76), judgement of 30 November 1976, Court of Justice of the European Communities, <i>Reports of Cases before the Court</i> , 1976-8, p. 1735.
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<i>North Sea Continental Shelf</i>	<i>Judgment</i> , ICJ Reports 1969, p. 3.
<i>Norwegian Loans</i>	<i>Certain Norwegian Loans (France v. Norway)</i> , <i>Judgment</i> , ICJ Reports 1957, p. 9.

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<i>Nottebohm</i>	<i>Second Phase, Judgment, ICJ Reports 1955</i> , p. 4.
<i>Nuclear Tests</i>	( <i>Australia v. France</i> ), <i>Judgment, ICJ Reports 1974</i> , p. 253. ( <i>New Zealand v. France</i> ), <i>ibid.</i> , p. 457.
<i>Oil Platforms</i>	( <i>Islamic Republic of Iran v. United States of America</i> ), <i>Order of 28 August 2001, ICJ Reports 2001</i> , p. 568.
<i>Ok Tedi</i>	<i>Dagi, Rex and Ors v. BHP Ltd. and Ok Tedi Mining Ltd.</i> , Victoria Supreme Court, judgement of 22 September 1995.
<i>Orinoco Steamship Company</i>	(United States of America, Venezuela), arbitral award of 25 October 1910, UNRIAA, vol. XI (Sales No. 1961.V.4), p. 237.
<i>Passage through the Great Belt</i>	( <i>Finland v. Denmark</i> ), <i>Order of 10 September 1992, ICJ Reports 1992</i> , p. 348.
<i>Peter Pázmány University</i>	<i>Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Peter Pázmány University)</i> , Judgment of 15 December 1933, <i>PCIJ, Series A/B</i> , No. 61, p. 208.
<i>Pinochet</i>	<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte</i> (No. 3), England, House of Lords, 24 March 1999, <i>ILR</i> , vol. 119.
“Rainbow Warrior”	Case concerning the differences between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the <i>Rainbow Warrior</i> affair, ruling of 6 July 1986 by the Secretary-General of the United Nations, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 197.  Decision of 30 April 1990, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215.
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<i>Sabbatino</i>	<i>Banco Nacional de Cuba v. Sabbatino, Receiver</i> ( <i>United States Reports</i> , vol. 376, 1964), p. 398.
<i>South West Africa</i>	<i>Second Phase, Judgment, ICJ Reports 1966</i> , p. 6.
<i>Southern Bluefin Tuna</i>	( <i>New Zealand v. Japan; Australia v. Japan</i> ), <i>Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999</i> , p. 280.

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<i>Temple of Preah Vihear</i>	<i>Merits, Judgment, ICJ Reports 1962, p. 6.</i>
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| European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977)   | <i>Ibid.</i> , vol. 1137, No. 17828, p. 93.  |
| Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003)   | Council of Europe, <i>European Treaty Series</i> , No. 190.  |
| International Convention against the Taking of Hostages (New York, 17 December 1979)  | United Nations, <i>Treaty Series</i> , vol. 1316, No. 21931, p. 205.   |
| Convention on the Physical Protection of Nuclear Material (with annexes) (Vienna, 26 October 1979, opened for signature in Vienna and New York on 3 March 1980) | <i>Ibid.</i> , vol. 1456, No. 24631, p. 101.   |
| Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)   | <i>Ibid.</i> , vol. 1678, No. 29004, p. 201.   |
| Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988)                      | <i>Ibid.</i>   |
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| Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991)   | <i>Official Records of the Security Council, Forty-sixth Year, Supplement for January, February and March 1991</i> , S/22393, annex I. |

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Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Moscow, London and Washington, D.C., 27 January 1967)	United Nations, <i>Treaty Series</i> , vol. 610, No. 8843, p. 205.
<b>Miscellaneous</b>	
Convention on Rights and Duties of States (Montevideo, 26 December 1933)	League of Nations, <i>Treaty Series</i> , vol. CLXV, No. 3802, p. 19.
Convention of the World Meteorological Organization (with annexes and Protocol concerning Spain) (Washington, D.C., 11 October 1947)	United Nations, <i>Treaty Series</i> , vol. 77, No. 998, p. 143.
Charter of the Organization of American States (Bogota, 30 April 1948)	<i>Ibid.</i> , vol. 119, No. 1609, p. 3.
Treaty Establishing the European Community (Rome, 25 March 1957) as amended by the Treaty on European Union	European Union, <i>Selected Instruments Taken from the Treaties</i> , book I, vol. I (Luxembourg, Office for Official Publications of the European Communities, 1995), p. 101.
Statutes of the World Tourism Organization (Mexico City, 27 September 1970)	United Nations, <i>Treaty Series</i> , vol. 985, No. 14403, p. 339.

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| Convention Establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985)  | <i>Ibid.</i> , vol. 1508, No. 26012, p. 99; see also <i>ILM</i> (Washington, D.C.), vol. 24, No. 6 (November 1985), p. 1598. |
| Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Amsterdam, 2 October 1997) | <i>Official Journal of the European Communities</i> , No. C 340 (10 November 1997), p. 1.                                    |
| Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)  | United Nations, <i>Treaty Series</i> , vol. 2216, No. 39391, p. 225.   |
| Additional Protocol to the Criminal Law Convention on Corruption (Strasbourg, 15 May 2003)   | Council of Europe, <i>European Treaty Series</i> , No. 191.  |
| Civil Law Convention on Corruption (Strasbourg, 4 November 1999)   | United Nations, <i>Treaty Series</i> , vol. 2246, No. 39988, p. 3.   |
| Inter-American Democratic Charter (Lima, 11 September 2001)  | <i>ILM</i> (Washington, D.C.), vol. 40, No. 5 (September 2001), p. 1289.   |
| Convention on Contact concerning Children (Strasbourg, 15 May 2003)  | Council of Europe, <i>European Treaty Series</i> , No. 192.  |

## CHECKLIST OF DOCUMENTS OF THE FIFTY-FIFTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/527 and Add.1–3	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	A/CN.4/527 and Add.2 reproduced in <i>Yearbook ... 2002</i> , vol. II (Part One). A/CN.4/527 and Add.1 and 3 mimeographed.
A/CN.4/528	Provisional agenda	Mimeographed. For agenda as adopted, see p. [...] above.
A/CN.4/529	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-seventh session of the General Assembly	Mimeographed.
A/CN.4/530 and Add.1	Fourth report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in <i>Yearbook ... 2003</i> , vol. II (Part One).
A/CN.4/531	First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	<i>Idem.</i>
A/CN.4/532	First report on the responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/533 and Add.1	First report on shared natural resources, by Mr. Chusei Yamada, Special Rapporteur	<i>Idem.</i>
A/CN.4/534	Sixth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/535 and Add.1	Eighth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.630 [and Corr.2]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee	See summary record of the 2760th meeting (para. 34).
A/CN.4/L.631	Diplomatic protection. Titles and texts of draft articles 8 [10], 9 [11] and 10 [14] adopted by the Drafting Committee	See summary record of the 2768th meeting (para. 3).
A/CN.4/L.632	The responsibility of international organizations. Titles and texts of draft articles 1, 2 and 3 adopted by the Drafting Committee	See summary record of the 2776th meeting (para. 1).
A/CN.4/L.633	Draft report of the International Law Commission on the work of its fifty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10</i> (A/58/10). The final text appears in <i>Yearbook ... 2003</i> , vol. II (Part Two).
A/CN.4/L.634	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-fifth session)	<i>Idem.</i>
A/CN.4/L.635	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.636 and Add.1	<i>Idem</i> : chapter IV (The responsibility of international organizations)	<i>Idem.</i>
A/CN.4/L.637 and Add.1–4	<i>Idem</i> : chapter V (Diplomatic protection)	<i>Idem.</i>
A/CN.4/L.638	<i>Idem</i> : chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities))	<i>Idem.</i>
A/CN.4/L.639 and Add.1	<i>Idem</i> : chapter VII (Unilateral acts of States)	<i>Idem.</i>
A/CN.4/L.640 and Add.1–3	<i>Idem</i> : chapter VIII (Reservations to treaties)	<i>Idem.</i>



<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.641	<i>Idem</i> : chapter IX (Shared natural resources)	<i>Idem</i> .
A/CN.4/L.642	<i>Idem</i> : chapter X (The fragmentation of international law: difficulties arising from the diversification and expansion of international law)	<i>Idem</i> .
A/CN.4/L.643	<i>Idem</i> : chapter XI (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.644	The fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group	Mimeographed. Reproduced in <i>Yearbook ... 2003</i> , vol. II (Part Two), chap. X, sect. C.
A/CN.4/L.645	Programme, procedures and working methods of the Commission, and its documentation. Report of the Planning Group	Mimeographed.
A/CN.4/L.646	Unilateral acts of States. Report of the Working Group	<i>Idem</i> .
A/CN.4/SR.2751–A/CN.4/SR.2790	Provisional summary records of the 2751st to 2790th meetings	<i>Idem</i> . The final text appears in the present volume.



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-FIFTH SESSION

*Held at Geneva from 5 May to 6 June 2003*

### 2751st MEETING

*Monday, 5 May 2003, at 3.05 p.m.*

*Outgoing Chair:* Mr. Robert ROSENSTOCK

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

### Opening of the session

1. The OUTGOING CHAIR declared open the fifty-fifth session of the International Law Commission and extended a warm welcome to all members.

### Tribute to the memory of Valery Kuznetsov, member of the Commission

2. The OUTGOING CHAIR said it was sad to recall that Valery Kuznetsov had passed away the previous year. Valery Kuznetsov had been the head of the international law department of the Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation and a member of the Permanent Court of Arbitration and had served on several important international bodies. He had combined the talents of the practitioner of international law with the erudition of the academic. He had been elected to the Commission in 2002 and had served as its Rapporteur.

3. On behalf of the Commission, he would send a letter of condolences to Valery Kuznetsov's family.

*At the invitation of the Outgoing Chair, the members of the Commission observed a minute of silence.*

4. The OUTGOING CHAIR said that the topical summary of the discussion on the Commission's report held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat, was contained in document A/CN.4/529. Delegations in the Sixth Committee had expressed an interest in enhancing the dialogue between the Committee and the Commission. Mr. Dugard, representing the Commission, had been able to respond to several questions regarding the topic of diplomatic protection. The proceedings had been held in a very positive atmosphere.

### Election of officers

*Mr. Candioti was elected Chair by acclamation.*

*Mr. Candioti took the Chair.*

5. The CHAIR thanked the members of the Commission for the honour they had done him and said that he would make every effort to deserve their trust and make the session a success.

6. Since the position of first Vice-Chair was to be filled by a member from an Eastern European country, the election of that officer should perhaps be deferred until after the elections to fill casual vacancies.

7. Mr. GALICKI supported that suggestion. Currently, he was the only Eastern European member of the Commission, and vacancies for two more members from Eastern European countries were to be filled.

*It was so decided.*

*Mr. Chee was elected second Vice-Chair by acclamation.*

*Mr. Kateka was elected Chair of the Drafting Committee by acclamation.*

*Mr. Mansfield was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/528)

8. Mr. DUGARD said that consultations were currently taking place on the possibility of proposing an additional agenda item. He asked whether the adoption of the provisional agenda would preclude such a possibility.

9. The CHAIR said that additional issues could be considered under item 13, "Other business", but that the proposal would first have to be considered by the Bureau and the Planning Group.

*The agenda was adopted.*

### Organization of work of the session

[Agenda item 2]

10. The CHAIR drew attention to the proposed programme of work for the first two weeks of the Commission's session. If he heard no objection, he would it take that the Commission decided to adopt the proposed programme.

*It was so decided.*

11. The CHAIR invited members to join the Drafting Committee and the Planning Group. Since the Drafting Committee would be taking up the topic of reservations to treaties the following afternoon, he urged its Chair to form its membership as soon as possible.

### Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/527 and Add.1-3)

[Agenda item 1]

12. The CHAIR announced that the Commission was required to fill three casual vacancies that had arisen as a consequence of the death of Valery Kuznetsov and the election of Mr. Bruno Simma and Mr. Peter Tomka to ICJ. The curricula vitae of the five candidates for the vacancies were contained in document A/CN.4/527/Add.1. He would suspend the meeting to enable members to hold informal consultations.

*The meeting was suspended at 4.10 p.m. and resumed at 4.45 p.m.*

13. The CHAIR announced that the Commission had elected Mr. Roman Kolodkin, Mr. Teodor Melescanu and Mr. Constantine Economides to fill the casual vacancies which had arisen. On behalf of the Commission, he would inform the newly elected members and invite them to join the Commission as soon as possible.

### The responsibility of international organizations (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

### FIRST REPORT OF THE SPECIAL RAPPORTEUR

14. Mr. GAJA (Special Rapporteur), introducing his first report on the responsibility of international organizations (A/CN.4/532), said that it built on the report of the Working Group on Responsibility of International Organizations adopted by the Commission at its fifty-fourth session<sup>2</sup> and attempted to take the Commission's work a few steps further. After a historical survey, the report addressed the scope of the work on the responsibility of international organizations and the related question of the definition of an international organization.

15. The report then discussed what the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>3</sup> had termed "General principles". Following the framework used in those articles, the next question to be dealt with would be attribution. In 2002 he had indicated his intention to cover in his first report attribution of conduct to international organizations. He had not been able to fulfil that part of his plan because international organizations had been slow responding to the request for information on their practices addressed to them by the Secretariat in accordance with the recommendation in paragraph 488 of the Commission's report to the General Assembly on the work of its fifty-fourth session.<sup>4</sup> The request had been sent in September 2002 and answers had reached the Secretariat only recently. Since the Commission had enlisted the support of organizations in providing information, it must take their answers into account, even if such a course took more time. All questions of attribution of conduct to an international organization, or to a State, when there was any uncertainty about the matter, would be dealt with in the next report.

16. As the consideration of questions of attribution had been postponed, only a few matters were now being proposed for discussion by the Commission, but they were far from secondary ones. For example, the determination of the scope of the work was of particular importance for the drafting of articles on substantive issues, since it would indicate which organizations' practice must be taken into account.

17. A number of elements relating to scope could already be gleaned from the Working Group's report, but the Commission had adopted that report at the very end of the previous session and had had little opportunity to discuss it in full. Moreover, the Working Group had examined the issues on a preliminary basis and had not had to grapple with the difficult questions that often arose when one was required to write an accepted solution as a normative proposition. The Working Group's conclusions did not entirely reflect his views, but he sincerely hoped they would not be reversed. He did, however, think there was room for refining and clarifying them.

18. He referred in his report to the Commission's specific contributions to the study of the responsibility of international organizations under international law. Much

<sup>2</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VIII, sect. C, p. 93.

<sup>3</sup> *Yearbook ... 2001*, vol. II (Part Two), pp. 26-30.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 96.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

more in the Commission's previous work was no doubt relevant as well, but a general survey of all the materials would be difficult to carry out at the present stage. The relevant materials would be taken into account in future work whenever the discussion so warranted, but for the time being it seemed appropriate to consider only contributions that he would term "specific". He accordingly mentioned in the report the saving clause contained in article 57 of the draft articles on State responsibility for internationally wrongful acts and the related commentary. Most of the other "specific" materials concerned attribution of conduct. The report referred in some detail to two draft articles which had been adopted on first reading but, for various reasons, dropped from the final text. It was the commentary to those draft articles that was particularly interesting, as was the discussion of questions that would undoubtedly arise in the Commission's future work. Attribution of conduct was an area in which international law had developed considerably in the past few years.

19. Many elements of interest could also be gathered from the work of other institutions. For example, in 1995, at its Lisbon session, the Institute of International Law had adopted a resolution entitled "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties".<sup>5</sup> The preparatory work, in particular the reports by Ms. Rosalyn Higgins, and the debates<sup>6</sup> were important.

20. Special mention should be made of work paralleling the Commission's now being undertaken by ILA, which had a Committee on the Accountability of International Organizations. The topic was undoubtedly broader than the Commission's, for it comprised good governance, for example. The Committee, chaired by Sir Franklin Berman, had presented its third report<sup>7</sup> in New Delhi in 2002, including a number of proposals on the responsibility of international organizations under international law. A series of articles had already been drafted, but the work was not yet finished. In a letter, the Chair of the Committee had informed him of the Committee's plans for a series of private seminars with groups of international organizations and had noted that there might be some useful overlap between that activity and the Commission's request to international organizations to provide information about their internal practices. Of course, cooperation between the Commission and ILA would have to be considered in a wider context, perhaps in the Planning Group, and not solely with reference to the responsibility of international organizations, but the situation did seem to offer an important opportunity for a concrete discussion on cooperation with learned institutions of a non-governmental character.

21. To speak of the responsibility of an international organization was to presuppose that the organization had legal personality. Otherwise, its conduct would have to be attributed to other entities, probably the member States. Article 1 of the resolution adopted by the Institute of International Law at its Lisbon session stated, "This Resolu-

tion deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members."<sup>8</sup>

22. It had traditionally been held that many organizations did not meet the legal personality requirement. The requirement had thus limited the scope of study to a small number of organizations, the most significant ones, starting with the United Nations and branching out to its larger family and to certain regional organizations. That approach was no longer tenable in view of the trend towards recognizing the legal personality of individuals, as was highlighted by the decision of ICJ in the *LaGrand* case and the Commission's own commentary on the draft articles on State responsibility for internationally wrongful acts. If individuals had legal personality, it was difficult to deny legal personality to organizations, whether their members were States or individuals or both States and individuals. The only proviso was that the organization should act in its own capacity, not merely as an instrument of another entity.

23. That left the need to look for other elements in defining organizations for the purpose of discussing international responsibility. It would be difficult to deal simultaneously with governmental organizations of a universal character and organizations composed of individuals. Obviously, different rules should be applied, and the Commission should focus on those that were more clearly a part of international law. Yet the references to international organizations contained in a number of codification instruments, starting with the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), which merely defined them as intergovernmental organizations. One might well ask whether that was a definition at all. Such a definition conveyed the idea that some members must be States, but did not necessarily say that the international organization must be established by treaty, and it did not make any distinction among the organizations created by States, which might also deal exclusively with commercial or private law matters. The definition of an international organization as an intergovernmental organization had been endorsed by the Commission, albeit briefly, in its commentary on article 57 of the draft articles on State responsibility for internationally wrongful acts. One alternative would be for the Commission to reproduce the definition contained in several codification conventions; "intergovernmental organization" could then be defined in greater detail in the commentary. As was pointed out in paragraph 14 of his report, the meaning was less obvious than might appear at first glance, particularly in view of the existence of several organizations whose members included not only States but subjects that could be individuals, territories or international organizations.

24. His report explored alternatives to the current definition. The Commission should try to produce a functional definition covering a relatively homogeneous category of organizations, so that it could establish one set of rules with just a few variations, rather than a number of different rules depending on the type of organization concerned. A new, more precise definition would in any case make an elucidation in the commentary superfluous.

<sup>5</sup> *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 444.

<sup>6</sup> *Ibid.*, pp. 233–320.

<sup>7</sup> ILA, *Report of the Seventieth Conference* (London, 2002), pp. 772–806.

<sup>8</sup> See footnote 5 above.



25. He had proceeded on the premise that the present work was a sequel to the draft articles on State responsibility. The Commission should try to define the category of organizations that exercised functions similar to those of States. In English, such functions might be referred to as governmental. He was aware that the use of that term might raise drafting problems in other languages. If the definition referred to governmental functions, then non-governmental organizations, which usually did not exercise those functions, were left out, apart from a few exceptions, such as ICRC, which exercised some governmental functions in the broad sense. The Commission might discuss what to do about those exceptions. His decision to rule out non-governmental organizations was in keeping with the views expressed by many delegations in the Sixth Committee in response to the Commission's request for comments. The proposed definition would also leave out governmental organizations whose conduct was less likely to give rise to questions of responsibility under international law. International human rights rules were of relevance to all organizations, whether governmental or non-governmental, but there were many rules of international law which concerned entities only insofar as they exercised governmental functions. For an organization to be covered by the draft articles, the definition might specify that some of its members must be States, but the presence of other subjects—other international organizations, territories or individuals—was not a reason for excluding it.

26. The definition in draft article 2 proposed by the Special Rapporteur in his report contained three elements: (a) the organization included States among its members; (b) it exercised functions in its own capacity and not as an instrument of other subjects; and (c) those functions might be regarded as governmental. The definition of "organization" related to the scope of the draft articles, but it might be preferable to follow the precedents referred to in paragraph 28 of the report and place the definition in draft article 2, while draft article 1 specified the general scope. It seemed appropriate to make it clear from the outset what the draft articles were about, namely issues relating to the responsibility of international organizations under international law. That would exclude the sometimes interrelated questions of the civil liability of international organizations. One reason was that at the present time there were very few rules of general international law on the civil liability of international organizations. Thus dealing with civil liability would constitute solely an exercise in progressive development of the law, which would be difficult to carry out on a general scale. The other reason for omitting civil liability was that the questions were heterogeneous. Rules of international law existed on the civil liability of States which operated a nuclear plant, but that did not mean the resulting civil liability was analogous to responsibility under international law. Referring to responsibility under international law would make it clear that the draft articles did not cover international liability for injurious consequences arising out of acts not prohibited by international law, the topic assigned to Mr. Sreenivasa Rao as Special Rapporteur. In suggesting that such liability should not be included in the present draft articles, he had again followed the view expressed by a large number of representatives in the Sixth Committee in response to the Commission's request for comments.

He did not wish to query the usefulness of a study on international liability for injurious consequences also in the case of international organizations, nor did he wish to increase the burden on Mr. Sreenivasa Rao. The Commission should perhaps decide that the questions which might arise in the case of international organizations were really more analogous to questions concerning States, and that it should deal with them as a sequel to the present study, or possibly within the scope of the work on liability.

27. Another point needed to be considered in an introductory provision. Article 57 of the draft articles on State responsibility for internationally wrongful acts expressly left aside not only "any question of the responsibility under international law of an international organization" but also any question of the responsibility of "any State for the conduct of an international organization". The study in hand would be inadequate if it did not attempt to fill that gap and cover responsibility for the conduct of an organization incurred by States as members or otherwise. The scope of the draft articles should include an express reference to that issue in draft article 1.

28. He would like to defer his presentation of draft article 3, on general principles, as it sought to encompass the substance of articles 1 to 3 of the draft articles on State responsibility for internationally wrongful acts.

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

[Agenda item 2]

29. Further to consultations, the CHAIR announced the composition of the Drafting Committee for the topic of reservations to treaties: Mr. Kateka (Chair), Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Rodríguez Cedeño, Mr. Rosenstock and Mr. Yamada (members), and *ex officio* Mr. Mansfield (Rapporteur). Membership was still open to other members of the Commission.

*The meeting rose at 5.50 p.m.*

### 2752nd MEETING

*Tuesday, 6 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

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

Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

**The responsibility of international organizations  
(continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup>  
A/CN.4/L.632)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIR invited the Commission to continue its consideration of draft articles 1 and 2 contained in the first report on the responsibility of international organizations (A/CN.4/532) introduced by the Special Rapporteur.

2. Ms. ESCARAMEIA commended the Special Rapporteur for his history of the topic. Like him, she believed that the Commission should try to model the draft articles on the responsibility of international organizations on the draft articles on State responsibility for internationally wrongful acts<sup>2</sup> whenever there was no specific reason to do otherwise. As for the scope of the study and with regard to the definition of the term “international organization”, it was good to use the references to international organizations contained in previous conventions. Since international organizations were not composed exclusively of States and their constituent instruments were not always international treaties, the Special Rapporteur was proposing a functional approach to the definition of an international organization, starting from the premise that, in order for such organizations to have responsibility, they must have international personality. While she realized that the organization itself was different from the sum of its members, she had problems with the Special Rapporteur’s proposal to use the governmental functions exercised by such organizations as a defining criterion. Governmental functions were in fact very difficult to establish. International organizations could exercise functions that were associated more with the State, for instance, judicial or legislative functions, but they could also be lobbies for human rights or environmental protection. Would an international organization then be responsible only for acts arising from its judicial or legislative functions and not from its other functions?

3. She agreed fully with the scope of the draft articles as defined in article 1, namely, responsibility under international law, but not civil liability. She also agreed that the Commission should limit itself for the time being to acts that were wrongful under international law and should tackle the difficult question of the responsibility of States which somehow contributed to the wrongful act of an organization or which were members of an organization that committed a wrongful act, the responsibility of the organization itself being a different issue. On the other hand, she had problems with the wording of article 2, particularly the phrase “insofar [as] it exercises in its own

capacity certain governmental functions”. That seemed to exclude any organization which did not exercise governmental functions, probably because it would involve issues of civil liability, but that could raise the question of international responsibility for acts that were not easily connected with governmental functions. That led to the core question of what governmental functions were. It might be safer to go back to the traditional criteria of the organization’s membership and constituent instrument and to say that the latter did not necessarily have to be an international treaty and that the organization’s members could be any kind of territorial-based entity, in other words, territories as well as States. She assumed that the present study did not apply to organizations whose member were non-territorial entities, such as individuals or non-governmental organizations.

4. Mr. PAMBOU-TCHIVOUNDA said that the use in English of the words “governmental functions” might mislead the reader. It went without saying that the concept of government related to States, but the topic under consideration concerned not States but international organizations. There could therefore be no doubt about what was meant by “governmental functions”, and the Special Rapporteur appeared to have succumbed to this confusion.

5. Mr. PELLET recalled that, during the consideration of the draft articles on State responsibility for internationally wrongful acts, the Commission had had lengthy discussions on how the idea of *prérogatives de puissance publique*, which was familiar to French jurists and had ultimately been used, should be translated into English. What applied in the context of State responsibility was less appropriate in the context of the responsibility of international organizations, however. The English term posed a real problem, whereas the French was perfectly acceptable, and a very complicated translation problem was thus involved. He nevertheless reserved his position, as he was not sure whether the definition of an international organization should be based on governmental functions. Many international organizations had no such functions; what they provided was much more of an international public service.

6. Mr. DUGARD said that the Special Rapporteur had been wise in stressing the elements of an international organization’s membership and its function in article 2. It would be extremely difficult to emphasize only governmental functions because some organizations seemed to exercise them while others did not. Many people considered, for example, that national liberation movements had international legal personality and could exercise governmental functions. The same might be said of many non-governmental organizations, which increasingly carried out functions normally reserved for States. It was even fair to say that today they played an important role in the development of international law, perhaps even in the creation of customary law, which might be described as a governmental function. But that simply showed that governmental functions could not be used as the sole criterion. There must be an additional criterion, and the Special Rapporteur had wisely chosen to emphasize both the function of the organization and the fact that States must be members. There must be some States involved in the organization in order to give it an intergovernmental char-

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st meeting, footnote 3.



acter. There were always going to be difficult cases, and that was why it was important to emphasize both criteria.

7. Mr. BROWNLIE said that it was not a good idea to try to define what governmental functions were. Governments did all sorts of things. They could create railways and even private enterprises. From a purely pragmatic viewpoint, he wondered why the criterion was useful as a factor of differentiation.

8. Mr. GAJA (Special Rapporteur) said he agreed that there was indeed a translation problem, the reverse of the one that had come up during the drafting of the draft articles on State responsibility for internationally wrongful acts. The term “governmental functions” could be understood in many ways. The concept could be widened to comprise that of *service public*, as mentioned by Mr. Pellet. The basic reason for having a criterion of that sort was that the Commission should be developing rules which followed the framework of the ones on State responsibility. It was reasonable to take into consideration those entities that, even if it was only a small part of their activity, could be assimilated to the activity of States, because some of the functions of the international organization were of the kind that a State would normally be expected to undertake. That did not mean that there might not be obligations under international law that were incumbent on other types of organizations. Similarly, individuals had not only rights under international law, but also obligations. The fact that one did not deal with the responsibility of individuals, or of non-governmental organizations composed of individuals, did not mean one denied that problems involving the responsibility of such entities existed.

9. Mr. ROSENSTOCK pointed out that a significant element of article 2 that facilitated the kind of language and approach used by the Commission was that it spoke of exercising certain functions, meaning that the institutions functioned, at some point, in some way, at a governmental level or like a government. That did not mean that they were governments, but rather that they did some things that governments did. The fact that it was not necessary for their activities to be specifically those of governments in order for the particular actions under consideration to give rise to responsibility seemed to support the general approach in article 2. It might be argued that the wording was not ideal, but, until something better was found, it could be seen as a reasonably sensible definition of what ought to be involved if the laws of State responsibility were to be applied.

10. Mr. BROWNLIE said that, in fact, the concept that worked best was that of “activity analogous to that of Governments”—a beautiful phrase that was completely useless, but was exactly what was needed. The article referred not to governmental functions but to the functions of international organizations, which were analogous to governmental activity.

*The meeting rose at 10.30 a.m.*

## 2753rd MEETING

*Wednesday, 7 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Statement by the Director-General of the United Nations Office at Geneva

1. Mr. ORDZHONIKIDZE (Director-General, United Nations Office at Geneva), welcoming the members of the Commission to Geneva, said that since its inception the Commission had held almost all its sessions in that city. Tasked with the progressive development and codification of international law, it had made impressive achievements over the 55 years of its existence: the law of treaties, the law of the sea, State responsibility, diplomatic relations, humanitarian law and an international criminal court were just a few of the areas that owed their codification to the Commission. Never before had so many different fields of international law been clarified and regulated. The fact that the last half-century had seen the universal codification of international law at an unprecedented pace was attributable in no small measure to the work of the Commission.

2. International law laid the foundations for just, humane and rational conduct among States. It set the basic rules on which any civilized society must rely. At the dawn of the twenty-first century, which was witnessing the emergence of a global community confronted with unprecedented challenges and risks, well-ordered State behaviour had become more crucial than ever before.

3. It was sometimes averred that the rule of law was too often ignored or flouted. He profoundly disagreed with that assertion: those whose short-sighted motives drove them to show contempt for international law usually found themselves obliged to circumvent it.

4. The scope of the Commission's agenda for its fifty-fifth session testified to the extensive areas of law that still required international regulation. The fact that the Commission studied topics such as diplomatic protection, reservations to treaties, unilateral acts of States and the responsibility of international organizations was proof that many fundamental elements remained to be defined before universally accepted norms were established. He was confident that the Commission would continue to fulfil

its pivotal role of contributing to the establishment of the rule of law in international relations, a notion that lay at the heart of the Charter of the United Nations. The United Nations Office at Geneva stood ready to provide any facilities that could contribute to creating an environment conducive to the smooth functioning of the Commission.

**The responsibility of international organizations**  
(*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup>  
A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

5. Mr. RODRÍGUEZ CEDEÑO said that article 1 of the draft articles on the responsibility of international organizations, as proposed by the Special Rapporteur in his first report (A/CN.4/532), restricted the scope of the draft to two separate areas which must, however, be considered as a whole: the international responsibility of an international organization for acts wrongful under international law; and the international responsibility of a State for the conduct of an international organization. Article 1 thus excluded civil liability, for justifiable reasons set out in paragraphs 29 and 30 of the report: questions of civil liability had not been dealt with in the Commission's previous work on State responsibility for internationally wrongful acts; furthermore, exclusion of that issue reflected the preference of most States. The first sentence of article 1 was thus satisfactory as currently drafted. The draft also covered responsibility for acts of another international organization, and the responsibility that might arise from the internationally wrongful act of an international organization of which that organization was a member. Thus, the wrongful act might arise from an act not performed by the organization itself, as was reflected in the second part of the draft article, the wording of which was broadly acceptable. The form of the article might perhaps be improved by dealing with the two situations it envisaged in two separate paragraphs. That, however, was a question for the Drafting Committee.

6. Article 2, defining the term "international organization", would need to be expanded in due course to cover other terms to be introduced elsewhere in the draft articles. The term must be defined in the broader context of the organization's international responsibility for wrongful acts. The definition of an "international organization" as an "intergovernmental organization" used, *inter alia*, in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Vienna Convention on Succession of States in Respect of Treaties (hereinafter "the 1978 Vienna Convention"), was thus too general for the purposes of the present draft articles and should be retained as just one element of a new definition covering a wider range of organizations.

7. It was important to distinguish clearly between, on the one hand, the legal capacity of the organization *vis-à-vis* the internal law of the State and, on the other, the inter-

national legal personality of the organization as a subject of international law. In practice, those terms tended to be confused. Accordingly, the Rome Statute of the International Criminal Court had included a provision expressly defining the Court as an international organization as well as a criminal jurisdictional body. Those were two different and not necessarily complementary questions, as the Special Rapporteur pointed out in paragraph 18 of his report.

8. Two fundamental criteria should govern a definition appropriate to the draft articles under consideration. First, the organization must be one established by States, whether through a formal instrument such as a treaty or agreement, or by some other means reflecting a conventional basis for its establishment. Second, it must be an intergovernmental organization, not in terms of its composition but in terms of its creation. In other words, the organization must be established by States, though it could also include entities other than the State—a criterion that automatically excluded non-governmental organizations, which did not fall within the scope of the draft.

9. The Special Rapporteur also put forward another, more complicated criterion: the vexed question of governmental functions. Leaving aside any potential problems of translation, such functions were analogous to governmental functions, as Mr. Brownlie had pointed out, but related to the competences—including implicit competences—and powers conferred on the organization by States. They were not "governmental functions" in the strict sense of the term, but functions that the organizations could perform in the context of the competences established by their constitutions, by their internal rules, regulations and decisions, and by practice.

10. In short, the definition, or the commentaries thereto, should thus specify that an organization, regardless of its composition, must be established by States; must have international legal personality; and must exercise its functions pursuant to its own relevant rules and practice.

11. Mr. PELLET, welcoming Mr. Gaja to the "special rapporteurs' club", said that the Special Rapporteur's first report was both stimulating and debatable. The task of a special rapporteur was often a thankless one, calling for an ability to give as good as one got and, above all, to turn colleagues' suggestions and criticisms to one's advantage while continuing to steer a steady course. The Special Rapporteur seemed abundantly endowed with all those qualities, save, perhaps, the ability to respond to ferocious criticism with a like ferocity. That quality, however, might too lurk undetected.

12. While, generally speaking, he endorsed the Special Rapporteur's approach, he nonetheless had some serious grounds for disagreement. In that regard he recalled how, when newly elected to the Commission, he had been surprised at the manner in which members would praise special rapporteurs' reports at length, only to subject them to very severe strictures thereafter. Responding to his surprise, a more experienced member had explained to him that the role of members *vis-à-vis* a special rapporteur was analogous to that of a surgeon, namely, to anaesthetize the patient before proceeding to painful surgery.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

13. First, the anaesthetic. The report was dense, concise, intelligent, interesting and broadly acceptable. In particular, the Special Rapporteur was right to define his topic in relation to the topic of State responsibility, and to propose to treat problems relating to the responsibility of international organizations that—rightly or wrongly—had been left aside by the Commission in its consideration of State responsibility. For instance, as the Special Rapporteur himself pointed out somewhat allusively in paragraphs 8 and 9 of the report, and more explicitly in paragraph 33, it might have been more logical to deal with State responsibility for the conduct of an international organization in the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> rather than in the current set of draft articles. That course, however, had not been taken. Nonetheless, if such a responsibility existed, it must certainly be dealt with somewhere, and the new topic was the natural—though not the most logical—place to do so.

14. However, there were two “buts”. First, the title of the topic was somewhat misleading. A better title would be “Responsibility arising by reason of the conduct of international organizations”; for one might otherwise infer that the conduct of international organizations could trigger the responsibility of the State. While a formal amendment of the title was not indispensable, that ambiguity, to which the Special Rapporteur had drawn attention, should be borne constantly in mind.

15. The same could not be said of his second reservation. The Special Rapporteur showed undue boldness, in his drafting of article 1, in seeming to propose that States could be held responsible for the conduct of an international organization—a point to which he would revert when, having, as it were, administered the anaesthetic, he came to perform the operation itself.

16. That being said, he nevertheless unreservedly endorsed the decision, referred to in paragraph 30 of the report, to exclude the responsibility of international organizations for activities not prohibited by international law. He agreed with the Special Rapporteur that those questions had their place within the topic of liability, and that they should be taken up forthwith in that context. He had no doubt that, in principle, the problem of liability was posed in the same terms for international organizations as for States, even if the formers’ lack of any resources could give rise to serious problems calling for imaginative yet practical solutions.

17. A third point on which he agreed with the Special Rapporteur concerned the method adopted. The Special Rapporteur was right to stress that the Commission was not starting from square one, having already postulated certain approaches, if only *a contrario*, as was clearly if somewhat succinctly indicated in paragraphs 3 to 11 of the report. He also endorsed the idea, again adumbrated somewhat allusively, notably in paragraph 11, that the draft articles on State responsibility for internationally wrongful acts should constitute a reference tool but that there should be no prior assumption of similarity, or even of comparability. There could be considerable variations between one problem and another, and even between one organization and another. In some cases international or-

ganizations “behaved” like States and there was no reason to treat them differently. That was particularly true of integration organizations, which tended to replace States in the exercise of their traditional functions and prerogatives. In other respects, however, international organizations posed specific problems which should be highlighted, and the solutions to them should not be calqued on the rules applicable to States. That, at any rate, was how he interpreted the Special Rapporteur’s intentions, couched as they sometimes were in somewhat sibylline terms.

18. Finally, he unhesitatingly endorsed the format adopted by the Special Rapporteur for draft articles 1 to 3, regarding the scope, definition—perhaps “definitions” would prove more appropriate—and general principles.

19. Now that the patient was—it was to be hoped—sufficiently anaesthetized, he would turn to some more critical remarks, stressing, however, that the problems tackled by the Special Rapporteur in his first report were so fundamental and central to international law that they must inevitably generate heated and impassioned debate.

20. Article 1 was conspicuous both for what it said and for what it omitted to say. As to the first sentence, he agreed that the scope should be limited to responsibility for internationally wrongful acts, and that it was thus imperative to align it with the draft articles on State responsibility for internationally wrongful acts. His only objection concerned the phrase “for acts that are wrongful under international law”. There seemed no reason to discard the terminology established in the draft articles on State responsibility, which had remained unchanged since the 1970s and was now firmly established in doctrine, and even in the jurisprudence of ICJ. The wording “for internationally wrongful acts” should be used.

21. He was more critical of the second sentence, to which he had already alluded. As drafted, it implied that the State could be responsible for the conduct of an international organization. That was possible, but not certain; and to incorporate it into a set of draft articles without first proving or even debating it seemed somewhat rash.

22. There were two possible solutions. The first, inelegant but simple, would be to place the sentence in square brackets pending further consideration. The second solution, one which he himself favoured, would be to delete the second sentence and to redraft the first sentence so as not to rule out that possibility, adopting some such wording as “This draft article applies to the question of [international] responsibility incurred by an international organization or arising by reason of internationally wrongful acts of an international organization.” The precise wording could be left to the Drafting Committee. The important point was to make it clear that the article concerned the responsibility for internationally wrongful acts of an international organization, while not prejudging questions of attribution or of the consequences or content of responsibility, which would also need to be considered in due course.

23. Admittedly, the first part of his proposal might raise objections, since responsibility incurred by an international organization did not necessarily exclude liability for acts not prohibited by international law, which the Spe-

<sup>2</sup> See 2751st meeting, footnote 3.



cial Rapporteur wanted to leave aside. However, wording could doubtless be found that would satisfy both himself and the Special Rapporteur. Besides, none of the draft articles on State responsibility for internationally wrongful acts formally excluded acts not prohibited by international law, and he wondered whether it was absolutely necessary to do so in the present draft, despite the somewhat sibylline explanations given by the Special Rapporteur in his report. It would become sufficiently clear from subsequent articles that such acts were excluded, and the title could even be changed, as had happened *in extremis* with the draft articles on State responsibility. Paragraph 31 of the report seemed to suggest that the Special Rapporteur would be open to making changes.

24. As to what the first sentence of draft article 1 omitted to say, he noted that the Special Rapporteur discussed one of the most important elements of the report, namely, civil liability, in paragraph 29 but made no mention of it in article 1. He disagreed with the Special Rapporteur's proposition that issues of civil liability, which the Special Rapporteur contrasted with responsibility under international law, should be left aside. He had two problems with that proposition. First, he was not convinced that civil liability and international responsibility could be contrasted in that way. International responsibility was neither civil nor criminal, it was simply international; the opposite of civil liability was not international responsibility but criminal liability. Second, and more importantly, unlike Mr. Rodríguez Cedeño he did not think that civil liability should be excluded. The Special Rapporteur gave as reasons for such exclusion the fact that the draft articles on State responsibility for internationally wrongful acts did not deal with questions of civil liability and his view that to state rules on civil liability would be an exercise in progressive development, rather than codification, of international law, and that the Commission was not the most appropriate body for studying those questions.

25. He disagreed with the Special Rapporteur for a number of reasons. First of all, under its Statute, the Commission was responsible for both the progressive development and the codification of international law. Second, he was not entirely sure that the Special Rapporteur's position on civil liability was based on premises that were factually correct. It did seem evident that what the Special Rapporteur termed "responsibility under international law" was based on far sounder practice than what he termed "civil liability". Third, the issue of civil liability raised real problems that were as essential to solve, if not more so, as those related to the traditional notion of international responsibility. The examples given in a footnote in paragraph 29 of the report made that quite clear. Fourth, he was far from convinced that the two concepts were as different and as easy to separate as the Special Rapporteur suggested. If international organizations incurred international responsibility in the restricted sense used by the Special Rapporteur, the question arose who would assume the resulting obligations, namely, reparation. That inevitably posed problems of the precise kind that the Special Rapporteur was proposing to leave aside by saying that they were issues of civil liability. Finally, he did not see why the Commission should not be the appropriate body to study those questions. He therefore disagreed with the exclusion of issues of civil liability from the wording in

paragraph 39, believing that the Commission could and must deal with those issues. Moreover, the Special Rapporteur was entirely capable of guiding the Commission in that task.

26. If, as he very much hoped, the Commission agreed that it should consider issues of civil liability and the Special Rapporteur resigned himself to doing so, that might mean article 1 would have to be redrafted. If the Commission subscribed to the Special Rapporteur's restrictive interpretation of the concept of international responsibility, "international" would have to be deleted before "responsibility" in the first sentence. Personally, he did not interpret the concept so narrowly and took the view that civil liability was in fact indissociable from international responsibility. If the Commission took the same view, the sensible solution would then be to retain "international". It was important not to ignore problems such as those that had arisen in the International Tin Council case (*MacLaine Watson and Co., Ltd. v. Council and Commission of the European Communities*). In that case, the English courts had been able to resolve some issues, but they had acted, or should have acted, only as bodies for the implementation of international law.

27. Draft article 2 posed a number of difficulties that had already been discussed following Ms. Escarameia's statement at the previous meeting and by Mr. Rodríguez Cedeño. It was not the first time that a special rapporteur had attempted to define the concept of "international organization". At the Commission's eighth session, in 1956, Sir Gerald Fitzmaurice, in his first report on the law of treaties, had defined an international organization as "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States..."<sup>3</sup> Parts of that definition could be said to have become obsolete. For instance, not all international organizations were necessarily established by treaty, OSCE being the most notable exception. Moreover, international organizations did not necessarily consist only of member States, although the term "collectivity of States" did not expressly exclude non-State members. The only real objection that could be made to the 1956 definition, in his view, was that it did not envisage the possibility of international organizations consisting purely of organizations. The only such organization with which he was familiar was the Joint Vienna Institute, set up in 1994 by agreement of IMF, BIS, EBRD, OECD and WTO, but there might be others. Generally speaking, however, the 1956 definition was a good starting point, and a reference to organizations of organizations, although not really crucial, could be discussed at some future point.

28. Fitzmaurice's definition had been produced in the context of the law of treaties, whereas the Commission was currently dealing with international responsibility. However, that did not warrant a fundamental difference of definition. Whether the issue was the organization's capacity to conclude treaties or its capacity to engage its international responsibility, neither was conceivable unless the organization had international legal personality. On that point, he had considerable problems with the Special Rapporteur's approach, as discussed at some length in paragraphs 15 to 19 of the report. He did not entirely agree

<sup>3</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108.

with those paragraphs, firmly believing as he did that all international organizations had an objective international personality—not for the negative reasons invoked by ICJ in its advisory opinion in the *Reparation for Injuries* case, referred to in a footnote in paragraph 19 of the report, but for those invoked by Judge Krylov in his dissenting opinion in the same case. It was surprising that the Special Rapporteur attached such importance to the Court's advisory opinion, which seemed to be of marginal relevance to the issue at hand, and also that the Special Rapporteur drew no conclusions from his reasoning. It was essential to make the point that international organizations had international responsibility not because they existed but because they had international personality—a chair or a dog existed, but that did not give it responsibility. He could not understand why, in attempting to define international organizations for the purposes of international responsibility, the Special Rapporteur had not made that point. The Court's advisory opinion stated that international organizations had a measure of international personality and that that was sufficient for them to incur responsibility. Since, judging by paragraph 15, the Special Rapporteur agreed with that position, he wondered why such a vital element was omitted from the definition in article 2 and suggested that it should be reinstated.

29. The Special Rapporteur took the view that the definition should not include a reference to establishment by treaty. He, personally, would prefer to retain such a reference—while explaining in a commentary that there might be exceptions—since the vast majority of international organizations were established by treaty. More to the point, he wished to correct a slight error in paragraph 14. As Legal Adviser to the World Tourism Organization, he wished to point out that, contrary to the assertion in the 1971 article in the *Netherlands International Law Review*,<sup>4</sup> the organization had been established not by a non-binding instrument of international law but by a binding international instrument (Statutes of the World Tourism Organization), signed in Mexico City on 27 September 1970, which had entered into force on 2 January 1975 and which was registered with the United Nations Secretariat. It would, in fact, probably become the sixteenth specialized agency of the United Nations system in the course of 2003. In article 1 of its statutes, the Organization expressly defined itself as “intergovernmental”, even though its membership consisted of member States (full members), non-self-governing territories (associate members) and private companies, individuals, universities, non-governmental organizations, and others (affiliate members).

30. Accordingly, article 2 could simply state, as was mentioned in paragraphs 12, 13 and 23 of the report, that the definition referred to “intergovernmental” organizations, or else, as suggested by the Special Rapporteur, that it referred to organizations which included States among their members or, as suggested by Mr. Rodríguez Cedeño in an attempt to avoid mention of a treaty, to organizations established by States, in which case the commentary could explain that such organizations could be established either by treaty or by non-binding instrument. All those options were acceptable, but the first was the simplest. He

disagreed that to use the word “intergovernmental” would be to wrongly equate Governments with States. Whichever of the three options was chosen, the commentary would have to recall that organizations of organizations could also exist.

31. In his opinion, organizations of organizations raised different problems, if only because they lacked the safety net of having States behind them. Such problems would have to be discussed when dealing with the issue of the possible responsibility of members of international organizations for the conduct of an international organization whose membership included States and other international organizations. That issue could not be left out of the draft articles, and the Special Rapporteur certainly had not suggested doing so.

32. The definition should therefore include the following elements: intergovernmental, possibly established by treaty, and possessing legal personality. The Special Rapporteur had, however, omitted any reference to establishment by treaty or to international legal personality. Instead, he had polarized the definition around the organization's exercise of certain governmental functions in its own capacity. As he had said at the previous meeting, using the English term “governmental functions” to render *prérogatives de puissance publique* might be acceptable for the draft articles on State responsibility for internationally wrongful acts, but not for those on responsibility of international organizations. Even though, as Mr. Rosenstock had said, it might be a generally reasonable translation, in the present case it was highly problematic. In that connection, he agreed with Mr. Brownlie that the organization must exercise functions analogous to those of a government, but he did not share his misgivings about including the management and promotion of tourism among such functions. The rendering “governmental functions” was a problem only for the English version, but in any case he seriously doubted whether the criterion used by the Special Rapporteur for the purposes of the draft was valid. In the systems of internal administrative law with which he was to some small extent familiar and which invoked the concept of *prérogatives de puissance publique*, the concept always seemed to refer to “inordinate” prerogatives of ordinary law, reflecting the idea that States and their organs did not behave like private individuals. If all activities that were not strictly governmental were excluded from the draft articles, however, that would leave little more than responsibility for the use of force, the conclusion of treaties and the adoption of binding legislation. That approach was unsatisfactory for many of the same reasons that he had invoked with regard to civil liability.

33. Moreover, the notion of *service public* was used in French administrative law to differentiate between activities under administrative law and those under private law—in other words, activities in the general interest as opposed to activities that served private interests. If he had to choose between the two terms, he would prefer to use *service public*. Article 2 would then read in French “...dans la mesure où elle assume une activité de service public”. However, he would rather use neither term, for a number of reasons. First, it was ill advised to refer, even implicitly, to concepts of internal law in an international legal instrument. That was clear from the translation problems to which he had alluded. International law was

<sup>4</sup> D. R. Gilmour, “The World Tourism Organization: international constitutional law with a difference”, *Netherlands International Law Review*, vol. 18 (1971), p. 275.

neither civil, criminal, Romano-Germanic nor common law, and he saw no reason to refer to concepts of internal law in the draft articles. The important point in article 2 was not that the international organization exercised certain governmental functions but that it did so “in its own capacity”. As soon as the organization acted in its own capacity rather than on behalf of its member States, it became internationally responsible. In fact, even the mention “in its own capacity” might be redundant, since an organization with legal capacity automatically acted in its own capacity.

34. To sum up, in article 2 his preference would be simply to say that the term “international organization” referred to an intergovernmental organization with international legal personality. However, he did not want the patient to emerge from the operation without anaesthesia and with no limbs left, so he would be prepared to retain the term “in its own capacity”, if the Special Rapporteur was attached to it, by inserting at the end “insofar as it acts in its own capacity”. For the time being, he could also agree to retain the wording “which includes States among its members” or to add a reference to the organization’s establishment by States or by treaty, although that did not really add anything. His proposal was a blend of the wording used by Fitzmaurice and by the Special Rapporteur, but it seemed appropriate.

35. He wished to thank the Special Rapporteur for initiating what promised to be a fascinating debate.

36. Mr. GAJA (Special Rapporteur) said that he would respond later to Mr. Pellet’s constructive comments. However, to dispel any confusion, he wished to clarify one point immediately. It had never been his intention to deny that international legal personality was an indispensable element. However, since many international organizations had such personality, he had not deemed it necessary to deal with the issue at length in the report or to include it expressly in draft article 2. The term “capacity” in article 2 implied that the organization had legal personality. While the wording might be improved, there was no need to discuss the issue of legal personality; such personality was an essential element and he did not think that Mr. Pellet’s otherwise constructive criticism was entirely justified on that score.

37. Mr. DUGARD said that, as he recalled, the International Tin Council would have fallen within the definition in article 2, since the Council had had member States and had exercised certain governmental functions. That point would prove important at a later stage. Of more immediate importance was the fact that the Special Rapporteur seemed to suggest in his report that the International Tin Council case (*Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*) had involved an internationally wrongful act, but that the plaintiffs had chosen to take the case to the municipal courts rather than to international litigation. If that was so, it was difficult to invoke that case to justify making a distinction between international responsibility and civil liability. He shared Mr. Pellet’s concern that the two concepts should not be separated, but he would be grateful if someone could clarify the history of the International Tin Council litigation for him.

38. He agreed with the Special Rapporteur that there was no need for a reference to international legal personality. Indeed, to include such a reference might be risky, given that an intense debate was currently under way on the legal personality of non-governmental organizations. The purpose of article 2 was to exclude non-governmental organizations from the scope of the draft by placing the emphasis on States and the exercise of governmental functions, and he supported the approach taken by the Special Rapporteur in that regard.

39. Mr. GAJA (Special Rapporteur) said the litigation concerning the International Tin Council did undoubtedly yield interesting material, and the judgements handed down by national courts, particularly the English courts, were of special interest. The problem was that, while some questions before national courts had pertained to international law, there had chiefly been issues of municipal law, indeed of civil liability. It was such issues that he thought were dissimilar to the ones dealt with in the draft articles on State responsibility for internationally wrongful acts, and he proposed to deal only with those that came under international law.

40. Mr. KAMTO, referring to Mr. Pellet’s statement that a chair or a dog could not be a subject of international law or bear international responsibility—in other words, that it was not because something existed that it had objective international personality—said the question should rather be viewed from the standpoint of legal personality. The status of subject of international law was conferred on an international organization by the fact that States were members. By their membership, States brought to the organization a number of prerogatives and constituent elements of international legal personality. The advisory opinion of ICJ in the *Reparation for Injuries* case was insufficiently clear in that regard, but he had problems with Mr. Pellet’s assertion that Judge Krylov’s dissenting opinion was correct.

41. Mr. Rodríguez Cedeño had raised the interesting point that it was the element of creation, and not merely of control, that counted. IUCN was a non-governmental organization and had not been created by treaty; did the presence of States within it mean it could be considered an international organization? He did not think so. For that purpose, the State presence must be large enough so that States could be deemed to have control over the organization. It was being contended in legal writings in France that enterprises which signed contracts with individuals became subjects of international law. He thought not: they lacked the element that transformed the State into a subject of international law, the element of sovereignty.

42. Mr. BROWNLIE said that he had at one point advised a number of the member States of the International Tin Council on what to do, and that in the end they had engaged in extensive diplomatic activity, for lack of any other recourse. Some had gone to municipal courts, which had made for terrific fun for the lawyers but had immensely complicated the situation and delayed the diplomatic resolution of the problem. The Special Rapporteur was quite right that the judgement of the English court, while interesting, was not about international law; rather, it was about recognition in English courts of international organizations. In that and other contexts referred to by



Mr. Pellet, the Commission might advert to the question of what was the applicable law, which often provided the answer.

43. Mr. PELLET, responding to Mr. Kamto's remarks, said Mr. Kamto was reasoning the wrong way around: one should start from the proposition that international organizations had legal personality, which was precisely what ICJ had done in its advisory opinion in the *Reparation for Injuries* case. It had then looked into whether that legal personality was objective. Judge Krylov's argument pertained solely to the second issue. A chair could never have objective personality, as it had no personality whatsoever. An organization did have personality, and personality which, it seemed to him, must necessarily be objective. On the other hand, like Mr. Kamto, he thought that consideration should be given to Mr. Rodríguez Cedeño's proposal to incorporate in the definition of international organizations a reference to the fact that they were created by States.

44. He strongly disagreed with Mr. Dugard's final point: not including in the draft any reference to international legal personality would not signify that non-governmental organizations were excluded. Both non-governmental and intergovernmental organizations had international legal personality to some degree, that of the latter being much better established than that of the former. The main difference was that intergovernmental organizations were created by States, *inter alia*. In the absence of legal personality, however, there was no responsibility, and the draft was supposed to be about responsibility.

45. The International Tin Council had been a purely intergovernmental organization comprising no private individuals, but only States and the European Community. Had it exercised governmental functions? Yes and no: it had bought and sold tin, and, under the Special Rapporteur's very broad conception of governmental functions, that could constitute the exercise of such functions—but so could engaging in tourism.

46. Finally, he agreed with what had just been said by Mr. Brownlie: the question was not which municipal courts had handed down judgements, but what types of issues had been involved. The English courts, like the French ones, were not terribly concerned about international law, even though it was part of domestic law, and they had applied English law. That did not mean, however, that the issues involved did not raise problems of international responsibility with which the Commission should be concerned.

47. The CHAIR, speaking as a member of the Commission, noted that little had been said about an essential feature that should be part of the definition of international organizations: their capacity to assume rights and obligations under international law. Responsibility was triggered when an obligation under international law was breached. Irrespective of how it was created or of its composition, the important point was that an international organization was one that assumed obligations under international law.

48. Mr. RODRÍGUEZ CEDEÑO said there were two entirely unconnected criteria within the definition of an

international organization: first, the organization must be created by a State, and second, the organization must have international legal personality. Such personality was usually explicitly set out in the constituent instrument or was conferred on the basis of the organization's activities. As the Chair had suggested, that meant that the organization had the capacity to assume rights and obligations at the international level. Not all organizations or entities created by States were necessarily international organizations with international legal personality: even though they were public entities, States could set up private enterprises.

49. Mr. FOMBA, congratulating the Special Rapporteur on the excellent quality of his report, said the Commission had already done work on the responsibility of international organizations, even if only incidentally. The Special Rapporteur's review of that work was useful, and the conclusion had been drawn that the responsibility of international organizations must be handled in a manner analogous to the approach taken to the responsibility of States. Personally, he would add that that must be done *mutatis mutandis*, and he noted in that connection Mr. Pellet's remark about similarity and comparability.

50. The Special Rapporteur had rightly drawn attention to the fact that the topic raised complex and controversial issues of doctrine. The Commission must accordingly move forward with imagination yet also circumspection, particularly in making comparisons between States and international organizations and drawing the appropriate conclusions.

51. Draft article 1, which covered the scope both *ratione materiae* and *ratione personae* of the study, seemed to present no difficulties, especially since he agreed with the Special Rapporteur's view that the scope of the study did not include international liability for activities not prohibited by international law. He had some questions about whether civil liability should be included and endorsed the objections raised by Mr. Pellet, but he agreed with the Special Rapporteur that questions such as the responsibility of an international organization for conduct performed by a State or another international organization and the responsibility of an international organization for the unlawful conduct of another organization of which the first organization was a member should come within the scope of the study. Those issues, and the related remarks by Mr. Pellet, deserved further consideration and should be reflected in some way, but he had no firm ideas as yet about whether it should be in the wording of the draft article itself or in the commentary. Mr. Pellet's proposal for revising the title of the article to take account of those issues likewise deserved consideration. He agreed that matters that concerned the responsibility of States and were related to the wrongful conduct of an international organization must also be included in the scope of the study.

52. In draft article 2, the Special Rapporteur proposed two criteria for the definition of an international organization. First, its membership must comprise States, reflecting the desire to concord with the Vienna definition but also to take account of recent developments in the lives of international organizations, some of which now included entities other than States. The second criterion was that of autonomy in the exercise of "certain governmental functions". The present wording in French, *certaines préro-*



*gatives de puissance publique*, had already given rise to extensive discussion: apparently, under French law, few organizations had the capacity to exercise such functions. Alternative formulations such as those proposed by Mr. Brownlie and Mr. Pellet would thus be preferable. While the criterion of international legal personality had been amply shown to be relevant, perhaps that of the exercise of certain governmental functions would prove to be a dead end. It was a delicate question, and the Commission should examine it further.

53. Mr. PAMBOU-TCHIVOUNDA said that the first report on the responsibility of international organizations was fittingly sober, even though certain subjects were emphasized while others were left undeveloped. The approach, which was outlined in paragraph 11 and which he endorsed, was to align the treatment of the topic upon the work done on the responsibility of States for internationally wrongful acts. The limitations inherent in basing the treatment of one subject upon that used for another should be kept in mind, however, as they had become apparent in the work on unilateral acts of States. The Special Rapporteur on the responsibility of international organizations should therefore take account of the particularities of international organizations when pursuing the parallels between that topic and that of State responsibility.

54. In the matter of substance, he queried the need to raise the question of what criteria should be used to define the international organization for the purposes of the present study. Surely it was answered in the literature as well as in the codification conventions cited in paragraph 28 of the report. Was there any reason to depart from the definition in those conventions? He thought not. Any international organization whose acts or omissions could engage its international responsibility was manifestly an intergovernmental organization. It would be prudent and appropriate to the Commission's past practice, he believed, to hew to that description of an international organization.

55. By referring to acts or omissions which might engage the responsibility of an international organization, he had been alluding to the source of the international responsibility of the international organization. One could agree with the Special Rapporteur in that regard that a functional definition of the international organization was appropriate, as was made clear in paragraph 25 of the report: "What seems to be significant for our purposes is not so much the legal nature of the instrument that was adopted for establishing the organization, as the functions that the organization exercises."

56. The reason for stressing the functional aspect was that, in pursuing the purposes and objectives which an international organization had assigned itself, specific functions were exercised in the form of acts or the failure to act, and those functions were at the origin of any prejudice that might be caused to other subjects of international law, whether States or international organizations. The concept of function was crucial, stemming as it did from the idea of international legal personality. It was the attribute that made the international organization a subject of international law, even if the organization did not have sovereignty, because an international organization was not a State, but it had legal personality, which was implicitly

conferred to it by the States that created it, thereby making that organization a subject of international law. But at the same time, an international organization had obligations towards other subjects of international law, and that included the obligation to be responsible for the possibly prejudicial character of the acts through which its functions were exercised. Mr. Pellet had rightly referred to the overriding importance of responsibility's being linked to international legal personality. Those key concepts must be defined in one of the draft articles.

57. The Special Rapporteur had asked the Commission to consider the scope of the criterion of legal personality since the *LaGrand* case. But it might be argued that ICJ had gone rather too far in some instances. It would not have occurred to anyone in the Commission to treat an international organization as an individual just because, in the *LaGrand* case, the Court had found that an individual had an international legal personality. Similarly, in its advisory opinion in the *Reparation for Injuries* case, the Court had had the idea of assimilating a State to the United Nations and, by extension, to an international organization. Everyone knew in what terms the Court had produced the advisory opinion: it had done so saying that the United Nations was neither a State nor a supra-State. Should the Commission say, on the basis of the *LaGrand* case, that the United Nations or an international organization was neither a State nor something less than an individual? That would be an affront, if not to States that created an international organization, then at least to the international organization as a subject of international law. Of course, nowadays anything was possible. What had just happened in Baghdad might lead some to conclude that the United Nations was worthless and that States could decide to do as they pleased.

58. Regardless of whether an international organization was established for the purpose of cooperation or integration, it was the product of those who created it and had assigned it its purposes and objectives and its powers. That was a point on which he disagreed with Mr. Pellet. Even in the case of regional integration organizations, it was the constituent instrument that defined what the organization could and could not do. It was not advisable to try to make too many distinctions.

59. Draft article 1 focused on the question of attribution. Yet, as it stood, it seemed to be meant as a reply to article 57 of the draft articles on State responsibility for internationally wrongful acts. Article 1 made two points, which should have been presented separately. The attribution to an international organization of responsibility that stemmed from its own conduct should form the subject of a separate paragraph, because in its present wording the article gave the impression that both sentences dealt with the same issue. A second paragraph should be inserted to meet that concern and address a question that had not been covered in the draft on State responsibility. Furthermore, the words "for acts that are wrongful under international law", at the end of the first sentence, should be replaced by "for acts which, owing to the conduct of that organization, are wrongful by virtue of international law": it was by reference to the international law of responsibility, which the Commission had already codified, that the responsibility of international organizations must be defined.

60. As to draft article 2, was it sufficient to pose questions of definition? Since legal personality and the functions exercised in accordance with an organization's purposes and objectives were taken into account, it would be better to include the scope of the subject in the title of article 2. For the sake of concision, article 2 should be recast to read: "For the purposes of the present draft articles, the term 'international organization' refers to an intergovernmental organization exercising, by virtue of its international legal personality, the functions required to realize the object and purpose defined in its constituent instrument." Such a wording would cover the whole discussion on the concept of governmental functions.

61. The CHAIR invited the Special Rapporteur to introduce draft article 3 of his report, which read:

*"Article 3. General principles*

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
  - (a) Is attributed to the international organization under international law; and
  - (b) Constitutes a breach of an international obligation of that international organization."

62. Mr. GAJA (Special Rapporteur) said that the main reason for separating the presentation of article 3 from the other two articles was that articles 1 and 2 considered the scope of the topic, while article 3 related to the substance of the rules and also raised different types of questions.

63. The draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session contained in Part One a short chapter consisting of three articles of an introductory nature. Pursuant to article 1, every internationally wrongful act of a State entailed the international responsibility of that State. The meaning of "responsibility" was not defined, but emerged from Part Two of the text. Article 2 gave the elements of an internationally wrongful act. They consisted of the attribution of conduct to a State and the breach of an international obligation. Article 2 contained an implied reference to Chapters II and III of Part One. He would return to article 3 of the text on State responsibility later on.

64. Introductory draft articles of the type adopted on State responsibility might prove useful with regard to international organizations. In the present articles, those provisions would be less prominent, because they would follow the articles on scope, whereas in the draft articles on State responsibility for internationally wrongful acts, they were placed at the very beginning.

65. The propositions contained in articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts were hardly controversial and could be transposed to international organizations. But a few questions arose. The first was whether the statement concerning the attribution of conduct was appropriate in view of

the possibility that an international organization incurred responsibility for conduct which was not its own but that of a State or another organization. Since those cases were of marginal importance and general principles did not exclude that responsibility could otherwise be incurred under certain circumstances, the statement concerning the attribution of conduct might be justified.

66. The second question arose if one accepted the proposal to include the issue of the international responsibility of a State for the conduct of an international organization within the scope of the draft articles, currently in the second sentence of draft article 1. There might seem to be an inconsistency between the provision regarding the scope, which mentioned questions of State responsibility, and the article on general principles, which referred only to the responsibility of international organizations. There again, it could be said that the general principle did not exclude the case of State responsibility, which might be dealt with in other provisions later in the draft.

67. As to drafting, was it necessary to state each general principle in a different article, as had been done in the text on State responsibility? Since the principles were closely interrelated, it might be preferable to combine them in a single article. Logically, the wrongful act occurred first, and then international responsibility arose. However, as had been done with State responsibility, it might be thought that in the draft articles on international responsibility, the stress should be on responsibility. Thus, the same order could be followed as in the draft articles on State responsibility, namely starting with the paragraph on responsibility, then explaining when a wrongful act arose and referring to attribution and the breach of an international obligation.

68. Another issue was whether the draft should include a text similar to article 3 of the draft articles on State responsibility for internationally wrongful acts. As the Commission had noted in its commentary on that article, the idea expressed in article 3—that the characterization of an act of a State as internationally wrongful was governed by international law—was already implicit in article 2: if there was a breach of an obligation, it was of an obligation under international law. Once it was stated that an internationally wrongful act constituted a breach of an international obligation, it hardly seemed necessary to say that that characterization depended on international law.

69. Some might want to follow closely the precedent of the draft articles on State responsibility for internationally wrongful acts and repeat what was arguably implicit. But, on balance, it seemed preferable not to do so, the main reason being that article 3 on State responsibility had been adopted mainly because of a rider, which created a number of problems with regard to international organizations. Article 3 went on to say that the characterization which was governed by international law was not affected by the characterization of the same act as lawful by internal law. A similar statement with regard to international organizations would be controversial, because it was by no means certain what was part of the internal law of an organization. At the previous meeting the Drafting Committee had briefly discussed whether or not the constituent instrument was part of the internal law of an organization. It could be argued that it was, but then one could not

ignore the fact that it was also part of international law. If it was a constituent treaty, as it was in most cases, how could that treaty, which the 1969 Vienna Convention regarded as such, not be part of international law?

70. The situation of international organizations was also different in another respect. It was clear that for a State, its internal law, which was the result of its unilateral choice, could not prevail over international law. That was the idea that article 3 was meant to convey. For a State, international law could not be derogated from by internal law. The same did not necessarily apply for international organizations, whose internal laws might well be the result of the collective choice of member States and might even affect treaties that were in force among them. One could not assume that States were bound *inter se* by treaties in such a way that the law of an international organization could not have any consequence for them. The question of the hierarchy between international law and the internal law of the organization did not need to be addressed at this stage, when it was not yet certain that it was relevant.

71. Everything contained in the draft articles on State responsibility had to be considered, and he agreed on the need for a parallel approach. However, it was not necessary for the Commission to state the same rules with regard to international organizations as it had done with regard to States. Such a course would make for a very long text and would not always be justified. The Commission should aim for a shorter text that only included issues that had to be dealt with specifically. His own suggestion was thus not to aim for an entirely parallel text. There was no parallel in draft articles 1 and 2, and draft article 3 could encompass all the general principles and say what was currently contained in articles 1 and 2 of the articles on State responsibility. Certain matters could be developed in the commentary.

*The meeting rose at 1.05 p.m.*

## 2754th MEETING

*Thursday, 8 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

## The responsibility of international organizations (continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

### FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENNIEMI said that, as a new member, he was struck by how much the legal background of the members of the Commission influenced their approach to a subject. That cultural clash had been particularly evident in the discussions the day before on the question whether legal personality should be a criterion for defining an international organization. In his view, that was like putting the cart before the horse. Legal personality was the consequence of rights, obligations and powers, not their source. That was one of the lessons of the advisory opinion by ICJ on the *Reparation for Injuries* case, in which the Court had said that international organizations all differed in their nature, their rights and their duties. That was tantamount to saying that there was no *a priori* concept of legal personality, but that everything depended on what responsibilities the various sources of law conferred on a given organization.

2. He thanked the Special Rapporteur and congratulated him on his thought-provoking report. There was little to object to in the three draft articles.

3. The second sentence of draft article 1 was problematic, as Mr. Pellet had already indicated the day before. Although State responsibility might be incurred through the conduct of an international organization, that came within the scope of the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> and it was odd to refer to such problems in the first article on the responsibility of international organizations. It might be preferable to deal with the question by referring to the draft articles on State responsibility later on, either in the final articles or in a section entitled "Miscellaneous".

4. He agreed with the Special Rapporteur that an international organization did not necessarily have to be established by treaty in order to be regarded as such, but he took issue with the idea that "an organization merely existing on paper cannot be considered a subject of international law" (para. 19 of the report). Many lawyers had taken part in the establishment of paper organizations which might acquire a *de facto* existence if it proved useful; such operations were not necessarily shady and could take place for perfectly honourable motives. In the final analysis, the criterion of establishment by treaty, if present, ought to be sufficient. It could be said that it was perhaps not necessary, but sufficient.

5. He endorsed the substantive criterion discussed by the Special Rapporteur in draft article 2, namely, that the organization should include States among its members, but further thought needed to be given, for example, to the question of when a State could be considered to be a member of an organization. In some organizations, States

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st meeting, footnote 3.



did not participate directly, but through governmental agencies. Should they be excluded from the draft articles? The functional criterion, namely, the exercise of governmental functions, contained an unfortunate ambiguity: it could be understood in two ways, either as the exercise of functions analogous to those of national governments or as a form of participation in international governance. Moreover, the functional criterion was too restricted because it excluded from the scope organizations devoted solely to scientific research, such as the European Forest Institute, with headquarters in Finland, whose status as an international organization no one would think of contesting. It would be preferable to speak of “functions analogous to those of national governments or international governance functions”.

6. To delimit the scope of the draft articles, it would be better not to be restricted to a simple definition, but to establish a typology of as many international organizations as possible. Perhaps the Special Rapporteur could focus on that question in his next report.

7. He fully agreed with the content of draft article 3. He merely drew the attention of the members of the Commission to an important question raised the day before by the Special Rapporteur, namely, the relationship between the internal law of an organization and international law, which should be addressed later in greater detail. In the case of the European Union, a situation could easily be imagined in which an act of that organization was perfectly lawful under European law, but illegal under international law. The case of WTO could prove more complicated: WTO could very well take a decision that was lawful under “WTO law”, but illegal under international law. That raised the problem of the fragmentation of law, which had already come up in the Commission’s discussions: Could “WTO law” be conceived of as a special legal regime whose occasional deviations from international law did not constitute illegality? Finally, the Commission should examine the case of the normative hierarchy within international law. Although the principles that governed it were rather ambiguous, principles such as *erga omnes* and *jus cogens* were universally recognized.

8. Mr. DUGARD said that it was essential to delimit the scope of the draft articles by means of a definition, however elusive it might be. However, he took issue with the proposal to distinguish between international and national governmental functions in the definition. As international lawyers, the members of the Commission were probably prepared to accept that there was such a thing as international governmental functions, but many Governments still objected to the very suggestion that there was any form of international governance, and that might frighten the horses in the Sixth Committee. He was surprised that Mr. Koskenniemi should present organizations devoted solely to research as a special case; surely scientific research was a governmental function.

9. Mr. FOMBA, commending Mr. Koskenniemi on his excellent and thorough statement, requested clarification on a point that was unclear to him, namely, the idea that, in order to define the type of international organizations to which the draft articles applied, establishment by treaty was not necessary, but should be sufficient. Logically, it would be preferable to say that, although more formal and

sound from a legal standpoint, establishment by treaty was not an absolute or essential criterion. Did Mr. Koskenniemi take “sufficient” to mean that that was the only sufficient criterion, or that it was one sufficient criterion among others?

10. Mr. CHEE said that the expression used by ICJ in the *Reparation for Injuries* case was “international personality” and not “international legal personality”. That should be borne in mind when assessing decisions on reparations. Noting that all non-governmental organizations operated on the basis of terms of reference, he questioned whether the internal acts of such organizations should be characterized as legal or illegal under international law.

11. Mr. KOSKENNIEMI, replying to Mr. Dugard, said that, if scientific research was a “governmental” function, then the list of other activities that came within that category would be very long. If such a list were compiled, the very notion of “governmental function” would lose all meaning.

12. Concerning a comment by Mr. Fomba, he said that his choice of the word “treaty” as a sufficient but not necessary condition had been deliberate. That meant that, if an organization had been established by treaty, there was no need to ask whether it was an international organization: that was automatically the case. It was also possible to have international organizations not established by treaty, but to be established by treaty sufficed.

13. Mr. Chee’s comment on the question of the legality of the internal constitution of non-governmental organizations under international law raised a number of difficult problems and opened Pandora’s box. As those issues concerned the fragmentation of international law, it would be preferable to deal with them at a later stage.

14. Mr. BROWNLIE said that the subject being pursued raised some difficult questions. The first was the issue of the organization’s acting as an organ of one or more States in the context of State responsibility, referred to in paragraphs 27 and 33 of the report, which, according to the Special Rapporteur, should not be set aside, but referred to at least by way of illustration. He himself was a little uneasy about the general relationship between the topic of the responsibility of international organizations and the topic of State responsibility. It made sense to treat the latter as a sort of builder’s yard from which material could be extracted as the need arose. But the assumption that State responsibility and the responsibility of international organizations were somehow the same—an assumption that might or might not be one made by the Special Rapporteur—gave rise to a certain unease. If he himself preferred to use the very vague term “analogous”, that was because he felt that there was a problem and that the question of the role of international organizations acting on behalf of States should be treated separately, as a special category. It should not be allowed to impinge too much on the Commission’s general approach to the topic.

15. Regarding the issue of governmental functions, the question was what rationale lay behind the selection of such a criterion. In paragraph 20 of his report, the Special Rapporteur referred to the need to address only questions relating to a relatively homogeneous category of interna-

tional organizations. He himself did not find that argument very persuasive and believed that the Commission must face up to the fact that international organizations, even those consisting in whole or in part of States, were so protean that it was very difficult to get away from the multiplicity of types. Perhaps Mr. Rosenstock's suggestion that they should in a general way behave like States could be accepted as a working assumption as to the existence of a standard type of international organization. But it did not seem helpful to include an express restriction in article 2.

16. The question of the polarity between responsibility under international law and civil liability, referred to in paragraph 29 of the report, had been the subject of some criticisms by Mr. Pellet. Perhaps the source of the difficulty might be the determination of applicable law: in the way in which different organizations functioned, several applicable laws were often brought into operation for different purposes. For instance, the European multilateral conventions dealing with nuclear risk used civil liability as an instrument for the distribution of loss. The Commission should concern itself with questions relating to the identification of applicable law and should reserve at least some room for references to the role of civil liability. The basic problem seemed to be the individuality of international organizations. Each had its own internal applicable law. Of course, States too had their own internal law, but the interrelation between the internal law and the external relations of States was much more easily recognized and better established than the relationship between the external relations of international organizations and their "internal law". The Commission was thus stuck with a subject in which everything was in a sense *lex specialis*, and the question arose why international organizations were bound by international law. A possible suggestion was that they were bound for the same reasons of practicality and principle for which new States were so bound.

17. One more point no doubt merited further consideration. It had been acknowledged for some time that perfectly well-recognized international organizations of States had taken it upon themselves to suddenly change their characters. One of the more dramatic instances had been the gradual bringing about of a change of regime in the former Yugoslavia. The dear old European Union had detached itself from economic questions in order to play a major role in that change of regime. NATO had also stepped well outside the purposes stated in its constituent treaty (North Atlantic Treaty). In western Africa, ECOWAS had also changed its function. Perhaps such cases should be treated merely as political turbulence, but perhaps, too, they raised questions of principle to which a little thought should be given.

18. Mr. PELLET said he agreed with Mr. Brownlie that applicable law was a sound basis on which to proceed and that if, by proposing to exclude civil liability, the Special Rapporteur meant that the Commission should not deal with internal law, he appeared merely to be stating the obvious. But it was important not to throw the baby out with the bathwater by disregarding situations such as the bankruptcy of the International Tin Council which might entail the responsibility of the organization, under the pretext

that the problem could also be settled in the context of the internal legal order.

19. Mr. MOMTAZ said that, among the cases where an international organization acted as an organ of one or more States, one could cite, for example, the case where an international organization supervised elections at the request of a State. According to the Special Rapporteur, in that type of situation, the conduct of the international organization should be attributed to the State (para. 27 of the report). In other words, the international organization acted as an organ of the State. That was precisely the case provided for in articles 4 and 5 of the draft articles on State responsibility for internationally wrongful acts. If he had understood Mr. Brownlie correctly, a special category of international organizations was being referred to in situations of that type. The question was thus whether the act performed by such an organization on behalf of the State would be attributed not to the State but to the organization.

20. Mr. BROWNLIE said that the difficulty was that, at the time of the establishment of an organization, arrangements were not always made for the division of risks. For example, the European Space Agency (formerly ELDO and ESRO) appeared to have made no express arrangements for the losses that might be caused by its activities. But the real problem was that it was not always easy to know in advance whether an organization was not only a risk-taking organization but also one that had internalized those risks. In other words, it was difficult to know whether it was ready to pay up if non-members—or even members—were damaged. The ultimate problem about the individuality of international organizations was that they could be hired for different purposes, in the same way as a private organization could be selected and used by a State, and could become a State entity for certain purposes or for a period of time. It was very difficult to know that in advance because an element of pragmatism entered into play, and because international organizations were often willing to change their own objectives or to accept roles that nobody could have foreseen, at the behest of individual States or groups of States. Much depended on the particular relationship created.

21. Mr. YAMADA said he agreed with the Special Rapporteur that it would be unreasonable for the Commission to take a different approach from the one it had adopted on State responsibility unless there were specific reasons for doing so, and that the model of the draft articles on State responsibility for internationally wrongful acts should be followed both in the general outline and in the wording of the new text. Nevertheless, there were a number of differences between international organizations and States warranting a different approach in some areas.

22. In paragraph 15 of his report, the Special Rapporteur seemed to imply that his study would deal with secondary rules and not with primary obligations. It might thus be asked whether there was a sufficient accumulation of laws and practice on the responsibility of international organizations at the level of primary rules, as had been the case for State responsibility; whether those primary rules were so different as to justify the Commission's leaving them out and concentrating on the secondary rules; and whether it would not be more meaningful to examine and

codify, to the extent possible, the most important areas of primary rules concerning international organizations so as to contribute to the progressive development and codification of those rules.

23. While fully agreeing with the proposal to limit the scope of the study to questions of international responsibility for internationally wrongful acts, he nevertheless had the impression that instances of international organizations committing internationally wrongful acts were few and far between: there was no comparison with the number of instances of wrongful acts committed by States. It was more likely that harm would be caused by international organizations performing acts not prohibited by international law. For instance, technical assistance programmes and lawful acts of international organizations always carried a risk of causing harm. Currently, however, organizations obtained immunity by inserting "hold harmless" clauses in the agreements concluded with recipients, and the burden thus fell on the countries of the developing world. He was not for a moment suggesting that the liability aspect should be dealt with at the current stage; rather, it should be a separate topic. However, the Commission should at least have a rough picture of the relative importance of the responsibility and liability of international organizations.

24. Turning to the draft articles proposed by the Special Rapporteur, he said he had no further comment to add to those he had already made concerning the first sentence of article 1. As to the second sentence, he recognized the need to include the question of the international responsibility of the State for the conduct of an international organization in the scope of the draft articles. He assumed that question would be treated more fully at a later stage in the subsequent articles. It was already well covered in chapters II and IV of the draft articles on State responsibility for internationally wrongful acts. The question of the responsibility of a member State of an organization for a wrongful act committed by that organization called for careful study.

25. Regarding draft article 2, it was really too early to examine the question of the definition of international organizations, and this should be done only out of practical necessity, to establish a preliminary starting point for the study. The question should be re-examined after the study was further along. As a matter of principle, a simple and concise definition would be preferable. But as the responsibility of international organizations was at issue, the definition should be precise and free of all ambiguity.

26. The three main features identified by the Special Rapporteur in the definition that he was proposing, namely, that the organization must include States among its members, that it must exercise certain functions in its own capacity and that those functions must be comparable to governmental functions, were of the utmost importance and should be formulated more precisely. The first feature might need further refinement, for the fact that an organization was open to States was not sufficient. The organization must also have been created or established by States and not by non-State entities. States might even need to constitute the dominant majority of the membership. The second feature had to do with the question whether the organization was a subject of international

law. Further thought should be given to whether the term "in its own capacity" was appropriate. Third, the functions of the organization must be defined clearly. They must be comparable to governmental functions, but an international organization was not a government, and he did not know whether its functions could be described as "governmental". It exercised the governmental functions its member States delegated to it, and the appropriate term for that concept needed to be found. It was rather difficult to discuss the definition in the abstract. Perhaps, as Mr. Koskenniemi had suggested, the Special Rapporteur should provide a list of the major international organizations that he hoped to cover in his study, giving their basic data, such as membership and main functions. That would certainly help the Commission to define the international organizations to which the draft articles were to apply.

27. He had no comments on article 3.

28. On another matter, he noted that the Special Rapporteur, like himself and Mr. Dugard, had close personal contacts with members of ILA. The Association and the Commission had common undertakings, namely, to produce authoritative statements on the present status of international law and on its desired development. The promotion of a cooperation arrangement between the two bodies would be mutually beneficial. The Commission should perhaps consider what form such future cooperation with the Association, and with other bodies such as the Institute of International Law, might take. That issue should be discussed at an early date, either in the plenary or in the Planning Group.

29. The CHAIR said that consultations would be held on that subject.

30. Mr. PELLET said he personally thought that it would be absolutely disastrous to change approach radically and abandon the consideration of secondary rules at the present stage in favour of the consideration of primary rules. In the same spirit, he was utterly opposed to the idea put forward by Mr. Koskenniemi, and taken up by Mr. Yamada, of drawing up a list of organizations. What was important was to adopt an approach that was broadly similar to that followed with regard to States. The example of technical assistance used by Mr. Yamada to show that problems of the responsibility of international organizations arose more frequently with activities not prohibited by international law than with internationally wrongful acts seemed to be the worst that could be found. While an international organization could incur responsibility in the context of technical assistance, such responsibility would be incurred by a wrongful act, and it was hard to see why it would be incurred by activities that were not prohibited. However, in his statement Mr. Yamada had put his finger on a problem that the Commission would have to address at some time or another, that of the immunity of international organizations, which conflicted with the implementation of their responsibility. The problem of immunity and that of responsibility had common points, but the Commission would have to take care not to confuse the two.

31. Mr. KOSKENNIEMI said that what he had suggested was that, based on empirical studies, the Special



Rapporteur should draw up a set of types of international organizations on which the Commission might base its deliberations. He supported Mr. Yamada's proposal that cooperation should be established with ILA, as well as other associations.

32. Mr. BROWNLIE said he agreed with Mr. Koskeniemi. He emphasized that the suggestion was not to produce a complete repertory of international organizations, something that would be an impossible task, but to make a typology of some kind which, while not highly developed, might be helpful for the Commission's deliberations.

33. Mr. KEMICHA said that the approach taken by the Special Rapporteur was in line with the Commission's earlier work, in particular the draft articles on State responsibility for internationally wrongful acts, and seemed to meet with general approval. With regard to draft article 1, he supported the proposed drafting improvements, even though they might seem premature at the present stage. As to the definition given in draft article 2, he noted that all members seemed to agree that the text should apply only to intergovernmental organizations and not to non-governmental organizations, but he would prefer the term proposed by one member, namely, "organization established by States". The wording "in its own capacity certain governmental functions" also gave rise to problems, and the criterion of international legal personality seemed to be an adequate basis for the notion of the responsibility of international organizations. He had no criticisms of draft article 3 to make at the present stage.

34. Mr. BAENA SOARES said that he agreed with the approach taken by the Special Rapporteur and his decision to limit the scope of the draft articles to "the international responsibility of an international organization for acts that are wrongful under international law". Going back to the Special Rapporteur's review of the Commission's earlier work, he emphasized that the latter must be relied on purely for purposes of guidance, given the changes that had occurred in the meantime.

35. Turning to draft article 1, he noted that it envisaged two distinct situations which should perhaps be kept separate. That was a matter for the Drafting Committee. With regard to draft article 2, he emphasized the need to agree on a preliminary definition that could be altered later. There was general agreement that the draft articles must apply to intergovernmental organizations, which could be defined by retaining some of the suggested elements, such as the fact that the organization exercised in its own capacity certain functions analogous to governmental functions. The criterion, proposed by some members, of organizations established by States would remove any ambiguities. It would be possible to specify that the international organization must have a constituent instrument defining its goals, structure and functions.

36. He emphasized that, in order for provisions to be implemented effectively, they must be formulated clearly and objectively. Finally, the proposal to produce a kind of typology of international organizations seemed a prudent one.

37. Mr. SEPÚLVEDA said that the nature and functions of international organizations had evolved dramatically

since the time, 40 years previously, when distinguished legal experts had deemed it preferable to exclude from consideration subjects of international law other than States. It had since become a legal necessity to study the international responsibility of international organizations, for such organizations were now recognized as subjects of international law. In order to determine the scope of the draft articles, it should first be specified how the responsibility of an international organization was entailed. Taking the draft on State responsibility as a model, it could be said that any internationally wrongful act of an international organization entailed its international responsibility, as the Special Rapporteur in fact established in draft article 3. That principle was not clearly stated in draft article 1, however, where it was necessary to introduce the notion of attribution and a causal link between the wrongful conduct of an international organization and the existence of an internationally wrongful act. The first sentence of article 1 should therefore be combined with the first sentence of article 3, so that the draft articles would begin by stating general principles and defining the scope of the draft articles and article 3 would characterize the internationally wrongful act of an international organization. With regard to the question of the international responsibility of a State for the conduct of an international organization, as mentioned in article 1, the text should make it clear that a State was responsible only for the *wrongful* conduct of an organization. The draft articles must deal with that question, since, as the Special Rapporteur noted in paragraph 8 of his report, it had been omitted from the draft articles on State responsibility for internationally wrongful acts. It was true, however, that article 1 did not refer to another possible legal situation, that of the responsibility of an international organization for the conduct of another international organization of which it was a member.

38. Turning to the definition of an international organization, since the definition established in various multilateral conventions was, as the Special Rapporteur had said, concise but not necessarily precise, he suggested that a number of elements should be added to it. First, the organization must be intergovernmental, in other words, have been established by States and have States as its members, a definition that would exclude non-governmental organizations. There might be exceptions—for instance, organizations whose members included States and non-State entities—but a specific clause could be adopted to cover those special cases, the important issue being to establish a general principle that was applicable to the vast majority of international organizations. Second, the organization's constituent instrument must be a treaty, although here too there might be certain exceptions. Third, in order for an international organization's responsibility to be entailed, the organization must be a subject of international law with its own legal personality. Fourth, the organization must exercise functions analogous to governmental functions. In that connection, he felt that it would be preferable for the Spanish version of draft article 2 to use the term *ejercicio de atribuciones del poder público*, which was used in articles 5, 6, 7 and 9 of the Spanish version of the draft articles on State responsibility for internationally wrongful acts, rather than *ciertas funciones de gobierno*. Incorporating all those elements in the definition would make it possible to arrive at a set of common denominators for establishing a more homogeneous category of



international organizations for the purposes of attributing responsibility.

39. Finally, while the present draft articles dealt with the responsibility of international organizations for internationally wrongful acts, the Commission should consider at a later stage the liability of international organizations for acts not prohibited by international law. In so doing, it would establish a set of norms embracing the responsibility of States for internationally wrongful acts, the liability of States for acts not prohibited by international law, the responsibility of international organizations for internationally wrongful acts and the liability of international organizations for acts not prohibited by international law.

40. Mr. KABATSI said that he supported the Special Rapporteur's approach of closely following the model of the draft articles on State responsibility for internationally wrongful acts. He had no problem with the proposal that the title of the draft articles should be changed, even though, as it now stood, it was acceptable. If the title were to be changed, however, he suggested that it should read: "The responsibility of international organizations for internationally wrongful acts".

41. On article 1 relating to the scope of the draft articles, he supported the Special Rapporteur's proposal that the scope should be limited to responsibility for acts prohibited by international law, and that liability arising out of acts not prohibited by international law and civil liability should be left aside. The question whether the topic should also cover the responsibility of a State for the conduct of an international organization might well be dictated by the fact that it had not been given much consideration during the work on the topic of State responsibility. In fact, article 57 of the draft articles on State responsibility for internationally wrongful acts presumed such responsibility, and articles 16, 17 and 18 of those draft articles also applied to international organizations. That being said, and at the present stage, he thought it might be clearer to limit the scope to the responsibility of international organizations.

42. In article 2, the definition of an international organization should be recast to emphasize that the draft was dealing with organizations established by States which exercised functions similar to those of States. The international organization should, of course, also have legal personality of its own, separate from that of its States parties. The definition should thus make it clear that an international organization was an intergovernmental organization established by States to exercise certain governmental functions. Of course, such a definition did not resolve the problem of entities that were known as international organizations even though they had not been established by States such as ICRC. Such organizations constituted exceptions and could perhaps be given special treatment.

43. Finally, he supported the approach used by the Special Rapporteur for setting out general principles, namely, the transposition into a single article, article 3, of the content of articles 1 and 2 of the draft on State responsibility for internationally wrongful acts.

44. With regard to the supremacy of international law over internal law arrangements, he said it was unlikely

that the two legal orders would conflict. Nevertheless, cases might arise when the internal rules of international organizations ran counter to the provisions of international law, and it might be useful to provide for treatment similar to that given to States.

45. Mr. MOMTAZ said he thought that the approach to the topic under consideration should be no different from the one used for the responsibility of States, since similar questions arose in both contexts, even though the solutions were not always the same. In any event, the draft articles on State responsibility for internationally wrongful acts must at least serve as a reference. The Commission should accordingly not be concerned with primary rules and should focus on breaches of secondary rules by international organizations. He did not think that the Commission should catalogue the primary rules applicable to international organizations, as Mr. Yamada had proposed, since he believed that, despite their particular features, international organizations were obliged to respect the rules of international law in the same way as States were. There was also no need to go into the responsibility of international organizations arising from acts not prohibited by international law. That question, which was of the greatest importance, should be studied in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

46. With regard to the exclusion of the issue of civil liability from the scope of the study, he said that, like Mr. Pellet, he wondered whether the Special Rapporteur should not consider the matter further. In his own opinion, it should be included.

47. Turning to the draft articles contained in the report, he said he believed that the point of reference for article 1 was indeed the escape clause contained in article 57 of the draft articles on State responsibility. Accordingly, that ought to be reflected in the wording of article 1.

48. Regarding the definition of international organizations, he had difficulty understanding why the Special Rapporteur had abandoned the traditional and well-established terminology relating to intergovernmental organizations in favour of a new definition based on the criterion of function. The reasons given by the Special Rapporteur in paragraph 14 of his report did not seem very convincing. While he agreed with the Special Rapporteur that there was no reason today why non-State entities should not be considered fully fledged members of international organizations, he did not think that meant that the words "intergovernmental organization" could be taken as not covering that new category of international organizations. In his view, the authors of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention") had chosen to use that expression advisedly. He feared that the criterion of function discussed in paragraph 20 of the report might unduly restrict the scope of the draft articles. The reference to governmental functions reduced the number of international organizations that actually exercised functions that could be described as governmental. In addition, the use of that criterion might raise problems of interpretation and, consequently, of the application of the draft. The determining factor in the definition of international or-

ganizations should be that of legal personality. It was precisely because they had legal personality that international organizations had the capacity to acquire rights and had to respect international law. In short, all international organizations that had obligations under international law could have their responsibility come into play in the event of a breach of such obligations. Contrary to what the Special Rapporteur suggested in paragraph 26 of the report, he therefore saw no need to include in the topic international organizations that had no international obligations, since the issue of their responsibility would never arise.

49. Mr. CHEE said that, in attempting to characterize an international organization, the Special Rapporteur referred to the 1969 Vienna Convention, article 2, paragraph 1 (*i*), of which stated that “international organization” meant “intergovernmental organization”. He subscribed to that definition, which had also been used in other international conventions, even if it left non-governmental organizations out of the scope of the study. As he saw it, consideration of the topic would be easier if the concept of international organization was divided in two: non-governmental organizations and governmental organizations. If the international organization was characterized as an intergovernmental organization, that meant that it was a treaty-based institution as opposed to a non-governmental international organization.

50. The Special Rapporteur had wisely not taken up the question of civil liability because it was generally in the realm of domestic law and, as such, had never really entered into the corpus of public international law.

51. Turning to the draft articles proposed by the Special Rapporteur, he said that article 1 created a duality of responsibilities, those of the international organization and those of the State which was a member of it. That was not a sound approach, and a uniform legal regime should be envisaged.

52. The words “governmental functions” in draft article 2 should be avoided, as they gave rise to problems. In his opinion, the definition of an international organization should be in line with the traditional one based on article 2, paragraph 1 (*i*), of the 1969 Vienna Convention. There was a contradiction in stating clearly, on the one hand, that international organizations were intergovernmental organizations and then speaking of governmental functions, which might be carried out by certain non-governmental organizations.

53. He accepted the wording proposed by the Special Rapporteur for article 3.

*The meeting rose at 1 p.m.*

## 2755th MEETING

*Friday, 9 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### **The responsibility of international organizations (continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)**

[Agenda item 7]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. KAMTO said that he fully subscribed to the approach explained in paragraph 11 of the report (A/CN.4/532). But insofar as the scope of the study included the international responsibility of States for the conduct of an international organization, he thought the title should be recast to read: “The responsibility of international organizations, as well as of States, owing to the conduct of the former”.

2. One of the basic concepts at issue was the nature of the constituent instrument, which, according to the Special Rapporteur, could be not only a treaty but also a non-binding instrument of international law or one governed by municipal laws (para. 14 of the report). For the first such case, the report cited the constituent instrument of the World Tourism Organization, although the Commission had seen that it was not a good example. The report gave no example for the second case, but referred to a work by Seidl-Hohenveldern.<sup>2</sup> Although ICRC came to mind, it would have been useful if the Special Rapporteur had cited several examples so that the Commission could see whether the instance was an isolated one or part of a more widespread phenomenon. Since the first case was not relevant, and in view of the paucity of examples illustrating the second, he concluded that a treaty—an international legal act in written form—continued to be the instrument best suited to the establishment of an international organization. He was speaking of “treaty” within

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen, einschliesslich der Supranationalen Gemeinschaften*, 7th ed. (Cologne, Heymanns, 2000).

the meaning of article 2, paragraph 1 (a), of the 1969 Vienna Convention, which used the phrase “whatever its particular designation”—language that was similar to the wording in article 1 of the Regulations to Give Effect to Article 102 of the Charter of the United Nations, on the registration and publication of treaties and international agreements.<sup>3</sup> It would be noted that at the United Nations Conference on the Law of Treaties the United States of America had already proposed an amendment to article 2 of the Convention in order to define “treaty” as “an international agreement concluded between *two or more States or other subjects of international law*...”<sup>4</sup> Thus, once entities could be characterized as subjects of international law, there was no reason why they should not be able to establish an international organization.

3. International society had developed considerably over the past century. In a purely inter-State society, international organizations were strictly “intergovernmental”. In the past 50 years, however, many non-State entities had emerged, some of which sat alongside States in international organizations. Today there were international organizations which had mixed membership even though they had been created by States. For that reason, he agreed with the argument that the Commission should not take into account, for the purposes of the study, the “intergovernmental” character of the organizations concerned in the strict sense of the term. It was nonetheless necessary to retain the criterion of establishment by States, in other words, by means of a treaty, which brought States or other subjects of international law together. That criterion was preferable to the criterion of control, mentioned in paragraph 6.

4. A third substantive point concerned the personality of the organization and its characterization as a subject of international law. In his view, the terms “international personality” and “international legal personality” were synonymous, as could be seen in the advisory opinion of ICJ in the *Reparation for Injuries* case and also in the comments submitted by Governments to the Court, notably those of Philip Nichols, representing the United Kingdom. That seemed to be the Special Rapporteur’s opinion too, because he used the two terms interchangeably in paragraphs 15 to 20 of the report. The problem was not that the Special Rapporteur failed to address the question of the international legal personality of an international organization, but the way in which he did so. At first, he argued that international law could not impose obligations on an entity unless that entity had legal personality under international law and that, conversely, an entity had to be regarded as a subject of international law even if only a single obligation was imposed on it under international law (para. 15). That was a first criterion for characterization as a subject of international law. A second was given in paragraph 19, where the Special Rapporteur said that an organization merely existing on paper could not be considered a subject of international law. The entity needed to have acquired sufficient independence from its members

so that it could not be regarded as acting as an organ common to the members.

5. That was not at all clear. Actually, an international organization was a subject of international law because it had international legal personality, which it acquired by virtue of the fact that it had been established by a treaty, whatever its particular form or designation, which was a legal act formulated by subjects of international law. In other words, it was the States, the original subjects of international law, which, through the act of establishment, conferred upon the international organization—the new legal being—a functional international personality, regardless of whether that personality was “objective”. On the other hand, the personality must be legal and international. Only then could there be a subject of international law. In paragraph 19 of its advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, ICJ had stated that the “object [of constituent instruments of international organizations] is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals” [p. 75]. He disagreed with the Special Rapporteur’s assertion (para. 17 of his report) that, in the *LaGrand* case, the Court had stated that individuals were also subjects of international law: the Court had merely concluded that article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations set out the receiving State’s obligations with regard to an arrested person and required that State to inform the person concerned without delay of his rights. It was not the Court that declared that a person had rights; it simply took note of the rights States had created for that person in connection with a treaty instrument. Hence it could not be inferred that the Court recognized the characterization as a subject of international law for those persons, especially since the requirement—proposed by the Special Rapporteur—that an entity must have at least one obligation for it to be a subject of international law was not met in the current example.

6. The governmental function criterion, although tempting at first glance, was inappropriate and superfluous for a definition of an international organization, not because it would restrict the scope of the organizations concerned or of their activities, because even in administrative law, where it originated, the criterion of governmental function served to distinguish certain State acts, but could not be used to identify all such acts. The criterion should be left out because it was difficult to apply, even in internal law, and above all because it was not necessary, since it was sufficient for an entity to have international legal personality for it to be an international organization—in other words, one whose internationally wrongful acts would entail its responsibility.

7. The Special Rapporteur was right to say that the third general principle set out in article 3 of the draft articles on State responsibility for internationally wrongful acts<sup>5</sup> was unsuitable for the topic of the responsibility of international organizations, for the reasons cited in paragraph 37 of the report.

8. Draft article 1 did not pose any problems, assuming the Commission agreed that the subject should be

<sup>3</sup> United Nations, *Treaty Series*, vol. 859/860, p. XII.

<sup>4</sup> *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 111.

<sup>5</sup> See 2751st meeting, footnote 3.



extended to the aspects of State responsibility not covered by the draft articles on State responsibility for internationally wrongful acts. However, the wording in the first sentence needed to be modelled more closely on those draft articles, and draft article 1 must be divided into two paragraphs because it dealt with two different issues.

9. Draft article 2 should be reconsidered to take a number of elements into account: establishment of the organization by States and/or other subjects of international law; establishment by a treaty, namely an international agreement, whatever its particular form or designation; existence of international legal personality; and membership open to both States and other subjects of international law.

10. Draft article 3 should envisage not only the general principles applicable to the responsibility of international organizations but also those applicable to the responsibility of the State for acts by the international organization, unless the Special Rapporteur wanted to divide the report into two parts, the first on the responsibility of international organizations and the second on the responsibility of States, but such a course would be questionable. A third paragraph should therefore be inserted, with the following wording:

“An internationally wrongful act of an international organization may [also] entail the international responsibility of a State:

(a) Because the State has contributed to the internationally wrongful act of the organization; or

(b) Because the international organization has acted as a State organ.”

11. Mr. GALICKI said that the first three draft articles in the Special Rapporteur’s excellent first report were indispensable for the codification of legal rules governing the responsibility of international organizations.

12. He endorsed the approach in article 1 of establishing the scope of the draft and limiting its application to the question of the international responsibility of an international organization for acts that were wrongful under international law. The Special Rapporteur also proposed that the draft articles should cover the question of the international responsibility of a State for the conduct of an international organization, but that did not change the basic approach to the question of responsibility as already set out in the draft articles on State responsibility for internationally wrongful acts, article 57 of which expressly left aside any question of the responsibility under international law of an international organization and also of any State for the conduct of an international organization.

13. However, that did not weaken the close linkage that should exist between the principal rules governing the responsibility of States and the responsibility of international organizations. Unifying those rules on the basis of the concept of an internationally wrongful act, either in the case of States or of international organizations, would clearly strengthen their position in the body of contemporary international law and in the practice of States. The wrongfulness of the act under international law was right-

ly stressed in article 1 and in the first general principle set out in article 3.

14. Limiting the scope of the future articles did not mean the Commission was ignoring the possibility of international organizations’ being held liable for injurious consequences arising out of acts not prohibited by international law. On the contrary, at its fifty-fourth session, in 2002, the Commission had concluded that questions of the responsibility of international organizations were often coupled with those concerning their liability under international law.<sup>6</sup> For example, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on International Liability for Damage Caused by Space Objects provided for both the international responsibility of international organizations for violation of international law and their liability for damage deriving from activities not prohibited by international law.

15. The Commission should draw upon its earlier decision to separate the topics of responsibility and liability and apply a similar approach in the case of international organizations. That would mean including in the agenda a new topic relating to the international liability of international organizations for acts not prohibited by international law, by analogy with State liability for such acts. It was not clear, however, whether the topic was ready for codification. In any case, the Commission should not employ the term “civil liability” in speaking of the responsibility of international organizations and should avoid using it in referring to responsibility, which should be neither civil nor criminal but only international.

16. By and large, draft article 3, on general principles, followed the pattern in Chapter I of the first part of the draft articles on State responsibility for internationally wrongful acts. Nevertheless, the reason given by the Special Rapporteur in paragraph 37 of his report for omitting a third principle modelled on article 3 of the draft articles on State responsibility for internationally wrongful acts was not convincing, because such an omission might suggest that there were two very different systems, one for States and one for international organizations. The misleading term “internal law” might be clarified by adding the words “of the member States of the organization”. Suggestions to treat “internal law” as the internal law of international organizations were not in keeping with the original intention behind article 3 of the draft articles on State responsibility for internationally wrongful acts to differentiate between international and internal law systems. If it wished to speak of the “internal law of international organizations”, the Commission would in fact remain within the same realm of international law. It was not enough to include a crippled version of article 3 in the present draft.

17. The most controversial question had to do with how to define “international organization”, in article 2. Although the 1969, 1978 and 1986 Vienna Conventions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character had already formulated definitions stating

<sup>6</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 468.

rather simplistically that the term meant “intergovernmental organization”, many members were of the view that such a definition was not in keeping with the purposes of the draft on responsibility. The Special Rapporteur proposed fleshing out the definition of international organization by adding “which includes States among its members” and “exercises in its own capacity certain governmental functions”. According to the Special Rapporteur, it would then no longer be necessary to specify that the organization should be an “intergovernmental” organization.

18. The main problem was that a number of other criteria could also be used for the definition, but it was not clear which ones. Yet the general feeling was that neither conventional definitions nor the one proposed by the Special Rapporteur were appropriate. Many criteria were possible, including: the subjects establishing the organization, namely States; the instrument by which it was established, namely an international treaty; its membership—usually (but as practice showed, not exclusively) States; activities conducted on its own behalf (and not on behalf of States); legal personality, or the capacity to acquire rights and obligations under international law (it was important to differentiate between international legal personality and national legal personality, which was granted to virtually all organizations under the internal laws of their member States); and the capacity to exercise certain governmental functions. The Special Rapporteur had suggested the latter aspect, but the concept of “governmental functions” as exercised by international organization was not clear or precise.

19. To speak of “governmental functions” might create an illusion that powers similar to or replacing those possessed by State Governments were assigned to international organizations. Currently, however, very few such organizations possessed so-called supranational powers analogous to those of national Governments. The problem was further complicated by the Special Rapporteur’s proposal that the exercise of “certain” of such functions would be sufficient for it to constitute an international organization for the purposes of the draft articles. Given the extremely wide and differentiated nature of such functions under member States’ internal laws, that criterion did not seem to be appropriate for the purposes of article 2. A more promising one was that of international legal personality, especially as it might easily be tied in with the concept of international organizations as subjects of international law, and with the possibility of their bringing international claims, and of international claims being brought against them. That view was supported by a passage in the 1996 report of the United Nations Secretary-General on administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, which read:

The international responsibility [of an international organization] is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization)...<sup>7</sup>

<sup>7</sup> A/51/389, para. 6.

That opinion, albeit formulated not by a court or a jurist but by a high-ranking official of an international organization, should be borne in mind when the Commission attempted to finalize its work on defining the term “international organization” in a suitable manner.

20. Ms. ESCARAMEIA said the debate on which international organizations were to be included in the scope of the draft articles—namely, what “international” meant—was being made more difficult by a misguided attempt to assimilate the concept of an international organization to that of a State. Consequently, the debate was having recourse to vocabulary, legal concepts and regimes that were appropriate to States but not to organizations. Examples were the concepts of internal versus international law, and of governmental functions. The latter concept, for instance, was not appropriate, since international organizations in fact performed functions very different from those of Governments. Although the Special Rapporteur was right to use the draft articles on State responsibility as a guideline, it must be recognized that the present draft covered a very different area, since international organizations had different processes of creation from those of States, had different characteristics and were very diverse.

21. The fundamental issue in this draft was the decision on what organizations the Commission would want to cover. As Mr. Koskenniemi had pointed out, one could proceed by looking at the problems created by non-State international entities one would like to address and draft a list with types of organizations. Another way of proceeding would be to decide which characteristics an international entity must possess to be covered by this draft; this more formalistic path had been chosen by the Special Rapporteur.

22. The proposal to draw up an indicative list of organizations, stressing their functions, seemed the most attractive approach, although it would involve much research. Nevertheless, it would be helpful if the Special Rapporteur were to prepare a list of types of international organizations, singling out those that constituted borderline cases. The exercise would, however, merely postpone the problem of deciding whether—since the traditional definition of an international organization as an intergovernmental organization was inadequate for present purposes—to adopt a formal criterion, based on the organization’s constituent instrument and composition, or a substantive criterion, based on functions, applicable law and the exercise of rights and obligations. The simplest course might be to decide, not which organizations would fall within the scope of the draft, but which were to be excluded.

23. The question of primary and secondary rules, raised by Mr. Yamada, also merited further consideration. While questions of civil liability perhaps arose in a majority of relevant cases, she had doubts as to the feasibility of including civil liability issues in the draft. However, the situation of international organizations created by means of unlawful procedures—a category that was particularly prone to incur international responsibility—should also be addressed.

24. On draft article 3, she agreed with the Special Rapporteur’s view that internal law should be excluded, for,

in addition to the hierarchical problems to which it might give rise, the scope of the term itself was unclear.

25. In short, it would be useful to prepare a list of types of organization, on the basis of which a decision could then be taken on the criteria governing a definition. For reasons of practicality, a formal criterion might be more workable than a substantive one based on functions.

26. Finally, she supported Mr. Yamada's suggestion that ILA and the Institute of International Law should be involved in the exercise.

27. Mr. ADDO said that the Special Rapporteur's first report was lucid, well argued, comprehensive and painstakingly written. Given the object of the present exercise, its title was irreproachable and should be maintained. It was essential to settle on a definition at the outset, and that was precisely what the Special Rapporteur had set out to do. It could not be denied that, in its broadest sense, the term "international organization" could encompass organizations consisting not only of Governments but also of non-governmental organizations. Perhaps the most striking feature of the international scene was the tremendous growth of international organizations of all kinds. However, for present purposes the Commission must concern itself with international public organizations.

28. As a starting point, it must be determined what rights and duties, if any, the various international organizations were endowed with under international law. Both theory and practice suggested that the international organization must be an entity or personality distinct from its creators. Theory and practice further suggested that any "personality" international organizations might have in international law must be conferred upon them by States, or by other international organizations already expressly recognized by States as legal persons. In practice, it would seem that only international organizations created by States were treated as having rights and duties under international law. Admittedly, certain functions of ICRC with regard to prisoners of war might come close to implying the international legal personality of that non-governmental organization, but such personality was not expressly set out in its constituent instrument and must be left aside in the interim. The extent of the capacity of international organizations to incur rights and duties under international law depended on the constitutional documents—usually in the form of a multilateral treaty—under which they were created, and on the practice that had emerged around each organization. The question to be asked in each case was to what extent the organization acted as an entity in conducting international relations separate and distinct from the members that had established it. As a first step, it was important to establish that the organization possessed international personality, because that was what invested it with duties or obligations a breach of which might entail international responsibility.

29. Again, the possession of such international personality invariably involved the attribution of power to conclude agreements with other subjects of international law. Indeed, the Special Rapporteur covered all those cases by stating that the international organization must, for the purposes of the topic, be a subject of international law, and that for such organization to be held potentially re-

sponsible, it should have legal personality and some obligations of its own under international law.

30. He agreed with the Special Rapporteur that the scope of the study should be delimited to make it clear that the draft articles were to consider questions of international responsibility for wrongful acts. In addition, he fully agreed that, in approaching the question of a definition for the purposes of the draft, the weight of precedent could not be ignored. Precedent must also serve as a guide and had provided a good, albeit concise definition, but the Special Rapporteur's view was that the definition did not go far enough. Yet to take it further might only complicate matters and lead to disputation. He personally favoured sticking to the definition that precedent had provided. However, in order to make it clear that the organizations covered had been set up by Governments of States, he favoured rewording the definition in draft article 2 to read: "refers to intergovernmental and inter-statal organizations". The purpose was to ensure that the definition encompassed all the organs of the State, including the judiciary and the legislature, as well as the executive and its agencies. He was proposing that addition *ex abundanti cautela*, but if the term "intergovernmental" was subsequently deemed to cover all the organs of a State, he would not press the point. Finally, draft article 3 simply stated the obvious.

31. Mr. MANSFIELD said that the survey of the Commission's previous work on the topic was instructive and the conclusions drawn from it in paragraph 11 of the report were more or less inexorable. Rightly, the Commission should make no assumptions that the issues to be considered under the topic should lead to conclusions similar to those arrived at in respect of State responsibility, yet history surely suggested that, where the Commission's work indeed produced similar conclusions, it should follow closely the model provided by the draft articles on State responsibility for internationally wrongful acts.

32. The scope of the study and the definition of international organization were obviously closely intertwined. In a very elegant and condensed piece of writing, the Special Rapporteur pointed out in paragraphs 12 to 28 that, were it to adopt the traditional definition of an international organization as an intergovernmental organization, the Commission would find the scope of its exercise encompassing a much greater variety of organizations than those that would have been included when that definition was first made. It was simply a function of the rapid expansion of the range of international organizations for which obligations under international law were now considered to exist.

33. Did that matter? If one took a long enough view, maybe not. But the Special Rapporteur convincingly argued that if the Commission's work on the topic was to be developed as a sequel to the draft articles on State responsibility—and that was the course on which it had embarked—then a way or ways must be found of limiting the scope of the work (and therefore the definition of international organizations) to organizations that functioned in ways broadly analogous to the ways in which States functioned. He was in broad agreement with the Special Rapporteur on that score. What he had difficulty with was the process whereby the Special Rapporteur moved from that point to a new definition—though he had no quarrel



with the analysis or the conclusions to which it led, or even, at the present juncture, with the drafting.

34. Yes, for the purposes of the exercise, an international organization had to be one that included States among its members. But then again, the definition must be broad enough to cover at least some organizations that included non-State entities among their members. He had already made the point, at the previous session, that the trend towards increased involvement of civil society in its various forms, as well as of the private sector, in many aspects of international life was one that was likely to continue and even gather pace. As a result, more organizations operating at the international level in ways that were analogous to those of States were likely to have a mixed or hybrid character.

35. Again yes, the organizations to be covered needed to be ones that had a legal personality at international law. But, as the Special Rapporteur himself pointed out, that requirement did not really help to narrow the scope of the work adequately, and, as Mr. Koskenniemi had noted, it begged the question of what were considered to be the relevant powers, functions, rights and duties that gave rise to international legal personality.

36. Incidentally, at one level it sounded almost axiomatic that the draft should cover all international organizations that might be said to be subject to international legal obligations, but at another level it might prove much less helpful. Some high-level obligations at international law might well apply in principle to any organization that was established by States and had at least one or two States or State agencies among its members. But equally, the powers and functions of some such organizations meant that they might not operate in any way analogous to that of Governments, and there was little or no possibility they could in practice act in breach of the high-level obligations that might in theory apply to them. Was it necessary to cover such organizations in the current study? Probably not.

37. And yes, ultimately, it was likely that the types of organization deemed appropriate to cover would be the ones that operated like States in a functional sense and, of course, did so independently of their members.

38. But the process whereby those conclusions were reached was too abstract to generate confidence in them. That might be one of the reasons why a number of members had expressed concern about the apparent looseness or open-endedness of the criterion in draft article 2, namely, "[exercising] in its own capacity certain governmental functions". At that level of abstract discussion, it seemed impossible to be clear as to which types of organization would fall on which side of the line on the basis of that criterion. To one like himself, who tended to err on the side of an unduly practical approach, the Special Rapporteur's approach of working towards a definition—and hence towards the essential scope of the exercise—by abstract analysis seemed counter-intuitive.

39. By contrast, a more fertile approach might be for the Working Group to classify international organizations in three categories: those which, by common consent, were to be included in the study; those which, by common consent, should be excluded; and those about which

there were doubts or differing views. An exercise of that kind would rapidly throw up the common factors linking the organizations in each of those three categories. The object of such an exercise or typology would certainly not be to produce a definitive set of the various types of international organization, still less a definitive listing of organizations within each category. Doubts might in any case remain as to whether the categories were exhaustive and the boundaries between them watertight or porous. Yet such an exercise would provide a reasonably sound basis for discussions on the definition, making it clearer which types of organization would be included or excluded under the various criteria.

40. For his part, he was happy to accept the Special Rapporteur's new definition as a kind of working hypothesis, but was unlikely to feel any more comfortable with it until he was much clearer about which types of organization it actually encompassed.

41. As to the other issues on scope raised in paragraphs 29 to 33 of the report, the Special Rapporteur's general conclusions were acceptable, at least at the present stage. Mr. Pellet, however, had raised a doubt in his mind as to whether the Commission could entirely avoid looking at some aspects of civil liability, and, in the long run, Mr. Yamada might well turn out to have speculated accurately that, in respect of international organizations as opposed to States, there might be relatively few examples of internationally wrongful acts but rather more situations that raised questions of liability for the consequences of acts that were not unlawful. Perhaps, as Mr. Galicki had suggested, a new topic might in due course be needed to address those questions.

42. An additional advantage of a typology was that it might help to clarify the nature and dimensions of the problem the Commission was endeavouring to address, namely, what kinds of wrongful act might conceivably be committed, by which types of organization, and the likelihood of their occurrence. In any event, it might be a useful supplement to whatever information the Special Rapporteur received from the organizations that had been approached for statements about their practice.

43. The reasons that had led the Special Rapporteur to propose his particular formulation of general principles in draft article 3, and in so doing to depart to some degree from the State responsibility model, were compelling. The two general principles seemed relatively straightforward, but it would be interesting to see whether the Special Rapporteur found it necessary to examine in more detail the difficult questions referred to in paragraph 37 of the report.

44. Finally, he wished to express support for Mr. Yamada's suggestion regarding the participation of ILA in the study.

45. Mr. PELLET, noting that Mr. Mansfield had congratulated the Special Rapporteur for showing that the traditional definition of an international organization, namely, as an "intergovernmental" organization, should not be retained in the present draft articles, said that he was far from convinced by what either Mr. Mansfield or the Special Rapporteur had said. In fact, matters had been



considerably complicated by trying to add to the traditional definition. He was not at all convinced by the reasoning given in paragraphs 12 *et seq.* of the report for restricting the categories of international organization to be covered by the draft. He was curious to know what organizations the Commission might want to exclude. Obviously, non-governmental organizations would be excluded, but the retention of “intergovernmental” would automatically achieve that. The term “inter-State” could be substituted for “intergovernmental”, as suggested by Ms. Escarameia, but the meaning would remain the same.

46. He would like to hear just one example of an international organization that the Commission might want to exclude. His preference would be not to exclude any, to be all-inclusive, but if a member of the Commission could identify one such organization and give a convincing reason for excluding it, he would be prepared to consider a typology for determining which organizations to exclude. It was amazing that none of the members who had taken issue with the Special Rapporteur’s abstract approach had bothered to give an example of an international organization that might pose problems with regard to the issue of responsibility of international organizations. If there was no such organization, there was no need for a typology, or for a list of organizations as suggested by Mr. Koskenniemi. A typology might be useful for other reasons, in that different rules might apply to different types of organization: an integration organization, for instance, was very likely to raise different problems from a traditional cooperation organization. However, he failed to see why a typology was necessary for exclusion purposes if no organization needed to be excluded.

47. His own approach was much more empirical. Broadly speaking, members knew what an international organization was—“I know because I can see it”—and the only purpose of a definition was to ensure that no international “thingamabob” was excluded. Ultimately, international organizations must know what rules of responsibility applied to them.

48. He basically supported the Special Rapporteur’s views on draft article 3. In addition, it was essential to reproduce articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts unchanged. Those articles were superbly concise and were the fundamental contribution of Roberto Ago—and also of the Commission, which had had the intelligence to follow one of the pre-eminent legal experts of the twentieth century—to significant progress in international law. In fact, he was rather shocked that no one, not even the Special Rapporteur, had paid tribute to Mr. Ago during the current debate.

49. The only real problem, which the Special Rapporteur had analysed with his customary concision in paragraph 37 of the report, was whether the principle in article 3 of the draft articles on State responsibility for internationally wrongful acts, namely, that the characterization of an act as internationally wrongful was exclusively a matter of international law, must also be transposed to the present draft. He agreed with the Special Rapporteur that it must not, and had strong feelings on the subject.

50. If he understood the Special Rapporteur’s characteristically dense reasoning, it was basically that, since an international organization was itself a creature of international law, it would not make much sense to say that its internal law could not conflict with general international law, as referred to in article 3 of the draft articles on State responsibility for internationally wrongful acts, of which it was actually a part. It was not a question of legal systems. Internal law had nothing to say about the international responsibility of a State or anyone else: that was the whole point of article 3 of the draft articles on State responsibility for internationally wrongful acts. In the present case, however, the Commission’s task was not to distinguish between internal and international law but to establish a hierarchy of norms within the international legal system. With regard to the conduct of an international organization, the question was whether or not that conduct was consistent with the organization’s obligations, which might stem from its constituent instrument, which provided the link between general international law and the organization’s internal law; higher norms—for instance, the peremptory norms of general international law; rules deriving from treaties the organization was bound to observe; or ordinary norms of international law by which the organization was bound, to the extent that its constituent instrument did not derogate from those, it being understood that, in the relations between an international organization and its members, there could be derogations from such general rules of international law by virtue of provisions of the constituent instrument that might be very broad in scope, such as Article 103 of the Charter of the United Nations, or articles 306 and 307 or even the new article 292 (ex-article 219) of the Treaty on European Union (numbering revised according to the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts).

51. In his view, those considerations were sufficient reason not to transpose article 3 of the draft articles on State responsibility for internationally wrongful acts to the present draft. The law of an organization was anchored in general international law and had far too complex a relationship with it for the Commission to reasonably say in the present draft that the characterization of an act as internationally wrongful was not affected by the characterization of the act as lawful by internal law. At some point, however, the Commission would have to tackle two questions. First, when it came to the question of the nature and the existence of the obligation whose breach gave rise to the organization’s responsibility, the Commission would not be able to avoid a thorough discussion of the complex interplay of applicable legal norms. While that question was dispatched in article 12 of the draft articles on State responsibility because it did not raise very serious problems, in the present case it could not be dealt with so easily. When the Commission came to the equivalent article in the current draft, the Special Rapporteur would have to reflect very precisely on the difficult question of the nature and existence of the breached obligation.

52. Second, the Special Rapporteur’s solution to the question of the relationship between general international law and the internal law of an international organization, namely, not to discuss it, was satisfactory if one was ap-

proaching the question from the standpoint of general international law. From the standpoint of the organization's internal law, however, any organization, and not just the European Union, created its own legal system which was a particular kind of international law. Within that system, problems of responsibility arose, including, very frequently, that of the organization's responsibilities to its staff and, less frequently, that of the staff's responsibilities to the organization. How should those problems of the organization's own legal system, of which the law of the international civil service was just one example, be approached? In his view, they should be left aside, but the Commission must take a decision as to whether it wanted to exclude them and why. If it did, it should say in draft article 1, and not just in a commentary, that problems of responsibility under an organization's internal law were not dealt with in the draft. If the Commission discussed the law of the international civil service in the present context, it would be heading in the wrong direction.

53. He suggested to the Special Rapporteur and the Commission that that question should be discussed, and if possible solved, at the current session, while the Commission was dealing with draft article 1 and the scope of the draft.

54. Mr. KAMTO said that, in his view, "intergovernmental" had ceased to be a relevant criterion in defining an international organization, since subjects of law other than States could be parties to the instrument establishing an international organization. Many organizations had not only States but also non-State entities among their members. The "treaty" criterion, on the other hand, was fundamental, since treaties were open to other subjects of international law in addition to States.

55. Mr. KATEKA commended the Special Rapporteur on his report and said that the starting point for defining an international organization in draft article 2 should be the traditional definition, namely, "intergovernmental". As stated by the Special Rapporteur, the main difficulty in arriving at a satisfactory definition of an international organization was the great variety of organizations in existence. Elements of uncertainty made the criteria of the membership—whether by States alone or States and other entities—and constituent instrument problematic. The Commission should start with the criteria of membership by States and establishment by treaty. Control was also among the criteria one could use, for there was a safety net when the majority of the members were States.

56. Because international organizations had become so numerous and so diverse, he was tempted by Mr. Koskeniemi's suggestion for a list and Mr. Mansfield's suggestion for a typology. The Commission should indeed classify organizations into those it wanted to include, those it wanted to exclude and those that fell between the two. There were simply too many organizations for the draft to cover them all.

57. International personality was yet another criterion. Some members of the Commission contended that some international organizations had more personality than others, the latter presumably being non-governmental organizations. It might be problematic to establish such a characterization. In the *Reparation for Injuries* case, ICJ

had said that the legal personality of the United Nations was different from, and less than, that of States. While the legal personality of international organizations could be characterized *vis-à-vis* that of States, however, the Commission could not grade the relative legal personality of international organizations among themselves.

58. He had some doubts about introducing the concept of international governance for international organizations. If that meant situations such as the transitional administrations established by the United Nations in Namibia or East Timor, there was no problem. Otherwise, the concept could be problematic. Some international organizations were already very powerful, indeed more powerful than some countries, over which they exerted considerable influence. That was also true of some transnational corporations and even some non-governmental organizations.

59. The mushrooming of international organizations in recent years complicated the consideration of the topic of international responsibility, which was why a typology was needed to rationalize it. Mr. Brownlie had suggested at the previous meeting that the Commission should look into the phenomenon of some regional international organizations that had changed their original aims, for instance, the European Union and ECOWAS. There were others, such as SADC, that had also done so. It might be that the failure or imperfect implementation of the security system set up by the United Nations was prompting some regional organizations to fill the vacuum. In the case of the European Union, however, as early as the 1960s, in a case involving a Dutch company, the European Court of Justice had reasoned not only on the basis of the Treaties Establishing the European Communities but also by reference to a grand vision of the kind of legal community it expected for the future, one that transcended the original intention of economic integration.

60. He shared the concerns expressed by some members about the criterion of "certain governmental functions". Furthermore, issues of civil liability should be excluded, for the topic was complicated enough already. Finally, he agreed with the inclusion in the second sentence of draft article 1 of a reference to State responsibility for the conduct of an international organization, although it might be more appropriate to put it in a separate sentence.

61. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur on an excellent report and said he agreed that the definition of an international organization was important because it had a bearing on the scope of the draft articles. However, in the present case, the consequences of adopting a new definition were not very clear. He understood the need for a more inclusive definition but disagreed that the traditional definition used in so many treaties, including the 1969 and 1986 Vienna Conventions, should be sacrificed. No single definition would succeed in encompassing the diversity of international organizations.

62. The Special Rapporteur might consider the viability of linking the issue of definition to the notion of legal personality by indicating the most relevant criteria pertaining to such personality. That might require identifying the tricky problems of fact and law related to the legal personality of international organizations, but it would

ultimately permit the inclusion of the largest possible number of international organizations. There would be another advantage in doing so. The very important issues of responsibility raised by the International Tin Council case had never been adequately addressed, and it would be useful if the Commission could tackle them. Those issues had to do with the relationship between an international organization and its member States or third parties, including other international organizations. A very clear distinction also needed to be made between the responsibility and the immunity of international organizations. In the International Tin Council case, the decisions adopted had depended heavily on English law, but the overall case had illustrated the problems involved under international law.

63. The content of draft article 1 appeared to be in line with article 57 of the draft articles on State responsibility for internationally wrongful acts. He had no objection to it, but wondered whether that was the right place for it. Article 2 should comprise two paragraphs, the first giving the traditional definition of an international organization and the second covering a new category of organizations that were mixed and hybrid in nature and composition. Article 3 should be split in two, with the first paragraph becoming a new article 1 and the second constituting what was now article 3.

64. In paragraphs 30 and 31 of his report, the Special Rapporteur, probably correctly, took the position that matters of international liability for injurious consequences arising out of acts not prohibited by international law should be excluded from the scope of the draft. However caution was needed on that point. Regimes of strict liability were already incorporated in legal instruments and applied to some international organizations, for example, the treaty regimes relating to outer space. Perhaps a provision acknowledging that situation should be envisaged.

65. Mr. Sreenivasa RAO said the Special Rapporteur had provided a scholarly and thought-provoking report. After some useful background on the topic, he attempted to carefully delineate the scope of the topic through a series of propositions. The recommendation that issues already settled in the work on State responsibility should not be reopened must be kept in mind.

66. Clearly, an international organization must be an intergovernmental organization: that was recognized in the 1978 and 1986 Vienna Conventions and in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. But he agreed with the Special Rapporteur that a less concise and more precise definition was required at least in order to determine the scope of the study. While there might be differing opinions on the type of organization that should be included, non-governmental organizations should undoubtedly be excluded. Mr. Rodríguez Cedeño was right to say that the organizations should normally be those established by States. Whether it was to be done by an international instrument, and, if so, whether it should be binding, were separate issues.

67. He agreed with Mr. Pellet that the scope of the topic should not be unduly restrictive. Moreover, it should not matter whether an organization was established by an in-

strument that was only recommendatory, non-binding, or by parallel acts pertaining to municipal laws. It might also be possible to cover issues arising from the contractual obligations of international organizations and administrative matters, for example, service problems of staff members. Mr. Pellet had brought up the case of organizations established by a group of international organizations, and that could also be envisaged in the context of organizations with treaty-making capacity. All organizations with a headquarters agreement automatically had, and exhibited, such treaty-making capacity, as did international organizations that routinely concluded agreements with States on their privileges and immunities.

68. Dag Hammarskjöld and Boutros Boutros-Ghali, both former Secretaries-General of the United Nations, had spoken of its parliamentary diplomacy and peace enforcement functions. Such functions involved a network of arrangements between the United Nations and other international organizations to discharge various specific functions ranging from the supply of food, medicine and clothing, the operation of refugee camps and the maintenance of law and order to the establishment of international criminal courts. In more recent times, the wholesale administration of a territory before it was handed over to the elected Government, as in the case of East Timor, was another example of functions an international organization could perform.

69. International organizations established by States, such as the Centre for Science and Technology of the Non-Aligned and Other Developing Countries set up in 1989, offered another example of functions that could be of interest for the study. The fact that the organization had never materialized was a separate matter: indeed, an organization could be established but fail to function effectively. As he understood paragraph 19 of the report, the Special Rapporteur was recommending that organizations that were never established despite the conclusion of a constituent instrument should not be included within the scope of the draft.

70. The Special Rapporteur rightly recommended that a homogeneous category to serve as the source of the study should be identified. The exercise could be facilitated by following Mr. Brownlie's suggestion that the functions performed by the organization should be given greater attention than the existence of a constituent instrument establishing it. His own brief listing of functions of international organizations did not bring the Commission any closer to identifying a homogeneous category. Perhaps the functions could be listed in an illustrative manner or categorized broadly as "governmental functions", as in draft article 1, or perhaps the two techniques could be combined.

71. Other important points had to be taken into account. The organization must exercise functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that its obligations and the wrongfulness of any impugned conduct could be attributed to it. If that criterion was met, it should not matter if the international organization was made up of States and other international organizations. As was noted in paragraph 24 of the report, it was useful



to say that international organizations to which the draft articles applied could include other international organizations. The issues noted in paragraph 32 should certainly fall within the scope of the study.

72. Again, the study should exclude issues of civil liability. The Commission could well revert to the topic in future, after sufficient progress had been made with the topic of international liability. While certain issues connected with private international law could be better studied by other institutions, the Commission could deal with the allocation of loss in the event of harm or damage arising from the activities of international organizations. International organizations, like States, were liable for any damage they caused, irrespective of the legal status of the activity in which they were engaged and, he would add, of the immunity from judicial process in a national tribunal that they might otherwise enjoy, unless the State which had agreed to provide such immunity had also agreed to underwrite any liability arising from its activities within its territory.

73. As to draft article 1, when an international organization entered into an agreement on privileges and immunities with a State and responsibility was thereby incurred by that State for the conduct of an international organization, the matter should come within the scope of the study. Accordingly, such agreements were numerous enough to warrant retention of the second sentence.

74. The Drafting Committee would undoubtedly give suitable attention to the many other useful points made. In the articles themselves, some governmental functions should be specified in an illustrative manner, as that would obviate the need to refer to "certain" governmental functions in draft article 2. It was a word that seemed to imply some sort of limitation, which presumably was not the intention. He was not in favour of specifying to which international organizations the draft articles would apply. The Commission had tried that kind of technique in other topics, without success. A more general approach with greater attention to the functions performed by the organizations should be the basis for delimiting the scope. He agreed entirely with the general thrust of draft article 3 and endorsed the Special Rapporteur's view that there was no need to enter into the characterization of a wrongful act, whether at the international or national level. Characterization at the national level of an act of an international organization was at variance with the status of such an organization and the fact that its constituent instruments were rarely governed by national laws. The Drafting Committee might wish to look into that issue.

75. Mr. AL-MARRI thanked the Special Rapporteur for his valuable report. It would be impractical to try to differentiate among or categorize international organizations; rather, common criteria must be identified, general norms put forward. The treaty criterion was one that might need to be reconsidered, as it could prevent subjects of international law from undertaking functions that might prove important in the future. Finally, he fully agreed with the comments made by Mr. Sreenivasa Rao and Mr. Pellet.

76. The CHAIR, speaking as a member of the Commission, said the excellent first report on the topic had sparked a stimulating debate.

77. He fully endorsed the wording of the first sentence of article 1 but thought the second should be deleted or placed in square brackets pending further elaboration of the topic. The draft must not give the impression that there was a special normative regime, separate from the one set out in the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session, in 2001, that covered the responsibility of a State for the wrongful acts of an international organization. That might raise problems of attribution of responsibility or of joint, residual or shared liability which should be elucidated in the context of the law of international organizations. In any event, nothing could substantially alter the general features of the regime for responsibility of States developed in 2001.

78. Draft article 2, in addition to explaining the use of terms, sought to define a fundamental aspect of the scope, namely which international organizations would be covered. In view of the proliferation and variety of international organizations, for practical reasons, and as had been done in other instances, the Commission would have to confine the study to responsibility for the wrongful acts of a single category of organizations, those that were sufficiently visible and identifiable. He accordingly agreed that the study should concentrate on the responsibility of intergovernmental organizations. In the interests of progressive development and in the light of ongoing events in the international arena, however, he could agree to including mixed organizations in which, together with States, entities other than States were members, as the Special Rapporteur proposed. It should also be possible to include a "without prejudice" clause stating that the rules set out in the draft applied to intergovernmental or mixed organizations, without prejudice to their application to other international organizations.

79. He was sceptical, on the other hand, about the functional aspect to be included in the definition. Like other members, he considered "certain governmental functions" to be vague, not always a prerequisite and difficult to pinpoint. He would prefer to see the emphasis placed on another precondition that was essential, namely that, on the basis of the capacity granted to them by their constituent instruments or developed through their functioning, the international organizations in question should be subjects of international law, capable of assuming rights and, most importantly, of being bound by obligations the breach of which would trigger international responsibility.

80. He fully agreed with the Special Rapporteur's proposal to set out in the first paragraph of draft article 3 the principle that international responsibility was entailed by a wrongful act of an organization and to incorporate in the second paragraph two essential elements of that responsibility, namely attribution of the wrongful act to the organization in conformity with international law and the existence of a breach of an international obligation. On the other hand, he had some reservations about the advisability of not stating the principle that an act must be characterized as wrongful on the basis of international law and that such characterization could not be affected by the fact that in other legal systems the same act might be considered lawful. He would prefer the principle to be set out very clearly since, in view of the wording of the draft articles on State responsibility for internation-

ally wrongful acts, omitting it might raise doubts about whether it applied to the responsibility of international organizations, something about which he personally had absolutely no doubt.

81. Mr. GAJA (Special Rapporteur), summing up the discussion, expressed his gratitude for the kind words and thoughtful comments of many members. There had been criticism, too, which he did not intend to underrate, but the general approach in the report and the structure of the proposed draft articles had emerged relatively unscathed. Even on the most controversial point, the definition of international organizations, most of the criticism concerned the way the definition should be drafted rather than the identification of the core organizations whose practice would be relevant to the study.

82. The main purpose of draft article 1 was to define the scope of the topic as accurately as possible by making it clear that the draft applied to questions of responsibility in relation to acts that were wrongful under international law. Several members had expressed the view that the question of liability for injurious consequences arising out of the acts of an international organization that were not prohibited by international law should be dealt with in the context of, or as a sequel to, the study now being undertaken with regard to States. References had been made to harm that was caused or might be caused by space organizations or organizations engaged in technical assistance or disarmament control. If the resulting harm did not imply a breach of an obligation under international law, questions of liability should not be regarded as part of the current topic. He was aware, as had been pointed out in the course of the debate, that there were treaty regimes which seemed to combine the two aspects, but these regimes provided special rules. This situation would have to be referred to in the draft, but in the meantime enough progress might well be made in the study of the fragmentation of international law to give a clearer idea of what *lex specialis* meant.

83. The proposal to leave out matters of civil liability had also met with significant support, together with some dissent, although that dissent did not concern the exclusion of matters governed by private law, in other words, within the realm of civil liability, or of administrative law in civil-law countries. International law did not generally regulate such matters: as had been pointed out, there were very few treaties and, he would add, hardly any other instruments of international law that had specific provisions thereon.

84. It had been suggested that the study should be extended to rules of international law that could affect the responsibility of member States for the wrongful act of an organization, even if that act was connected with a contract and the dispute was submitted to a national court for commercial arbitration. While he did not wish to commit himself before gaining an idea of the Commission's views, he thought that consideration could indeed be given to whether there were rules of international law that might be relevant in private litigation. That would be in line with the approach taken by the Institute of International Law at its 1995 session in Lisbon in dealing in a similar context with issues of civil liability and international law.

85. The international responsibility of States for the conduct of international organizations was central to the study: the bulk of the writings on responsibility of international organizations and the best-known instances of practice related to that very question, not to questions of attribution to international organizations. Irrespective of whether the Commission concluded that States could be responsible for such conduct, it could not ignore that central question, which was no doubt also one of the most difficult. It had been left out of the draft articles on State responsibility for internationally wrongful acts, in which State responsibility for aid or assistance to an organization in the commission of a wrongful act and other aspects of Chapter IV of Part One had likewise not been considered. In article 1, paragraph 1, he had simply reproduced what was said in article 57 of the draft articles on State responsibility. Several members had suggested transposing the second sentence of that paragraph to a separate paragraph, and he had no difficulty with that suggestion, despite the similarity of the issues mentioned. The phrase "acts that are wrongful under international law" in the first sentence had been criticized for not reflecting the language of article 1 of the draft articles on State responsibility, namely "internationally wrongful acts". The reason, as was stated in paragraph 32 of his report, was that if the definition was to be comprehensive and accurate, one could not speak only of the responsibility of an organization for its own conduct, since such responsibility could also arise for the conduct of another organization of which the first organization was a member.

86. To conclude his summary of the discussion on draft article 1, his preference for the provisions on the scope of the topic was to have as accurate a description as possible of the questions covered. Certain members of the Commission appeared to prefer a less comprehensive description, focusing on the main issues, but that, together with the other points he had raised so far, could be left to the Drafting Committee.

87. The CHAIR said that Mr. Yamada's suggestion, supported by others, that consideration should be given to establishing contact with ILA in connection with the responsibility of international organizations, could be taken up by the Planning Group once it was established.

*The meeting rose at 1 p.m.*

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## 2756th MEETING

*Tuesday, 13 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia,

Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Election of officers (*concluded*)\*

1. The CHAIR welcomed the three newly elected members of the Commission, Mr. Economides, Mr. Kolodkin and Mr. Melescanu. As the Group of Eastern European States was now complete, it could propose a candidate for the position of first Vice-Chair.

2. Mr. GALICKI proposed Mr. Melescanu for the position of first Vice-Chair on behalf of the Group of Eastern European States.

*Mr. Melescanu was elected first Vice-Chair by acclamation.*

### The responsibility of international organizations (*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

3. The CHAIR invited Mr. Gaja, Special Rapporteur on the responsibility of international organizations, to continue his summary of the discussion on the topic.

4. Mr. GAJA (Special Rapporteur), addressing the more controversial part of his report, noted that Mr. Koskenniemi had spoken of the question of an international organization's legal personality as an example of a "cultural clash" (2754th meeting, para. 1) and had referred to two opposing views: according to one, legal personality existed *a priori*, and, according to the other, it resulted from the organization's rights and obligations. His own view lay somewhere between the two. If an organization had a right or an obligation under international law, it must necessarily possess legal personality. That was not to say that all the rights and obligations of an international organization fell under international law. That depended above all on the organization's capacity. An organization might act under the law of a particular State—for example, when concluding a contract—and it might also act as an organ of a State. He noted in passing that it was hardly revolutionary to hold that some rights and obligations under international law accrued to individuals. They thus had legal personality, although their capacity was limited.

5. In the definition of "international organization" contained in draft article 2, legal personality was clearly im-

plied in the words "in its own capacity". The French and Spanish translations (*en son nom propre* and *a su propio nombre*) were less clear than the English. In any case, it would make little sense to speak of the international responsibility of an entity which did not possess legal personality. He had no objection whatsoever to referring expressly to the existence of the legal personality of an international organization in the definition, as many members of the Commission had suggested.

6. Many members had also proposed that the definition should mention that the organization's constituent instrument was a treaty, or, at any rate, that the organization had been established by States. Most of them recognized that non-State entities sometimes participated in establishing an organization and that the constituent instrument might not be a treaty. He cited as examples OSCE and OPEC. In other cases such as that of the World Tourism Organization, no formal treaty existed. The Commission might follow the suggestion by Ms. Escameia and Mr. Sreenivasa Rao that reference should be made to an international instrument, although that term would also need to be defined. As Mr. Mansfield had emphasized, moreover, a reference to States alone as creators or members of an international organization would not correspond to a significant trend in practice. The prevailing view seemed to be that the draft articles should also deal with organizations which included non-State entities among their members. An accurate definition should reflect that in a less succinct way than in draft article 2.

7. The reference in draft article 2 to "governmental functions" had attracted considerable criticism, partly because of the difficulty of translating that expression into French and Spanish. An organization's functions were usually defined in its constituent instrument. But if an organization acquired new functions in practice, as was the case with NATO, ECOWAS and the European Union, its international responsibility could not be excluded simply because it had committed a wrongful act in the exercise of functions not covered by the treaty establishing the organization. For example, if an organization took military action and that constituted a wrongful act under international law, it could not be said that the organization escaped responsibility simply because it had exercised functions not originally provided for. Thus, the definition should take into account the functions that the organization actually exercised, rather than those contained in its constituent instrument.

8. The reference to governmental functions had been designed to encompass those organizations that had some legislative (in the broad sense) executive or judicial functions of the type that were part of the core activity of States. That approach had been approved by certain members and criticized by others, who had stressed that it was difficult to determine the meaning of "governmental functions". Admittedly, the criterion was a vague one, and various members had expressed a preference for the traditional definition of an international organization as an intergovernmental organization. There were two reasons to limit the scope of the draft articles to a defined category of international organizations. The first was that, given the great variety of international organizations, the application of rules developed on the model of the draft articles on State responsibility for internationally wrong-

\* Resumed from the 2751st meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



ful acts<sup>2</sup> should be limited to entities that had some characteristics in common with States. The second was that known practice with regard to issues of the responsibility of international organizations was limited to a few organizations such as the United Nations, NATO and the European Union. The practice of other organizations was probably limited, but it was also very difficult to ascertain. With regard to the key questions of attribution and member State responsibility, the difficulty was that it was not certain that the principles that could be developed with regard to the major existing organizations could apply in the same way to all existing organizations. According to some members of the Commission, it was necessary to establish a typology. However, in order to choose among the various organizations, a sufficiently precise criterion was needed, and no such criterion was currently available. If a functional definition was unacceptable or impossible, he therefore proposed falling back on a general definition of international organizations, to be formulated by updating the traditional definition to be found in the 1969 Vienna Convention and in other conventions. In so doing, it would also be necessary to clarify the meaning of the term “intergovernmental”, in the light of the requirement to come up with an exact definition applicable at least to all the major organizations.

9. In view of members’ comments, draft article 2 clearly needed rewriting. Accordingly, he suggested that an open-ended working group should be convened for that purpose and that the Commission should consider the results of that group’s work before referring the article to the Drafting Committee.

10. Draft article 3 had attracted few comments. No objections had been raised with regard to the text. The only issue discussed concerned the deliberate omission from the current text of a paragraph that appeared in article 3 of the draft articles on State responsibility. Only Mr. Khabat-si, Mr. Galicki and Mr. Candioti had criticized that decision. Since the current draft articles were not intended to parallel faithfully the draft on State responsibility, that omission should not give rise to any major difficulties, particularly given that the point was arguably superfluous. It would be strange to make a reference in article 3 to the internal law of States, as had been suggested.

11. Mr. Koskeniemi and Mr. Pellet had briefly examined the question of the relationship between international law and the law of international organizations. They had referred to the hierarchy of norms and to the key distinction between obligations of an organization towards its member States and its obligations towards non-member States. In his view, as Article 103 of the Charter of the United Nations showed, that distinction was not always conclusive. It would thus be difficult to formulate a general rule in that regard. However, he shared the view of Mr. Pellet that the issue should be examined in the context of the objective element—in other words, when considering a breach of an obligation under international law.

12. With regard to Mr. Kamto’s suggestion to add a paragraph on the responsibility of member States of the organization, either because they had contributed to the wrongful act or because the organization had acted as an

organ of a State, he pointed out that the latter case was covered, at least implicitly, in the draft articles on State responsibility for internationally wrongful acts. The issue of the responsibility of member States was too problematic to be dealt with at the stage of formulation of general principles. Once the relevant draft articles had been discussed, it would be possible to add something to draft article 3.

13. In conclusion, he proposed that articles 1 and 3 should be referred to the Drafting Committee and that article 2 should be dealt with in the way he had suggested.

14. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the Special Rapporteur’s suggestion that an open-ended working group should be established to deal with unresolved issues relating to article 2 and that articles 1 and 3 should be referred to the Drafting Committee.

*It was so decided.*

### **Diplomatic protection<sup>3</sup> (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>4</sup> A/CN.4/L.631)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR**

15. Mr. DUGARD (Special Rapporteur) said that, before introducing his report, he wished to comment on the treatment currently accorded to special rapporteurs. First, the Fifth Committee had decided arbitrarily to discontinue the payment of honoraria to special rapporteurs. Second, conference services had laid down strict new rules concerning the date of submission and the length of reports and the time needed for their translation and publication. Special rapporteurs now had to write their reports without any financial reward while continuing to perform their other functions. Only the knowledge that the Commission could not function without their reports compelled them to complete those reports on time.

16. The decision of the Fifth Committee was unfair, discriminatory and exploitative. He trusted that the Commission would again voice its complaints on that score, but, knowing that delegations would pay little attention, he appealed to members of the Commission who had the ear of their Governments to persuade them to raise the matter in the Fifth Committee.

17. His fourth report on diplomatic protection (A/CN.4/530 and Add.1) dealt with only one kind of legal person, namely, the corporation. That was because it was the most important kind of legal person for current purposes and most of the relevant judicial decisions dealt with it. Other draft articles would be added to those in the report, however, applying the principles expounded in respect of corporations to other legal persons. For the time being, he would limit himself to introducing draft articles 17 and 18. Draft articles 19 and 20, which also appeared

<sup>3</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>4</sup> See footnote 1 above.

<sup>2</sup> See 2751st meeting, footnote 3.



in the report, would be introduced at a later stage in the debate.

18. One decision dominated all discussions on the subject: the judgment of ICJ in the *Barcelona Traction* case, which was introduced in paragraphs 4 to 10 of the report. In that case, the Court had stated the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office (in that case, Canada) and not to the State of nationality of the shareholders (in that case, Belgium). The Court had acknowledged that there was a certain amount of practice relating to bilateral or multilateral investment treaties that tended to confer direct protection on shareholders, but that that did not provide evidence that a rule of customary international law existed in favour of the right of the State of nationality of shareholders to exercise diplomatic protection on their behalf. It had dismissed such practice as constituting *lex specialis* (see para. 6 of the report).

19. In reaching its decision, ICJ had ruled on three policy considerations, which were set forth in paragraph 10 of the report. First, where shareholders invested in a corporation doing business abroad, they undertook risks, including the risk that the corporation might in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Second, if the State of nationality of shareholders was permitted to exercise diplomatic protection, that might result in a multiplicity of claims because, in multilateral corporations, the shareholders were nationals of many countries. Third, the Court had said that it would not apply by way of analogy rules relating to dual nationality of natural persons to corporations and shareholders, which would allow the States of nationality of both to exercise diplomatic protection.

20. There had been widespread disagreement among judges over the reasoning of ICJ, as was evidenced by the fact that 8 of the 16 judges had given separate opinions, of which 5 had supported the right of the State of nationality of shareholders to exercise diplomatic protection. Among the judges who had supported the Court's reasoning, Mr. Padilla Nervo had really captured the ideological dimension of the debate when he stated that it was not the shareholders in those huge corporations who were in need of diplomatic protection, but rather the poorer or weaker States where the investments took place which needed to be protected against encroachment by powerful financial groups or against unwarranted diplomatic pressure.

21. The decision of ICJ in the *Barcelona Traction* case had been subjected to a wide range of criticisms, the most notable of which were listed in paragraphs 14 to 21 of his report. First, had the Court paid more attention to State practice as expressed in bilateral and multilateral investment treaties and to arbitral decisions interpreting such treaties, instead of dismissing them as *lex specialis*, it might have concluded that there was a customary rule in favour of the protection of shareholders. Second, the Court had established an unworkable standard since, in practice, States would not protect companies with which they had no genuine link. He had quoted at length from reports sub-

mitted to ILA by Bederman and Kokott,<sup>5</sup> in which they pointed out that the traditional law of diplomatic protection had been to a large extent replaced by dispute settlement procedures provided for in bilateral or multilateral investment treaties, meaning that what the Court had categorized as *lex specialis* had become very common. Third, the Court's reasoning occasionally lacked coherence. On the one hand, the judgment appeared to reject the application of the "genuine link" to companies; on the other, it concluded that there was "a close and permanent connection" [p. 42, para. 71] between Canada and the company. Finally, the Court had failed to justify its statements on policy mentioned in paragraph 10 of the report.

22. With regard to the authority of *Barcelona Traction*, the decisions of ICJ were not binding on the Commission, and the Commission might well decide not to follow that judgment. The Commission might also feel that, in the case in question, the Court had not been laying down a general rule, but had been resolving a particular issue. Moreover, in the *ELSI* case, a chamber of the Court had ignored *Barcelona Traction* when, as was described in paragraphs 23 to 26 of the report, it had allowed the United States to exercise diplomatic protection on behalf of two American companies which held all the shares in an Italian company. That having been said, it must be acknowledged that, 30 years on, *Barcelona Traction* was viewed as a true reflection of customary international law on the subject and that the practice of States in the diplomatic protection of corporations was guided by it.

23. Before proposing rules on the nationality and diplomatic protection of corporations or their shareholders, it was necessary to clarify the options open to the Commission with respect to the State that was entitled to exercise diplomatic protection. That was what he did in paragraphs 28 to 46 of his report, where he proposed seven options. Option 1, that of the State of incorporation, might be described as the *Barcelona Traction* rule, whose advantages and disadvantages had already been indicated. Option 2 was that of the State in which the company was incorporated and with which it had a genuine link. It might more accurately reflect State practice, since many States would prefer to protect only those corporations with which they had a genuine link. The main problem with that option, particularly if it was seen as an additional factor, was that many corporations were incorporated in a State for tax advantages and had no genuine link with that State. For the purposes of diplomatic protection, such companies would become stateless. Option 3 was that of the State of *siège social* or domicile, which, in practice, was not very different from that of the State of incorporation. The terms *siège social* and "domicile" were used in private international law, however, and perhaps the Commission should avoid using them. Option 4 was that of the State of economic control. Whether the standard of majority shareholding or of a preponderance of shares was used, in practice it was very difficult to prove economic control. The decision in the *Barcelona Traction* case illustrated how difficult it was to identify with certainty the share-

<sup>5</sup> D. J. Bederman, "Lump sum agreements and diplomatic protection", provisional report, and J. Kokott, "The role of diplomatic protection in the field of the protection of foreign investment", provisional report, ILA, *Report of the Seventieth Conference* (see 2751st meeting, footnote 7), pp. 230 and 259 respectively.

holders of a company. Option 5 was a combination of the criteria of State of incorporation and State of economic control. There might be something to be said for allowing dual protection, but, if one accepted the criticism of the concept of economic control, it made little sense to recognize that form of dual nationality. Option 6 was to use the State of incorporation in the first instance, with the State of economic control enjoying a secondary right of protection. In addition to the difficulties with the concept of economic control, there was another difficulty with determining at what stage a State of incorporation was unwilling or unable to exercise its right and when a secondary right came into existence. Option 7 would allow the States of nationality of all shareholders to bring legal action. In other words, it would allow a multiplicity of actions, and that raised dangers that would best be avoided.

24. At the end of the day, the *Barcelona Traction* rule was probably the one that should be considered seriously and codified, subject to the exception that the decision itself recognized. In draft article 17, he tried to draft a provision that gave effect to that rule. Paragraph 1 of the draft articles said that a State was entitled to exercise diplomatic protection, but that it was for the State to decide whether to do so or not. The discretionary nature of the right might mean that companies that did not have a genuine link with the State of incorporation went unprotected. That was why investors preferred the security of bilateral investment treaties, a shortcoming which ICJ itself had recognized. In paragraph 2 of the draft article, he suggested that the State of nationality of a corporation was the State in which the corporation was incorporated, adding in square brackets the phrase “and in whose territory it has registered its office” because some members wished reference to be made to the corporation’s office. In the *Barcelona Traction* decision, the Court had emphasized both requirements. He was not sure that the two conditions were necessary. They seemed to amount to the same thing in practice.

25. Draft article 18 dealt with exceptions to the rule that it was the State of incorporation that could exercise diplomatic protection. The first exception was when the corporation had ceased to exist in the place of its incorporation. The phrase “ceased to exist”, which had been used by ICJ in the *Barcelona Traction* decision [p. 41, para. 66], did not appeal to all writers, many preferring the lower threshold of intervention on behalf of the shareholders when the company was “practically defunct” [*ibid.*]. His own view was that the first solution was probably preferable. The criticisms dealt mainly with the way in which it had been applied by the Court in the *Barcelona Traction* case, rather than with the term itself. The other problem that might arise was that of the place in which the corporation had ceased to exist. The Court in *Barcelona Traction* had not expressly stated that the company must have ceased to exist in the place of incorporation, but that was clear from the context of the proceedings. The Court had been prepared to recognize that the company had ceased to exist in Spain, but it had emphasized that that did not prevent it from continuing to exist in Canada, where it had been incorporated, and that had influenced the Court’s finding that the company had not ceased to exist.

26. The other exception was the one that allowed the State of nationality of the shareholders to intervene when

a corporation had the nationality of the State responsible for causing the injury. It was the most important exception to the rule established by ICJ in its judgment in the *Barcelona Traction* case. It was not unusual for a State to insist that foreigners in its territory should do business there through a company incorporated under that State’s law. If the State (often a developing State) confiscated the assets of the company or injured it in some other way, the only relief available to that company at the international level was through the intervention of the State of nationality of its shareholders. The rule was not free from controversy. Some had suggested that it should be recognized only when the injured company had been compelled to incorporate in the State which had injured it or in which it was “practically defunct”. The Court, in the *Barcelona Traction* decision, had raised the possibility of such a rule, but had not given a definitive answer either on its existence or on its scope. To examine the arguments for and against that exception, one should look at the support it had received pre-*Barcelona Traction*, in *Barcelona Traction* and after the decision had been handed down in that case.

27. Before *Barcelona Traction*, the existence of the exception had been supported in State practice, arbitral awards and doctrine. Practice and judicial decisions were far from clear, however. The strongest support for such an exception was to be found in three cases in which the injured company had been compelled to incorporate in the wrong-doing State: *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company*.

28. In *Barcelona Traction*, ICJ had raised the possibility of the exception and then had found that it was unnecessary for it to pronounce on the matter since it had not been a case in which the State of incorporation (Canada) had injured the company. It was quite clear, however, that the Court had been fairly sympathetic to the exception, as had been emphasized by a number of judges such as Fitzmaurice, who had stated that the rule was clearly part of customary international law. On the other hand, Judges Padilla Nervo, Morelli and Ammoun had been vigorously opposed to the exception.

29. Post-*Barcelona Traction*, some support for the principle could be found, mainly in the context of the interpretation of investment treaties. In the *ELSI* case, a Chamber of ICJ had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, but it had clearly been present in the minds of some of the judges, as was shown by an exchange between Judges Oda and Schwebel in their separate opinions, with Judge Schwebel expressing strong support for the exception. It was difficult to know what to conclude from the *ELSI* case, but it would seem to strengthen the outlook of the majority of judges who had expressed their opinions in favour of the exception proposed in the *Barcelona Traction* case.

30. Thus, before *Barcelona Traction*, there had been some support for the proposed exception, although opinions had been divided. The *obiter dictum* of ICJ in the *Barcelona Traction* case and the separate opinions of some of the judges had added to the weight of arguments in favour of the exception. Subsequent developments, albeit in the

context of treaty interpretation, had confirmed that trend. Moreover, both the United States and the United Kingdom had declared their support for the exception. Writers remained divided on the issue. He himself proposed that the Commission should accept the exception and that the latter should not be limited to situations in which the injured company had been compelled to incorporate in the wrong-doing State, but should apply in situations where the company was not “practically defunct”. If the Commission had reservations about the exception, however, it would be very difficult to dismiss situations where a corporation had been compelled to incorporate in the wrong-doing State in order to be allowed to do business there.

*The meeting rose at 11.30 a.m.*

## 2757th MEETING

*Wednesday, 14 May 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) was helpful and well documented and that its quality was matched by that of the introduction by the Special Rapporteur, who had made it clear that he was confining his study to that of

corporations. Personally, he could see little justification for such a restriction and hoped that it would not be too strongly emphasized. Other bodies—cities, local authorities, universities, professional associations, non-governmental organizations—might require diplomatic protection, and some important cases—Ratibor, for example—involved universities and cities.

2. Numerous bilateral investment treaties were now being concluded, and one might ask to what extent a pattern of such treaties constituted proof of the development of customary international law. There were currently well over 2,000 bilateral investment treaties, but large numbers did not necessarily make for quality, and there was still a need to discover *opinio juris*. It was his impression that when bilateral investment treaties actually led to arbitration in which the applicable law was a mixture of the law of the respondent State and public international law, they had an extraordinarily unbalancing effect. A recent arbitral decision, not yet in the public domain, illustrated that proposition. Bilateral investment treaties thus raised very serious policy problems.

3. The *Barcelona Traction* case was an important part of the literature on diplomatic protection. The Special Rapporteur asked in his report whether the decision of ICJ in the case bound the Commission, but no such problem should arise: the decision had been carefully argued by two important teams of international lawyers, was part of the literature and simply had to be taken very seriously. The *ELSI* case also had to be taken seriously. It was quite clearly based on a cause of action relating to a bilateral treaty of friendship, and the alleged inconsistencies between the *ELSI* and *Barcelona Traction* cases should not worry the Commission unduly.

4. A central element in *Barcelona Traction* was the policy question. ICJ, sometimes accused of not taking policy into account, had on that occasion quite clearly done so: taking the view that if the holder of bearer shares, which were on the market for extended periods, could emerge from under the carapace of the corporation to make a claim, that would create considerable instability. It would be difficult for States and others to have clear expectations as to who their economic visitors actually were, and there would be a constantly changing population of holders of bearer shares. That was clearly a central point of policy and of public order as well. Judging from paragraph 10 of the report, the Special Rapporteur seemed to have accepted the broad policy lines of *Barcelona Traction*.

5. The first part of draft article 17 posed serious problems that would have to be dealt with by the Drafting Committee. Draft article 18 contained the proposition that shareholders did not receive diplomatic protection and their claims were not admissible in isolation from their relationship with a corporation. Subparagraph (a) set out the exception: that the corporation should have ceased to exist in the place of its incorporation. He had no difficulties with the exception, which was not controversial and seemed to be based on common sense. In some quarters, however, a more flexible approach was preferred, allowing the shareholder separate protection and recognition of his or her interests when the corporation existed in principle but was practically defunct. While he had no strong feelings on the matter, there did seem to be room for debate.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



6. A second exception, set out in draft article 18, subparagraph (b), namely that the corporation had the nationality of the State responsible for causing injury to the corporation, was highly controversial, and he was opposed to including it. All the evidence was carefully considered in paragraphs 65 to 87 of the report, but the authority for the exception was very weak. In a passage from his own publication, *Principles of Public International Law*, partly quoted in paragraph 85 of the report, he had written that the exception, if it existed, was anomalous, since it ignored the traditional rule that a State was not guilty of a breach of international law for injuring one of its own nationals, and that if one accepted the general considerations of policy advanced by ICJ in *Barcelona Traction*, then the alleged exception was disqualified.<sup>3</sup>

7. Subject to those observations, he thought that draft articles 17 and 18 were ready to be referred to the Drafting Committee.

8. Mr. PELLET said he was a fervent supporter of draft article 18, subparagraph (b), but would outline his views later. For the moment, he would like clarification from Mr. Brownlie about the statement that certain municipalities or universities might require diplomatic protection. Some universities were not public but private, of course, but municipalities were always emanations of the State and hence could suffer no direct harm, nor have need of diplomatic protection, since they were part of the State and it acted on their behalf.

9. Mr. BROWNLIE said that for an institution which was under the direct control of the State, what Mr. Pellet said was quite true. That was not the case of many universities, however, or of lower-level institutions in which the State might have a very indirect interest but which, at least for the purposes of local law, were private institutions. If litigation in the courts of Ukraine had been possible at the time of the Chernobyl disaster, for example, it would have proved difficult, as the institution responsible for the reactor was in fact a private-law institution. There were many other institutions that were difficult to classify as being part of the public sector or the private sector.

10. In response to a follow-up question by Mr. Pellet, he said there was no easy way, even in terms of comparative public law, to define the legal status of local authorities. Under English law, local authorities were by no means simply an emanation of the State: other than in London, they were not controlled by the State.

11. The CHAIR said that if the local authorities were acting as a State organ, then the State could act directly in the exercise of its responsibility, and diplomatic protection did not come into play. Diplomatic protection was an indirect route for providing protection for individuals or legal persons that were of the nationality of the State.

12. Mr. KOSKENNIEMI said that two opposing policy rationales were being applied to the problem. With reference to paragraph 85 of the report, he would like to know why Mr. Brownlie thought the general policy of the *Barcelona Traction* case overrode the particular concern outlined by the Special Rapporteur in paragraph 65, in

which he defended the exception in draft article 18, subparagraph (b), by outlining a different policy rationale in a very clear fashion: "A capital-importing State will not infrequently require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law." The Special Rapporteur went on to say that the State might then engage in dubious actions *vis-à-vis* that company, opening the door to evasion of the law, unless an exception like the one proposed in subparagraph (b) was made.

13. Mr. BROWNLIE said that the more serious cases involved a direct attack on the interests of the shareholder, but if the shareholder was of the same nationality as the corporation, a major problem of principle arose. There were two levels of argument, one relating to the parameter of protection or non-protection of shareholders, and the other to the more global parameter of how the State dealt with its own nationals. It was not surprising that the question had resulted in great divergences of view among the authorities: many international lawyers found the exception to be unattractive.

14. Mr. KAMTO said the Special Rapporteur had submitted a comprehensive and rigorous report on a difficult subject, the diplomatic protection of corporations.

15. Paragraph 10 spoke of the risk that the corporation might, in the exercise of its discretion, decline to exercise diplomatic protection, but surely it was the State of nationality of the corporation, not the corporation itself, that was meant. Paragraph 27 was so beautifully balanced that it was hard to know which way the Special Rapporteur was leaning. If, as he stated further on and as draft article 17 implied, the *Barcelona Traction* case was superannuated and no longer reflected the contemporary law of international investments, then that law must be developed on the basis of the practice followed in bilateral and multilateral investment treaties, with a view to codifying the diplomatic protection of shareholders, albeit with some conditions attached. If, however, *Barcelona Traction* today remained an accurate statement of the relevant customary law, a balancing act would have to be performed.

16. It was difficult to imagine that, for the purposes of obtaining compensation, foreign investors would prefer diplomatic protection over the protection offered by investment treaties. Such protection was often extremely extensive, couched in arbitration clauses that recent arbitral decisions characterized as riddled with traps for States. In any case, it was much easier to set in motion than was diplomatic protection: witness the recent decisions by ICSID.

17. One could not reason today as Judge Padilla Nervo had in his separate opinion in the *Barcelona Traction* case. At the time, he had undoubtedly been correct in saying that it was the poorer or weaker States in which investments were made that needed protection. They still stood in need of protection, but the economic context had changed. With the help of globalization, investments were now being made in every direction: indeed, many investors from developing countries were investing in other developing countries.

<sup>3</sup> See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), especially p. 495.

18. The Special Rapporteur had spoken of the danger of statelessness if the genuine link criterion was retained. It had, however, been incorporated in the *Barcelona Traction* decision, though in different terms from those in the *Nottebohm* case, which was understandable in that the latter had concerned an individual, not a legal person. The question was whether the Commission wished to encourage the phenomenon of tax havens, even indirectly, by formally denying the existence of a genuine link. He for one hoped not, especially since the *Barcelona Traction* decision went in the opposite direction.

19. Protection of shareholders in line with the exception envisaged by ICJ in the *Barcelona Traction* case was essential when the State that had caused injury to the corporation was the State of nationality of that corporation. The Special Rapporteur was proposing that the Commission should allow such a case as an exception, where the corporation had been forced to incorporate under the domestic law of the State in which the investment was made. It seemed an unnecessary requirement except in the sense that, without it, the investor could have gone elsewhere. It was always open to an investor not to invest in a particular country, but what was important was to provide a final legal safety net for the shareholder, who would otherwise be completely robbed without even a chance to present his or her case before an objective third party, namely an international court.

20. Sometimes an investor could not expect any help from the State, as could be seen from the *Biloune* case. Mr. Biloune, of Syrian nationality, had resided in Ghana for 22 years before being expelled in 1987. He had created a company of which he had held 60 per cent of the shares. The company had concluded agreements with its Ghanaian partners to build a hotel complex in Accra. Invoking the absence of a building contract, the authorities had stopped the construction and demolished part of the building. Mr. Biloune had then been arrested and held for 13 days before being expelled. Was it conceivable for Mr. Biloune's company, which had since gone bankrupt, to have obtained the diplomatic protection of its State of nationality? In such a case, the shareholder, and certainly a majority shareholder, should be able to request the diplomatic protection of his or her State of nationality, which for Mr. Biloune was Syria. Such a possibility should be encouraged, especially since under certain inter-State legislation, such as that of the Organization for the Harmonization of Business Law in Africa, it was now possible to have a company consisting of a single shareholder with a legal personality different from that of the sole shareholder.

21. Mr. Brownlie was right to raise the question of the protection of shareholders in international law, but protecting foreign shareholders was not the same as protecting nationals. It was the company, and not the foreign shareholder, that had the nationality of the host State of the investment. As for national shareholders, they should be able to protect their rights in the State of nationality, in accordance with domestic legislation. National shareholders came under existing law for nationals. Thus, there were different procedures, depending on the nationality of the shareholder; it was the only way to avoid the question of principles raised by Mr. Brownlie. However, that

should not prevent the Commission from envisaging diplomatic protection for foreign shareholders.

22. He agreed with the wording of draft article 17 but was in favour of deleting the phrase in brackets. Draft article 18 was acceptable, but a time limit should be set in subparagraph (a). If a company went bankrupt, it should not have recourse to diplomatic protection indefinitely. Perhaps the time limit could be set from the date on which the company announced bankruptcy. Likewise, subparagraph (b) should include the requirement of a "reasonable time limit" for exercising diplomatic protection.

23. Mr. PELLET said that he agreed almost entirely with Mr. Kamto's comments, in particular his defence of draft article 18, subparagraph (b). But he was somewhat puzzled as to why the question of time limits with regard to the protection of the shareholders of a company suddenly had to be addressed. Such a question could easily be posed for the whole subject of diplomatic protection. The issue was whether diplomatic protection could be exercised indefinitely. However, the legal impact of determining whether time had run its course was such a general problem in international law that he was not certain it had to be reflected in the draft articles.

24. Mr. KAMTO said that, as the article concerned an exception to the rule, the Commission should at least call for a reasonable time limit. Such a remedy should not be available to foreign shareholders indefinitely. Nevertheless, if members were not convinced, he would not press the point.

25. Mr. MOMTAZ said that the purpose of specifying a reasonable time limit was presumably to prevent a proliferation of claims by the States of nationality of the shareholders.

26. Mr. Sreenivasa RAO said that, as he understood it, Mr. Kamto was arguing that, if a company was incorporated in a particular State, it had that State's nationality, and if there was an injury to that company by virtue of an action of the State of incorporation, remedies must be sought in the domestic courts of that country. Yet draft article 18, subparagraph (b), concerned the extent to which a foreign State should be allowed to provide diplomatic protection to its nationals who were shareholders in a company that was incorporated in a foreign State. A State could provide diplomatic protection only if the person injured was its national. Shareholders should not be treated as a separate group or provided with separate protection. The Commission was not talking about individuals separately from the company itself. The Special Rapporteur had rightly stressed that the personality of a corporation was different from that of its shareholders. Thus, if diplomatic protection was tied to the personality of the company, how could foreign nationals who were shareholders of a company be provided separate diplomatic protection? If the Commission decided that a State had a right to provide diplomatic protection to nationals who were shareholders in a company incorporated in a foreign country, that would pose problems, as Mr. Kamto was aware.

27. Mr. KAMTO, replying to Mr. Sreenivasa Rao's comments, said that the Special Rapporteur had sought to provide for the exceptions envisaged in *Barcelona Traction*.



tion. It was the right approach, because it was consistent with the situation in the international community today. The Commission could not pretend that investment law did not have particular rules. Foreign investment did not have the same status in the legal system of the host State. It could have the same status if the corporation had been established in accordance with the rules of international law, but the fact remained that foreign investment always enjoyed special protection, whether through bilateral or multilateral investment agreements or through diplomatic protection. The question was how a corporation could exhaust local remedies if it was injured by the host State, as in the *Biloune* case. It was difficult to imagine how someone who had been thrown in prison and then expelled could exhaust local remedies.

28. Even assuming that local remedies could be exhausted and that the rights of the corporation were not sufficiently protected, foreign shareholders should have recourse to their State of nationality to obtain the protection not available to them under the rules of domestic law. In the *Biloune* case, perhaps the Ghanaian nationals holding the remaining 40 per cent of the shares in the company could have instituted legal proceedings in Ghana; Mr. Biloune might have tried to do so from abroad, but it was highly unlikely that he would have been successful. There must be some way to provide protection under international law for such cases.

29. Mr. PELLET said that Mr. Kamto's comments did not clarify the problem. It would be preferable to introduce the possibility of the exhaustion of local remedies. The Commission must consider the circumstances in which diplomatic protection was possible—in which recourse to local remedies had no chance of success—which was what Mr. Kamto had in mind with the *Biloune* case. Another example was the *Diallo* case pending before ICJ. The point under discussion was a corporation which had the nationality of the host State. In principle, diplomatic protection could not be exercised, because the condition set out in draft article 17, which reaffirmed *Barcelona Traction*, was not met. The question arose only when a foreign shareholder, who might or might not have a majority holding, was prosecuted by the authorities and could not exercise his or her rights. In such instances draft article 18, subparagraph (b), was an essential safety net. However, at issue was not the exhaustion of local remedies but rather the other condition for the exercise of diplomatic protection, namely nationality. If the Commission confined itself to the *Barcelona Traction* principle, reflected in draft article 17, the shareholder would not enjoy any protection, and the corporation was perfectly opaque. If the corporation that was the victim of the internationally wrongful acts of the host State had the nationality of the host State, then draft article 18, subparagraph (b), was justified. The Commission should proceed as though local remedies had been—or could not be—exhausted.

30. Ms. ESCARAMEIA said that she endorsed the Special Rapporteur's suggestions for draft articles 17 and 18 and was in favour of deleting the phrase in brackets at the end of draft article 17, paragraph 2, because it followed logically from the requirements of the provision.

31. The Special Rapporteur's justification for choosing the *Barcelona Traction* rule was that it was still the prac-

tice of most States. In analysing the *Barcelona Traction* case, the Special Rapporteur stressed that ICJ had been divided and that it could have taken into account the treatment of enemy companies in time of war, State practice in settlements through lump-sum agreements, investment treaties and arbitral awards, including the *Delagoa Bay Railway* case. There had also been a discussion of the practice of bilateral investment agreements, studies by Bederman and Kokott<sup>4</sup> and the *ELSI* case, which in substance addressed the same situation. The many examples given were confusing and could have led to precisely the opposite conclusion. Even legal arguments such as equity, harmonization with the *Nottebohm* genuine link and questions of analogy with dual nationality of individuals could have been cited. She nonetheless agreed with the Special Rapporteur's choice for draft article 17, because it was the best alternative in today's world. It was a choice based on policy rather than on legal necessity.

32. In her opinion, long and complex proceedings, if not chaos, could result from using the option of the State of nationality of shareholders. The State of nationality of shareholders would also create problems with the rule of continuity of nationality, given that shares changed hands so quickly.

33. The option involving the State of economic control (para. 32 of the report) was not clear. The Special Rapporteur had spoken in that connection of the majority shareholders, but sometimes a 1 per cent holding was more important for one State than a 30 per cent holding for another State. It depended on the State. Thus, the State of economic control rule might be unfair, because it might have a greater impact on the economies of States that did not have economic control and would be more likely to seek protection.

34. If the idea of the genuine link of the State of incorporation was adopted, most corporations would become stateless, because in practice they would have no possibility of obtaining diplomatic protection. As Mr. Kamto had rightly noted, surely the Commission did not want to encourage the use of tax havens, but it did not want to deprive corporations of the possibility of diplomatic protection. Dual protection of the shareholders—by the State of incorporation and by the State of nationality of the shareholders—would also cause many problems. *Barcelona Traction* was still the safest, clearest, most readily applicable and least confusing alternative.

35. As for draft article 18, subparagraph (a), the requirement that a corporation had ceased to exist might be too high a threshold. It would be preferable to use the words "practically defunct", as in the *Delagoa Bay Railway* case, or the phrase "deprived of the possibility of a remedy available through the company", as in the *Barcelona Traction* case [p. 41, para. 66]. In that way, the corporation would not have actually ceased to exist, but simply become non-functional, leaving no possibility of a remedy.

36. She agreed that draft article 18, subparagraph (b), involved an issue of equity. If the company was compelled to acquire the nationality of the State in which it

<sup>4</sup> See 2756th meeting, footnote 5.

was incorporated, that would bring an equivalent of the Calvo clause<sup>5</sup> into play, because the company would be deprived of any kind of protection. This was a frequent occurrence, and the report cited many examples, such as the *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company* cases. Those important exceptions should be retained; to do otherwise would be unfair to corporations. If the exceptions were recognized and the Commission decided that the State of nationality of the shareholder was entitled to exercise diplomatic protection, the question then arose which State: all of them or just those with economic control? The Special Rapporteur seemed to have in mind any State of any shareholder. In principle, she was not opposed to that view, but it might be better to include a reference to the economic control of the company, which would then need to be defined.

37. Mr. BROWNLIE, raising the question of equity as touched upon by Ms. Escameia when she referred to the second exception in draft article 18, said it was difficult to see how equity applied in that instance. Was the world one in which the importing of foreign capital was compulsory? On the contrary, investors were free agents and could choose to invest as they saw fit. If they were told that a local company must be formed, he did not think it was inequitable for investors to be required to meet certain conditions. Equity cut in different directions. As a result of bilateral investment treaties and other influences, the local remedies rule was in any case frequently inapplicable, and the host State of foreign capital often had to face compulsory arbitration. It was a strange proposition to assert that the matter was one of equity. Investors must take some risks. The attitude of claimant investors under bilateral investment treaties was that they had some sort of guarantee and that if things went wrong, they were going to receive massive damages, which might amount to a considerable percentage of the local economy. Thus, it was important to be very careful when bringing in considerations of equity.

38. Mr. Sreenivasa RAO said he agreed with some of Mr. Brownlie's remarks. The Special Rapporteur's concern about the statelessness of some companies, to which Ms. Escameia had referred, was a problem in isolation. However, in the context of economic development, and given the policies of countries seeking investments; the contractual arrangements currently being entered into, either as investment agreements or in other forms; the strict contractual conditions imposed on the host State; and the threat of massive damages in arbitration cases, the question of statelessness did not seem to pose a problem. Statelessness was a situation in which no other remedy existed and no one was prepared to promote the cause of the injured person, who was left without any way of receiving compensation for a serious injury.

39. How often did nationalization take place nowadays, and how serious was the problem in connection with statelessness? Some analysis was needed if the Commission was to speak of equity. In some cases, heavy damages were sought from States, to the detriment of the local economy—hence the need to be careful about making a case for statelessness in draft article 18, subparagraph (b).

40. Mr. SEPÚLVEDA said he agreed with Mr. Sreenivasa Rao that the question of statelessness was irrelevant, because the corporation was required to have the nationality of the State in which it was incorporated in accordance with the State's legislation. Such a corporation was not defenceless and had a number of forms of recourse, including compulsory international arbitration provided for under bilateral treaties on foreign investment guarantees and protection. But another element had not been taken sufficiently into account: the State in which the corporation was incorporated provided a legal system for settling disputes. Mr. Kamto had cited an extreme case in which the domestic legal system did not apply, but in the overwhelming majority of cases that system operated well, and, as a result, corporations which were incorporated, registered and domiciled in the host State had domestic remedies available to them. Only in exceptional cases was it necessary to apply to an international arbitration court or seek diplomatic protection.

41. Mr. DUGARD (Special Rapporteur), endorsing Mr. Sepúlveda's remarks in response to Mr. Sreenivasa Rao, said that the Commission was not dealing with an issue of statelessness: the corporation was incorporated in the State in which it did business, so it had the nationality of that State. Similarly, the shareholders were not stateless, having the nationality of the State of which they were natural persons. As Mr. Sepúlveda had pointed out, in most cases the corporation would indeed have remedies under the law of the host State. Only where those remedies had been exhausted and no justice obtained would draft article 18, subparagraph (b), come into play.

42. Mr. PELLET supported the Special Rapporteur's reasoning. In the normal situation covered by *Barcelona Traction*, corporation A had the nationality of State B and sustained injury in State C, the shareholder being a shareholder of State B. In the scenario covered by draft article 18, subparagraph (b), the shareholder was still a shareholder of State B, but corporation A had the nationality of the State in which it sustained injury. The difference was that, to draw an analogy with *Barcelona Traction*, the corporation was no longer a Canadian corporation but a Spanish corporation, and, if the corporation was Spanish, the scenario changed completely. Raising the issue of statelessness only complicated matters, as no corporation could be stateless. If the issue of statelessness was left aside, Ms. Escameia was right and, from a purely formalistic standpoint, it was, as Mr. Sepúlveda argued, an internal matter for the State that injured the corporation. If, however, one were to venture beyond such purely formalistic considerations, the problem was no longer merely internal, because the presence of a shareholder internalized an international problem. In such circumstances it was equitable to have recourse to the scenario covered by draft article 18, subparagraph (b), *Barcelona Traction* no longer being applicable because the corporation was Spanish and the shareholder continued to be Belgian.

43. Ms. ESCAMEIA said that her point—one made by the Special Rapporteur in his report—had been that such a situation would *virtually* amount to one of statelessness, in the sense that the corporation would have no State to protect it. Draft article 18, subparagraph (b), applied to a very extreme case, where local remedies could not be exhausted, or had been exhausted; where there could

<sup>5</sup> See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 206–208.

be no recourse to compulsory arbitration; and where the corporation enjoyed absolutely no protection, because it had the same nationality as the State that had injured it. Did the Commission seek, or did it not seek, to protect the capital and investment of a corporation in that situation? That was the policy decision it faced.

44. Mr. Sreenivasa RAO said he had been speaking figuratively in raising the issue of statelessness. If the scenario envisaged under draft article 18, subparagraph (b), was excluded, according to some members, as he understood, a situation tantamount to statelessness might arise.

45. Mr. KOLODKIN said that the Special Rapporteur had correctly defined the scope of his report and of the draft articles. The report provided a relatively clear formulation of an aspect of customary international law that was ripe for codification. He was not sure, however, whether the same could be said of diplomatic protection of other entities. In his view, the report devoted adequate space to an analysis of *Barcelona Traction*, since it was the case in which the general principles governing diplomatic protection of corporations were formulated. Justifiably little space was devoted to the *ELSI* case—a case on the consequences of the specific application of a concrete international treaty, and thus essentially an application of *lex specialis*.

46. The Special Rapporteur's analysis of hypothetical variant formulations of the norm on diplomatic protection of corporations was very useful and made it possible to assess the existing approaches to the question, primarily in doctrine. Last but not least, the Special Rapporteur's conclusions deserved to be supported as a whole.

47. First, he agreed with the general approach and methodology adopted, and could support the Special Rapporteur's proposal, in paragraph 47 of his report, to draft articles on the basis of the principles formulated in *Barcelona Traction*. It was important that that approach should also be consistent with the views of States, at least as formulated in the Sixth Committee.

48. Second, on the substance, it would be correct to start by codifying the rule whereby the right to exercise diplomatic protection of corporations was held by the State of their nationality, before going on to formulate exceptions—cases where such a right might be held by the State of citizenship of the shareholders. He had no problems with draft article 17, but a few doubts as to the exceptions. As the Special Rapporteur had rightly noted, the exceptions had been recognized by ICJ in *Barcelona Traction*, albeit to differing degrees. It must, however, be noted that that part of the Court's decision had given rise to differing opinions. The exceptions were formulated in draft article 18, but perhaps also provided for in draft article 19. In that case, it might be useful not to separate the presentation of draft articles 18 and 19. However, others might take a different view, and he would defer to the Special Rapporteur with regard to the issue of presentation.

49. He had no fundamental doubts about the exception in draft article 18, subparagraph (a), other than for a few minor drafting points. However, he had a few doubts with regard to draft article 18, subparagraph (b). The possible scope of application of the exception should perhaps be

limited to a situation in which the legislation of the host country—the country in receipt of the investments—might require the creation of a corporation. In that regard the exception under subparagraph (b) would be quite justifiable. In his view, the Commission would also be right to limit itself to a codification of the principles found in the *Barcelona Traction* case, as noted by the Special Rapporteur in paragraph 27 of his report, as that case reflected customary international law. Accordingly, draft articles 17 and 18 could be referred to the Drafting Committee.

50. Mr. GAJA said that, in spite of the Special Rapporteur's professed reluctance to take up the subject of diplomatic protection of legal persons, his fourth report was his best yet. He particularly welcomed the Special Rapporteur's clear statement of the options open to the Commission, and of the policy arguments for and against each possible solution.

51. His own claim to expertise in that field rested solely on the fact that he had assisted Roberto Ago in his pleadings on the question of diplomatic protection of shareholders in the *Barcelona Traction* case and had later been one of the counsel in the *ELSI* case, though on that occasion he had not pleaded on the issue currently under discussion. On both occasions he had been engaged on behalf of the respondent State—a fact that might affect his attitude to the present matter.

52. He agreed with the Special Rapporteur's approach of taking the *Barcelona Traction* judgment as guidance for his own proposals. In spite of certain commentators' attempts to draw elements from the *ELSI* judgment on the basis of which to reconsider what ICJ had said in the *Barcelona Traction* case, he found that little could be gleaned from that case for the Commission's purposes. The Court's jurisdiction in the *ELSI* case had been limited to the interpretation and application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy<sup>6</sup>—one of the many concluded by the United States in the period immediately following the Second World War. The applicant and respondent States had agreed that the treaty granted rights to shareholders, but they had differed about the extent of those rights. For instance, did the shareholders' rights to organize, control and manage a corporation under article III of the treaty include the right that the assets of the corporation should not be the object of requisition? The Chamber of the Court had not found it necessary to reach a conclusion on the extent of rights, but had hinted in some passages of the judgment that the wider interpretation of the treaty provision was more acceptable. The *Barcelona Traction* judgment, which concerned general international law, had indeed been referred to, albeit in passing, in the parties' pleadings, but it could hardly be considered as decisive for the interpretation of the relevant treaty. It was quite understandable that bilateral investment treaties and also treaties of friendship, commerce and navigation set out to give shareholders wider protection than was otherwise available under general international law.

53. Regarding the basic rule drawn from *Barcelona Traction* by the Special Rapporteur in draft article 17,

<sup>6</sup> Signed in Rome on 2 February 1948 (United Nations, *Treaty Series*, vol. 79, no. 1040), p. 171.



he had no objection to suppressing one of the two formal criteria listed in that judgment, namely, the criterion, currently placed in square brackets, of the registered office. As the Special Rapporteur noted, the registered office was generally located in the State of incorporation. In his view, the main reason why the Court had mentioned that both the place of incorporation and the registered office should be located in the State exercising diplomatic protection was that civil-law countries tended to give relevance to the place of the seat, whereas common-law countries preferred the criterion of the place of incorporation, particularly where conflicts of laws arose. The Commission could well accept one single criterion, and the choice of place of incorporation seemed justified, in view of its growing dominance in other areas of law.

54. On the other hand, he would hesitate before eliminating from the general rule any reference to the existence of an effective link between the corporation and the State of nationality. First of all, he understood the *Barcelona Traction* judgment as having asserted that requirement, only finding that “no absolute test of the ‘genuine connection’ has found general acceptance” [p. 42, para. 70]. Thus, the test had in fact also been used by the ICJ, as had been noted in particular in Judge Fitzmaurice’s separate opinion.

55. Furthermore, as a matter of policy, the reasons militating in favour of dropping a reference to effectiveness with regard to the nationality of individuals did not fully apply to the case of corporations. In many States incorporation was not made conditional on any substantial link between the corporation and the State of incorporation. Thus, incorporation was a much more tenuous relationship than citizenship as between the individual and the State. Admittedly, as the Special Rapporteur noted, in the absence of an effective link the State of nationality of incorporation was in any case unlikely to exercise diplomatic protection. However, that did not seem sufficient reason for saying that the State of incorporation *could* exercise diplomatic protection. Thus, he would favour the introduction of some element to that effect.

56. On the exceptions, like other members he had no particular problems with draft article 18, subparagraph (a), although it raised some questions of drafting and of substance. As to article 18, subparagraph (b), he noted, first, that ICJ had been much less affirmative with regard to that exception in the *Barcelona Traction* judgment. With regard to subparagraph (a), some elements in paragraph 66 of the judgment conveyed, albeit implicitly, that the Court favoured the existence of that exception. However, as to the second exception, in a passage cited in paragraph 75 of the fourth report, the Court had not endorsed that exception in the same way as the separate opinions of Judges Fitzmaurice, Tanaka and Jessup had. It might also be recalled that Judge Padilla Nervo had affirmed that the passage in question did not imply the existence of an exception of a more general scope—an understandable view, given that judge’s attitude to general international law concerning protection of shareholders. Thus, the exception under subparagraph (b) did not have a strong basis in the *Barcelona Traction* judgment.

57. As for the policy aspects, the exception, if it was to be retained, needed to be qualified. Most investments that

gave rise to wrongful acts were made by companies incorporated in the State of investment, although they might be part of a group of corporations based elsewhere. Hence, in a majority of cases the exception, rather than the rule, would apply. It was true, as had been mentioned in the report and in the debate, that in many cases foreign would-be investors were required to establish a corporation in the host State. That might be one of the elements of equity. However, if an exception as stated in draft article 18, subparagraph (b), were adopted and came to be accepted as an expression of general international law, the host State would be wise to make it a condition for an investment, not that the company should be incorporated locally, but that it should be incorporated elsewhere, so that it would not come under the exception that would open up the way for the protection of all the shareholders.

58. Finally, he shared the doubts voiced by Ms. Escarameia regarding the general reference to “shareholders”. That reference, understandable in the context of draft article 18, subparagraph (a), should perhaps be narrowed down in the context of article 18, subparagraph (b), so as to obviate the possibility of intervention by the national States of minority shareholders.

59. Mr. PELLET said it appeared to be generally accepted that determination of the nationality of corporations was a problem of internal law. Mr. Gaja had explained that internal laws varied in that regard and fell into two major systems: common-law countries favoured the criterion of the place of incorporation, while countries espousing civil or Romano-Germanic law favoured the criterion of the place of the registered office. What he failed to understand was the conclusion drawn by Mr. Gaja from that observation, namely, that the registered office criterion should be abandoned in favour of the incorporation criterion. That position was all the more regrettable in that Mr. Gaja hailed from a country that had seen the birth of Roman law. He was at a loss to understand why Mr. Gaja wished to throw himself voluntarily to the lions and place himself under the protection of common-law imperialism. There was no reason to accord precedence to either one of the two alternative systems. It was absolutely indispensable to retain the words “and in whose territory it has its registered office”, in draft article 19, paragraph 2, amending the conjunction “and” to read “or”, so as to reflect the fact that the two systems were equally valid.

60. Mr. GAJA said that not all the “Latin” countries adopted the criterion of the seat. In Italian law, for instance, article 25 of Law 218 (1995) on private international law used the criterion of incorporation.

61. As for the alternative nature of the two criteria, the *Barcelona Traction* judgment referred to “the State under the laws of which it is incorporated *and*\* in whose territory it has its registered office” [p. 42, para. 70].

62. It was questionable whether it was really internal law that conferred nationality on corporations. He had some doubts as to whether that was true with respect to legal, as opposed to natural, persons. The system of attribution of nationality to corporations varied, depending on whether, for instance, taxation, investment or corporate law issues were involved.



63. Mr. MELESCANU noted that Mr. Gaja had endorsed Ms. Escameia's idea of possible actions for diplomatic protection by shareholders of the State representing the majority shareholders. If the Commission pursued that idea, it would come up against a problem posed by the legal systems of all countries that had a functioning market economy, namely, the existence of special laws protecting minority shareholders. If the Commission wanted to introduce the concept of majority shareholders, it would have to deal with other issues that included the rights of minority shareholders.

64. He was impressed by Mr. Gaja's reasoning with regard to paragraph 24 of the report. He agreed strongly that, if the Commission chose to establish a clear exception like the one in draft article 18, subparagraph (b), it would face exceptional situations. For instance, in order to avoid actions for diplomatic protection based on that exception, States might be tempted to require corporations to incorporate in another country. That could also affect the proposed approach, which he supported, of using the principles enunciated in the *Barcelona Traction* case as a basis for the present draft.

65. Mr. KAMTO, referring to the suggestion to delete the wording in square brackets in draft article 17, paragraph 2, said that the criteria of State of incorporation and territory of registered office were cumulative, not alternative. Both criteria were stated clearly in the *Barcelona Traction* judgment, where the conjunction "and" was used rather than "or". The Commission could not use internal law as a starting point; it must start from the problem created in international law in order to solve it. If it retained only the criterion of State of incorporation, the indirect effect would be to encourage tax havens: companies would incorporate in one State and conduct their operations in another. The Commission should not encourage such practices by adopting a rule that departed from the clear criteria set in *Barcelona Traction*, which must be the point of departure for the draft articles.

66. The exception in draft article 18, subparagraph (b), might prompt States to require foreign companies to incorporate elsewhere in order to avoid actions for diplomatic protection. He did not see what States would gain from doing so, however, since the country in which the company had its registered office would be able to exercise diplomatic protection. States might escape actions for the diplomatic protection of shareholders, but they would not escape actions for diplomatic protection completely.

67. Not only did the idea of restricting protection to majority shareholders complicate matters, it was also discriminatory. He supported Mr. Momtaz's suggestion to impose a reasonable time limit for instituting diplomatic protection proceedings under draft article 18, subparagraph (b), and felt that the Commission should consider that idea.

68. Mr. CHEE, referring to draft article 18, subparagraph (b), asked Mr. Gaja what State, other than the host State, could cause injury to shareholders. From his own experience—for instance, with the Agreement between the Government of the Republic of Korea and the Government of the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments—it

seemed that the practice was for the parties to go directly to arbitration if there was a disagreement over interpretation, making diplomatic protection unnecessary.

69. Mr. GAJA, responding to Mr. Chee, agreed that in most, although not all, cases it was the host State that caused the injury. Mr. Kamto hoped to discourage companies from incorporating in countries with which they had no ties. However, the establishment of a registered office was entirely formal. If the Commission were to admit diplomatic protection on the part of States where companies were actually based and from which they were effectively controlled, it would be applying the opposite criterion from that identified in *Barcelona Traction*. If a company could be protected by the State of nationality of its shareholders, the host State would not gain much by requiring the company to take its nationality. A host State's interest would be to impose the condition that the company must not be incorporated in the State of nationality of the shareholders. Again, a company might feel that an action for diplomatic protection was sufficiently remote for it to stand to gain more from a taxation standpoint by incorporating in a country that was friendly to it.

70. Mr. MANSFIELD thanked the Special Rapporteur for his very thorough report and excellent introduction. The report made it clear that the *Barcelona Traction* judgment must be the starting point for any codification exercise. The criticisms made of that judgment, as detailed in paragraphs 14 to 21 of the report, were certainly important factors. In essence, the rule expounded in the judgment had become increasingly divorced from how States actually behaved, because companies continued to incorporate themselves, for tax reasons, in places with which they had little or no connection. They had effectively decided that tax advantages were more important to them than the possibility of recourse to diplomatic protection and had found it more useful to rely on the arrangements established through their States in bilateral investment treaties.

71. That situation confronted the Commission with a dilemma: either it codified rules on the basis of *Barcelona Traction*, knowing that such rules were irrelevant to current State practice, or it tried to develop a new or supplementary basis for the exercise of diplomatic protection of corporations and shareholders, but without there being any firm grounding for such a new rule in current State practice or any indication that such a rule would make diplomatic protection more relevant to the lives of States and companies or would even be desirable.

72. He agreed with the Special Rapporteur's conclusion that the wisest course was to draft articles based on the principles of *Barcelona Traction*. If future changes in the commercial world prompted corporations to attach more importance to diplomatic protection than they did at present, it would be for them and their shareholders to choose to incorporate in a country with which they had a genuine link and which might be willing to exercise diplomatic protection on their behalf. If, however, they preferred to obtain tax advantages by incorporating in countries with which they had little or no connection, and to rely on the protections available under bilateral investment treaties, that was their choice. If Governments themselves saw advantages in changing the basic rule of *Barcelona Traction*, they could always consider a multilateral treaty

to that effect. One advantage of basing the Commission's draft articles on *Barcelona Traction* was that it might encourage Governments to consider whether they wanted to propose a change based on the wide variety of bilateral investment treaties in existence. Thus far, the debate in the Sixth Committee seemed to suggest that they did not.

73. As to the draft articles, his initial reservations about the exception envisaged in draft article 18, subparagraph (b), had been strengthened by what Mr. Brownlie and other members had said. On the face of it, as the Special Rapporteur noted in paragraph 87 of the report, there was a basis in equity for such an exception where a company had been compelled to incorporate in the wrongdoing State. However, investors had a choice as to whether they accepted such a requirement. He was not sure that there was a significant point of equity underlying the issue, and he was still not fully persuaded of the need for the exception. That point aside, he was in favour of referring draft articles 17 and 18 to the Drafting Committee. For the reasons given in paragraph 56 of the report, he thought there was a strong case for deleting the words in square brackets in draft article 17, paragraph 2. However, the Drafting Committee could consider whether, in terms of the different possibilities under civil and common law, there was merit in including both criteria.

74. Mr. KATEKA said that, in introducing a stimulating report, the Special Rapporteur had asked the Commission to decide whether or not it wanted to follow the *Barcelona Traction* judgment. He personally felt that the *Barcelona Traction* judgment should be the starting point for the Commission's discussion of draft articles on diplomatic protection of corporations and shareholders. Despite the many criticisms of that judgment, most notably that it established an unworkable standard, that it overlooked policy considerations such as dual protection and multiplicity of claims and that ICJ had mishandled the relevance of the *Nottebohm* case, he shared the view expressed in paragraph 27 of the report that *Barcelona Traction* was an accurate statement of the law on the diplomatic protection of corporations and was a true reflection of customary international law.

75. The *Barcelona Traction* judgment also reflected the ideological and cultural differences among the eight judges who had given separate opinions. The judges from capital-exporting countries had supported the right of the shareholders' State of nationality to invoke diplomatic protection, while the judges from developing countries had contended that it was not the shareholders who needed protection, but the poorer or weaker States where the investment took place. Such States needed protection from powerful financial groups or against unwarranted diplomatic pressure from governments of the economic North.

76. In that connection, he acknowledged that globalization was inevitable and that, as a result, the situation had changed since *Barcelona Traction*. That did not alter the fact that globalization was inequitable for weak countries, however. To take foreign direct investment as just one example, sub-Saharan Africa received less than 2 per cent of global foreign direct investment, and 80 per cent of that went to South Africa and Nigeria. Globalization could not

be halted, but it was essential to make sure that no one was left behind.

77. Support for capital-exporting countries had also been expressed by Bederman and by Kokott, who was quoted in paragraph 17 of the report as having concluded that diplomatic protection had been sidelined by bilateral investment treaties because investors distrusted its political uncertainty and discretionary nature and preferred to opt for international arbitration. He felt that investors' fears were misplaced. Bilateral investment promotion and protection agreements, coupled with national legislation on investment guarantees, continued to attract investors, and recourse to international arbitral proceedings under those arrangements need not supplant diplomatic protection. He was concerned, therefore, that Kokott was quoted in paragraph 51 of the report as saying that, "in the context of foreign investment, the traditional law of diplomatic protection has been to a large extent replaced by a number of treaty-based dispute settlement procedures".<sup>7</sup> He disagreed that treaties replaced custom: the two existed side by side. In any case, ICJ had held in *Barcelona Traction* that investment treaties belonged to the realm of *lex specialis*, a subject on which the Special Rapporteur had said he would produce a separate report.

78. In paragraph 22 of his report, the Special Rapporteur appeared to be inciting the Commission to rebel against ICJ by saying that decisions of the Court were not binding on the Commission and that the Commission had severely limited the scope of one decision by the Court and expressly rejected another. He suspected that the intention of the Special Rapporteur's punchline—"Barcelona Traction is not sacrosanct, untouchable"—was to see how the Commission reacted. His own view was that paragraph 22 might have overstated the case. The limitations suggested by the Commission had been mainly in the form of commentaries, and the Special Rapporteur's apparent frontal attack on the Court reminded him of Judge Fitzmaurice's lament that the drafters of the Charter of the United Nations, and hence of the Court's Statute, had been wrong to label judicial decisions, including those of the Court, as subsidiary means for the determination of the rules of law in Article 38 of the Statute. If judicial decisions had been put on a par with treaties and customary law, the Court might have been shown more respect. Notwithstanding Mr. Brownlie's comments about the Court and how it took decisions, he felt that it was inappropriate for the Commission to openly challenge the Court.

79. In his report the Special Rapporteur had suggested seven options for the proposed articles, some of which—2 and 5, for instance—overlapped. He welcomed the Special Rapporteur's focus on option 1, involving the State of incorporation, which was based on the rule in *Barcelona Traction*. He had no problems with paragraph 1 of draft article 17 and would prefer to delete the wording in square brackets in paragraph 2. His preference was not influenced by the Commission's debate on civil versus common law, however. With regard to the exception in draft article 18, subparagraph (a), it was to be hoped the Special Rapporteur would make it clear in a commentary that the interpretation of "ceased to exist" was that given in paragraph 67 of the *Barcelona Traction* judgment, namely, that, a

<sup>7</sup> *Loc. cit.* (2756th meeting, footnote 5), p. 277.

company continued to exist even if it was in receivership; it ceased to exist only when it went into liquidation. The Special Rapporteur considered the exception in draft article 18, subparagraph (b), to be the most important one, and it was the one that three judges in *Barcelona Traction* had said reflected customary international law. He wondered how two contradictory rules of international law could be said to exist, and he was therefore opposed to including that exception in the draft articles. Presumably the third exception, covering cases in which the direct rights of shareholders were infringed, was addressed in an article that had yet to be introduced. Draft articles 17 and 18 could be referred to the Drafting Committee.

80. Mr. DUGARD (Special Rapporteur) confirmed that the third exception was dealt with in draft article 19.

81. Mr. CHEE, expressing surprise at Mr. Kateka's preference for deleting the wording in square brackets in draft article 17, paragraph 2, said it was his understanding that the wording was drawn directly from the *Barcelona Traction* judgment.

82. Mr. DUGARD (Special Rapporteur) confirmed that that was so, but said that the Commission needed to decide whether or not it wanted to follow that judgment in the present draft articles.

*The meeting rose at 1 p.m.*

## 2758th MEETING

*Friday, 16 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR invited the Chair of the Planning Group, Mr. Melescanu, to announce the composition of the Group.

2. Mr. MELESCANU (Chair of the Planning Group) said that the Planning Group would be made up of the following members: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Koskeniemi, Mr. Mansfield, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda and Mr. Yamada. He urged the special rapporteurs and the Rapporteur of the Commission to take part in the Group's work.

## Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. Mr. KOSKENIEMI said that the fourth report of the Special Rapporteur (A/CN.4/530 and Add.1) examined in depth two rather contentious issues, the first one being that of the nationality of a corporation. On that point, the Special Rapporteur urged the Commission to adopt the *Barcelona Traction* principle, namely, that the State of nationality of a corporation was the State in which it was incorporated. The second issue related to the case covered in draft article 18, subparagraph (b): when the corporation had the nationality of the State responsible for causing injury to it. One's position on those problems depended on one's view of corporate activity today and the particular situation in question. The more he thought about big multinational corporations with global strategies, the more he was in favour of ensuring that the host State was not beset by a large number of claims from foreign shareholders. On the other hand, if he looked at the case of small companies in developing economies, he was inclined to say that the shareholders needed protection. As big corporations dominated today's global economy, he tended to prefer the first position, perhaps to the detriment of the protection of the shareholders of small companies. He would have liked to find language to introduce the ideas of "equity" and "reasonableness" in draft article 17 or 18, but, as the Special Rapporteur pointed out, such rules were largely covered by bilateral investment treaties, so that the rules being considered by the Commission were merely residual in nature. He did not believe that the Commission was bound by the decisions of ICJ and, in particular, by the *Barcelona Traction* judgment. Those judgments had only the value that the Court's reasoning in them had. He also

\* Resumed from the 2751st meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



doubted that, in defining customary law, any conclusions could be drawn from lump-sum agreements or the provisions of bilateral investment treaties because such treaties were the result of bilateral negotiations and trade-offs and thus not amenable for generalizations.

4. Draft article 17, paragraph 1, was a reformulation of the principle contained in the *Barcelona Traction* judgment, pursuant to which the State of nationality was the State in which the corporation was incorporated. That principle had been criticized because a genuine link between the corporation and the State of nationality had been considered necessary. The Special Rapporteur's options were reformulations of the idea that the nationality of the corporation should be consistent with a social and economic context. In his view, the Special Rapporteur should have examined in greater depth the criterion of the domicile or *siège social* (see para. 31 of the report, option 3), which was the practice in international private law. The importance of the economic and social context for deciding on the nationality of the corporation was underscored by the global nature of the activities of big corporations and the fact that the place where they were incorporated could be chosen, for example, solely on the basis of tax considerations. In such a case, however, the corporation deprived itself of the possibility of diplomatic protection. He therefore endorsed the principle embodied in paragraph 1 and the rationale behind it. The words in brackets in paragraph 2 were unnecessary and could easily be deleted, whereupon draft article 17 could then be referred to the Drafting Committee.

5. He had no objection to the wording of draft article 18, subparagraph (a), which could be referred to the Drafting Committee. On the other hand, he had reservations about subparagraph (b), because, in the case in which a big corporation decided to be incorporated in a State and its shareholders suffered an injury owing to activities which that State had undertaken because of economic problems, he saw little reason to make life for the host State more difficult by allowing the State of nationality of the shareholders to exercise diplomatic protection on their behalf. He was thus opposed to referring subparagraph (b) to the Drafting Committee.

6. Mr. MOMTAZ said that the Special Rapporteur had dealt in depth with the important question of diplomatic protection of foreign corporations and their shareholders. It was no longer possible to study that question without taking account of contemporary economic realities. The time was long past when developing countries had shown distrust of foreign investors, fearing interference in their internal affairs by large financial groups. States now wished to attract foreign investment in order to promote their economic development and were ready to provide the necessary guarantees to achieve that objective. That concern was demonstrated not only in bilateral and multilateral foreign investment treaties, but also unilaterally, in foreign investment codes, which might usefully be studied in order to identify State practice in that area. Regardless of their level of development, all States were dependent on foreign investment, and international law must thus offer investors the necessary guarantees. The Commission must seek to ensure that the law coincided with the facts while maintaining a balance between the interests of States and those of investors. That was the background against which

the report defended the right of the State to exercise diplomatic protection on behalf of a corporation that had its nationality and also, subsidiarily, on behalf of shareholders who had its nationality. He thus endorsed draft article 17, paragraph 1, which reaffirmed the principle set forth in the *Barcelona Traction* judgment, but nonetheless thought it necessary to retain the text enclosed in square brackets in paragraph 2, replacing the conjunction "and" by the conjunction "or", since several countries did not require corporations incorporated under their law to have their registered office in their territory.

7. Article 18, subparagraph (b), provided for an exception to the nationality rule, for example, in the case where the host State required the foreign corporation to be incorporated in accordance with its internal law. Shareholders injured by a wrongful act of the host State must then be able to enjoy the diplomatic protection of their national State. However, that exception might jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State, thereby contravening the international rules governing treatment of foreigners. Admittedly, if foreign shareholders had no remedies other than those open to nationals, they would run up against the difficulties already identified in cases where there was no voluntary link between the injured persons and the State responsible for the wrongful act. But that rule remained controversial and could thus not be considered to be a customary rule. Instead, it belonged to the domain of progressive development of the law and, as such, deserved closer consideration. That exception was necessary, for shareholders could not be left defenceless and deprived of any possibility of protection by the State of which they were nationals. However, he preferred not to support it at that early stage, considering that the matter merited more reflection, perhaps in order to consider a saving clause aimed at limiting the consequences of its implementation—in other words, limiting the number of claims submitted by States whose nationals had been injured.

8. Furthermore, he noted a contradiction between paragraphs 22 and 25 of the report. In paragraph 22 it was stated that, in the *Barcelona Traction* judgment, ICJ was not codifying international law but resolving a particular dispute, with the result that its "rule" was to be seen as a judgement on particular facts and not as a general rule applicable to all situations; whereas paragraph 25 stated that the Court was concerned with an evaluation of customary international law. The latter point of view should prevail, since it strengthened the authority of the *Barcelona Traction* judgment, which constituted the basis for draft article 17 and draft article 18, subparagraph (a).

9. Mr. YAMADA said that the Special Rapporteur had endeavoured to modify the principles set forth in *Barcelona Traction*, taking account of the criticisms to which it had been subjected. Nevertheless, despite its shortcomings, that judgment was an accurate statement of the contemporary state of the law with regard to the diplomatic protection of corporations and a true reflection of customary international law in that regard.

10. Drawing attention to recent foreign investment protection practices through procedures provided for in bilateral and multilateral treaties, the Special Rapporteur



wondered whether the Commission might feel compelled to formulate rules according more fully with the reality of foreign investment and encouraging foreign investors to turn to diplomatic protection rather than to the protection offered by investment treaties. In his view, diplomatic protection should not be accorded precedence, since it posed difficult political and diplomatic problems for the State entitled to exercise it. During his 40 years in the Japanese Ministry of Foreign Affairs, he had never encountered any case in which Japan had exercised diplomatic protection or in which a foreign State had exercised it against Japan. On the other hand, consular protection was a much more widespread practice. He thus considered that investors were better protected by the special arrangements under their investment treaties than by diplomatic protection.

11. The distinction between a corporation and its shareholders was now more important than it had been in the past. There were significant instances of aggressive takeovers, mergers and liquidations, while shares constantly changed hands at a very rapid pace. In such circumstances, it would assist the orderly conduct of economic activity to shield shareholders behind the veil of the company.

12. He had no criticism to make on the substance of draft articles 17 and 18 but thought that they might need some drafting amendments. The text of draft article 17, paragraph 1, should also be aligned with that of draft article 3, paragraph 1, which the Commission had provisionally adopted at the preceding session.<sup>3</sup> He thus proposed the following wording: “The State entitled to exercise diplomatic protection in respect of an injury to a corporation is the State of nationality of that corporation.” Similarly, the definition of the State of nationality of a corporation, in draft article 17, paragraph 2, might be reformulated. It might also be useful to explain in the commentary that “corporation” meant a limited liability company whose capital was represented by shares. He had no strong views concerning the bracketed phrase. However, if it was to be kept, it should be a cumulative condition.

13. He had no problems with the two exceptions provided for in article 18. Accordingly, he proposed that draft articles 17 and 18 should be referred to the Drafting Committee.

14. In conclusion, he asked the Special Rapporteur whether, in the third part of the report, dealing with legal persons, he intended to examine the case of other entities such as other types of commercial corporation or entities with non-commercial purposes and, if so, whether he thought there was enough case law and practice to warrant codification.

15. Mr. DUGARD (Special Rapporteur) confirmed that he intended to include a provision dealing with other legal persons in that part of the report. At the current stage of his work, he envisaged a provision stating that the rules enunciated in the articles dealing with corporations also applied, *mutatis mutandis*, to other legal persons.

16. Mr. Sreenivasa RAO said that the Special Rapporteur had squarely raised the question of the rights of the

State of nationality of the shareholders in a company registered or incorporated in a foreign jurisdiction and had rightly accorded the dictum of ICJ in the *Barcelona Traction* case primary attention in his analysis. His own view was that many of the criticisms of the Court’s judgment were beside the point: the main point at issue was not who deserved diplomatic protection more—the developing countries or the shareholders of a company—but how the institution of diplomatic protection operated in the case of legal persons and under what circumstances the State of nationality of shareholders should be entitled to espouse their claims.

17. First, it was clear that a company which was registered or incorporated in a country had the nationality of that country. Moreover, companies did not register or incorporate in more than one country, even if they operated effectively from another country. Second, it was equally well understood that the personality of the company thus constituted was different from the personality of its shareholders, who bore only limited liability. In those circumstances, when an injury was caused to the corporation, the basic principle was that the State of incorporation would be entitled to exercise diplomatic protection in accordance with international law. The point had been made that many countries did not espouse the claims of companies, even if they were incorporated in their jurisdiction, unless some special bond or common interest existed between them and the companies concerned. That was not unusual, however, and did not apply only in the case of legal persons. As the Special Rapporteur noted in paragraph 76 of his report, ICJ had emphasized in *Barcelona Traction* the discretionary nature of the exercise of diplomatic protection by the State of nationality. It was difficult, therefore, to envisage any exception to the basic principle on grounds of special circumstances affecting the incorporation of companies.

18. The argument that a “genuine link” was a valid basis for the country with preponderant or effective control of the company to espouse the claims of its shareholders as shareholders was equally unconvincing. The genuine link principle arose under the law of diplomatic protection only in the case of persons with more than one nationality. It could not be extended to corporations or legal persons, which could not have dual nationality, and this possibility should not be envisaged. For that reason, he agreed with the many speakers who had suggested that the words in square brackets in draft article 17, paragraph 2, should be deleted. He agreed, in that connection, with the comment in paragraph 53 of the report that the presence of a registered office in the State of incorporation was a consequence of incorporation and not independent evidence of a connection with that State. For the reasons noted, he had no difficulty with draft article 17, paragraph 1, or with paragraph 2, subject to the deletion of the words in square brackets.

19. The next issue for consideration was the extent to which the Commission should entertain an exception or exceptions to the basic rule that the State of nationality of the shareholders in a corporation was not entitled to exercise diplomatic protection on their behalf. The exception in draft article 18, subparagraph (a), was based on the dictum of ICJ in the *Barcelona Traction* case and had the support of most members of the Commission, including

<sup>3</sup> See footnote 1 above.

himself. In that regard, he joined Mr. Kateka in recommending that the Commission should show the same caution as the Court and allow the right to diplomatic protection only in the event of the “legal demise of a company” [p. 41, para. 66] and not in the event of its “paralysis” or “precarious financial situation” [*ibid.*]. On the question as to which law should determine the fact of legal demise, the Special Rapporteur indicated in paragraph 64 of his report that a company “died” when it was wound up according to the law of its State of incorporation.

20. Turning to the exception in draft article 18, subparagraph (b), some members of the Commission were—rightly, in his opinion—hesitant to endorse it. With regard to the reasons of equity invoked in favour of that exception, particularly where the company’s nationality did not result “from voluntary incorporation” but was “imposed on it by the government of the country or by a provision of its local law as a condition for operating there, or of receiving a concession” [separate opinion of Judge Fitzmaurice, p. 73, para. 15], it had rightly been pointed out that the company had a choice not to invest in such a country. If it did so, in full knowledge of the consequences, there appeared to be little compulsion. In addition, it should be noted that most recent investment protection agreements provided effective legal remedies for investors in the case of any denial of justice or wrongdoing by the State of incorporation resulting in injury to the corporation. That trend towards recourse to international arbitration, including ICSID, raised the question whether any additional remedy at the international level in the form of diplomatic protection was needed. He therefore tended to agree that the exception in draft article 18, subparagraph (b), could be safely excluded without in any way compromising the position of corporations. The deletion of that exception would also obviate the need for the Commission to speculate on the conditions or limitations under which it should be applied.

21. He therefore supported referring only draft article 18, subparagraph (a), to the Drafting Committee.

22. Mr. DUGARD (Special Rapporteur), referring to Mr. Sreenivasa Rao’s comments on draft article 18, subparagraph (b), asked what would happen in a situation where the foreign shareholder had no access to any alternative remedy. The shareholder did have such a remedy if his State of nationality was a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, but many countries were not. Should one simply accept a situation of that kind?

23. Mr. Sreenivasa RAO said that the Special Rapporteur was right in pointing out that many countries were still not parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. However, if one looked at the investment agreements concluded in recent years, such as those concluded by India, they invariably provided for foreign applicable law and compulsory arbitration clauses. The ICSID mechanism was one of the alternatives and applied automatically when both countries were parties to it, but there were other arbitration procedures available to the company.

24. Mr. DUGARD (Special Rapporteur) said that Mr. Sreenivasa Rao was referring to the progressive Indian

system, but the fact remained that there were many countries which did not have laws of that kind, with the result that the shareholder in a company incorporated in a foreign country was frequently left without any remedy at all. That was why he had suggested that there should be a residual right of protection.

25. Mr. CHEE said he agreed with Mr. Sreenivasa Rao that provision for arbitration under bilateral investment treaties was the usual practice. However, arbitration was just one of several possibilities. It was possible that, in addition to arbitration clauses, other legal language that was common to different countries might be included in such treaties, since applicable law also played a role. If so, the interpretation and application of the treaty could give rise to differences.

26. Mr. Sreenivasa RAO, while acknowledging that such clauses were not easy to apply, said that investment treaties were nevertheless favourable to most investors. Moreover, some of those treaties also envisaged possibilities of diplomatic protection whereby, rather than going to court, the State of nationality of the shareholders could approach the Ministry of Foreign Affairs of the country causing the injury in order to present their grievances.

27. Mr. SEPÚLVEDA congratulated the Special Rapporteur on his excellent report, which was not only conceptually rich and intellectually precise but also innovative in many respects. He was particularly glad to see that the Special Rapporteur had offered the Commission a number of options, together with a critical analysis. He likewise endorsed the idea of preparing draft articles embodying the principles laid down in the *Barcelona Traction* case. However, he had none of the doubts that regularly plagued the Special Rapporteur, who first recalled that the decisions of ICJ were not binding on the Commission, then emphasized that the *Barcelona Traction* decision was not sacrosanct and subsequently invited the reader to consider a range of possibilities for departing from the course followed by the Court. He acknowledged that *Barcelona Traction* was undoubtedly a significant judicial decision, only to downgrade its significance by saying that the underlying reasoning was hardly persuasive and that it showed a lack of concern for the protection of foreign investment. Instead of such soul-searching, he himself frankly preferred the Special Rapporteur’s conclusion that, 30 years on, the *Barcelona Traction* decision was widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but also as a true reflection of customary international law.

28. The principle embodied in that decision was reflected in draft article 17, which he endorsed, although he would make a few comments that might help to define its scope.

29. First, as was indicated in article 1 of the draft articles provisionally adopted by the Commission at its previous session, it must be assumed that the injury that prompted the State of nationality to exercise diplomatic protection of a corporation was caused by an internationally wrongful act committed by a State, something which was linked to the topic of State responsibility.

30. Second, the nature and consequences of the injury could vary considerably. The draft articles on State responsibility for internationally wrongful acts<sup>4</sup> created a special category of offences, namely, serious breaches of peremptory norms of international law. Without going so far as to transpose that type of provision, it would be useful, perhaps in the Special Rapporteur's commentary, to mention that there was such a thing as particularly serious injury. For example, confiscation of the property of a company carried out with no view to the public interest, in violation of the law and without appropriate compensation, could not be placed on the same footing as the pressure that might be brought to bear by a host country on a company to compel it to appoint someone of a given nationality to an executive position. Hence the usefulness of differentiating between injury arising from a serious and systematic breach of an international obligation and injury which was comparatively less serious. Obviously, the consequences of such a classification would also have to be specified, particularly with regard to compensation.

31. Third, the nature of the injury could differ radically depending on whether it was to a legal person (economic loss, for example) or to a natural person (the violation of a fundamental right or an attack causing bodily harm, for example). A natural person could also suffer economic loss, although evaluating the non-material damage done to a legal person would be more difficult.

32. It was important to retain the two criteria stated in article 17, paragraph 2, namely, that the corporation must both be incorporated and have its registered office in the territory of the State that granted it nationality, so as to avert artificial situations such as flags of convenience and the use of tax havens. True, it was difficult to establish the existence of a "genuine link", and that was why the Special Rapporteur might give examples in his commentary of particular instances such as the payment of taxes to the State where the office was located or the employment of nationals of that State.

33. As far as terminology was concerned, it would be more accurate to use the words *está facultado para ejercer* rather than the words *tendrá derecho a ejercer* in the Spanish text of draft article 17.

34. He fully endorsed the introductory part of draft article 18 and the first exception provided for in subparagraph (a), but he thought that the second exception should not be retained because, as was indicated in paragraph 5 of the report, there was a clear-cut distinction between the shareholders and the company: a legal relationship was established solely between the company and the State that granted it nationality, and, according to a general principle of law, that State could not bear responsibility for damage caused to its own nationals. It could also not be said that the only relief available to a company on the international plane was action by the State of nationality of the shareholders, and it was wrong to say, as Mervyn Jones did in the quotation in paragraph 65 of the report, that if the normal rule was applied, foreign shareholders were at the mercy of the State in question; they might suffer serious

loss and yet be without redress.<sup>5</sup> That would imply that there was no domestic legal system and that the rule of law had given way to power-based rule. That system did exist in many countries, of course, and a number of examples could be given, but it must be borne in mind that the investor must assume some responsibility for risk assessment. Concern to ensure equitable treatment to nationals and foreigners should be reason enough to do away with the exception in draft article 18, subparagraph (b).

35. In conclusion, he said that bilateral or multilateral investment treaties usually provided that recourse to international arbitration ruled out all other recourse procedures. In order to shed new light on the Commission's work, the Special Rapporteur might review the major arbitral awards which related to foreign investment and in which diplomatic protection was frequently mentioned.

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

[Agenda item 2]

36. The CHAIR said that he had completed his consultations on the subject and suggested that Mr. Koskenniemi should be appointed Chair of the Study Group on the Fragmentation of International Law. If he heard no objection, he would take it that the Commission agreed with that suggestion.

*It was so decided.*

*The meeting rose at 11.30 a.m.*

## 2759th MEETING

*Tuesday, 20 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

<sup>4</sup> See 2751st meeting, footnote 3.

<sup>5</sup> See M. Jones, "Claims on behalf of nationals who are shareholders in foreign companies", *BYBIL*, 1949, p. 225, especially p. 236.



**Diplomatic protection<sup>1</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)**

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ADDO, commending the Special Rapporteur on a comprehensive and scholarly report (A/CN.4/530 and Add.1), said he agreed entirely with the comments concerning draft article 17, which in his view represented *lex lata* and must be codified. He also concurred with the statement in paragraph 47 of the report that, despite much criticism, *Barcelona Traction* enjoyed widespread acceptance on the part of States. Draft article 17 should therefore be referred to the Drafting Committee.

2. Draft article 18, however, posed problems. As to its subparagraph (a), perhaps the Special Rapporteur would clarify why, at the mere demise of a corporation in its place of incorporation, the State of nationality of the shareholders would automatically have to exercise diplomatic protection on their behalf. He would have thought that the shareholders had the right to share in the residual or surplus assets of the corporation in liquidation and that the company's liquidator would take care of matters following its demise. Shareholders could and should have direct access to the liquidator to settle any residual issues. Indeed, shareholders could bring action against the liquidator and vice versa. If the shareholders directly affected in their right to share in the surplus assets of the corporation in liquidation could approach the liquidator themselves to take care of such matters, he saw no need for the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Only when the shareholders had unsuccessfully exhausted whatever remedies they might have at the hands of the liquidator could their State of nationality step in on their behalf.

3. Like Mr. Brownlie, he was opposed to including draft article 18, subparagraph (b), which was far too controversial to be codified and lacked a firm foundation. In paragraph 73 of his report, the Special Rapporteur cited a number of cases as supporting intervention by the State of nationality of the shareholders, yet those cases had been shown not to be authoritative. According to Moore's *Digest of International Law*, the *locus standi* of the claimants in the *Delagoa Bay Railway* case had been conceded by Portugal in the *compromis* and the award had therefore been based on the corresponding agreement and not on international law.<sup>3</sup> Since the *El Triunfo Company* case had been one of protection of shareholders directly affected in their rights, it too could not be invoked in support of draft article 18, subparagraph (b). Jiménez de Aréchaga, writing in Sørensen's *Manual of Public International Law*, had cited several arbitral awards expressly rejecting

claims on behalf of the shareholders against the State of nationality of the company.<sup>4</sup>

4. The Special Rapporteur himself said in paragraph 66 of his report that the existence of such a rule was not free from controversy. In paragraph 68 he affirmed that there was evidence in support of such an exception before *Barcelona Traction* in State practice, arbitral awards and doctrine, but went on to say that State practice and arbitral decisions were far from clear. In paragraph 69, after citing several disputes in which the United Kingdom and/or the United States had asserted the existence of such an exception, he commented that none of those cases provided conclusive evidence in its support and concluded, like Jiménez de Aréchaga, that no certain argument could be made on the basis of such limited and contradictory State practice. In paragraph 70, a number of judicial decisions were cited as being likewise inconclusive, but the summing up in paragraph 72 averred that, while the authorities did not clearly proclaim the right of a State to take up the case of its nationals, as shareholders in a corporation, against the State of nationality of a company, the language of some of those awards lent some support, albeit tentative, in favour of such a right.

5. Given the limited and contradictory State practice, inconclusive judicial decisions and uncertain arbitral awards, it was rather bewildering to find in paragraph 87 of the report that the Special Rapporteur supported the exception in draft article 18, subparagraph (b), because it enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Personally, he disagreed with that assessment. Rather than attempt to codify the exception, the Commission should leave States to pursue bilateral investment treaties, as well as multilateral treaties. He concurred with Kokott's assertion, quoted in paragraph 17, that the analysis of the bilateral investment treaty regime, as well as multilateral approaches, had shown that diplomatic protection did not play a major role among the available means of dispute resolution.<sup>5</sup> That was a reality: investment promotion and protection treaties were a feature of current international practice.

6. In 1981, writing in the *British Year Book of International Law*, Mann had cited Germany, Switzerland, France and the United Kingdom as countries that had concluded bilateral investment treaties which allowed investors to settle their investment disputes with the host State before *ad hoc* arbitration tribunals or ICSID.<sup>6</sup> As of October 1995, the United Kingdom had concluded BITS with some 35 States, most of them developing countries. At the same time, the Multilateral Investment Guarantee Agency (MIGA) offered investment guarantee mechanisms that provided insurance protection for private investments abroad, its main task being to guarantee investments against non-commercial risks in host countries. Four categories of risk were mentioned in the Convention Establishing the Multilateral Investment Guarantee Agency: (a) transfer of risk, which occurred when the host country

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> See J. B. Moore, *Digest of International Law*, vol. VI (Washington, D.C., U.S. Government Printing Office, 1906), pp. 647 *et seq.*

<sup>4</sup> See E. Jiménez de Aréchaga, "International responsibility", M. Sørensen, ed., *Manual of Public International Law* (London, Macmillan, 1968), p. 531.

<sup>5</sup> See J. Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 276.

<sup>6</sup> F. A. Mann, "British treaties for the promotion and protection of investments", *BYBIL*, 1981, p. 241.



decided to impose restrictions on currency conversion and transfer; (b) expropriation, which deprived the investor of ownership or control; (c) breach of contract; and (d) war or civil disturbance in the host country. MIGA currently had 161 members, 139 of them developing countries, and was open to all members of the World Bank. That showed there was another way of approaching the issue that might not entail codification.

7. Mr. Kamto had cited the *Biloune* case to explain his support for draft article 18, subparagraph (b). However, after reading the case himself, he could say that it was not one of diplomatic protection. It was an investment dispute that had been submitted to the Permanent Court of Arbitration. The important fact that Mr. Kamto had lost sight of in that case was that the investment agreement between the Marine Drive Complex Ltd. company and the Ghana Investment Centre had included a dispute settlement and arbitration clause. Article 15 of the agreement had provided for an amicable settlement procedure and, failing that, for recourse to arbitration in accordance with UNCITRAL rules. Ghana's Investment Code had contained similar provisions. It was wrong, therefore, to assume that Mr. Biloune and his company had been left without a remedy. Consequently, the case could not be used to buttress the argument for including draft article 18, subparagraph (b). On the contrary, it justified its exclusion. In his view, State practice inclined overwhelmingly towards bilateral investment agreements accompanied by multilateral investment guarantee mechanisms. Finally, the Special Rapporteur's claim that the exception in subparagraph (b) enjoyed a wide measure of support in State practice was based on two States, the United Kingdom and the United States, yet even those countries had, in certain significant cases, rejected claims based on that exception.

8. In summing up, he would echo Kokott's conclusion, cited in paragraph 17 of the report, that the more realistic option was to accept that, in the context of foreign investment, the traditional law of diplomatic protection had been to a large extent replaced by a number of treaty-based dispute settlement procedures. For the reasons he had given, he could not support draft article 18, subparagraph (b).

9. Mr. KAMTO said that, as far as he was aware, Mr. Addo had known nothing of the *Biloune* case until he himself had mentioned it. He had never denied that the case had been settled by arbitration or that dispute settlement procedures had been available. His sole purpose in citing the facts of the case had been to show what could happen to a shareholder if he did not have some kind of safety net.

10. Mr. MOMTAZ, noting Mr. Addo's suggestion that there was another way of approaching the issue of exceptions that might not entail codification, asked what approach Mr. Addo was suggesting.

11. Mr. ADDO said that he had not suggested another approach. All he had said was that the Commission should abandon the exceptions it was attempting to codify since States were more likely to use bilateral investment treaties and multilateral agreements to solve any problems that might arise.

12. Mr. DUGARD (Special Rapporteur) asked whether Mr. Addo was suggesting that what was currently *lex specialis* should become *lex generalis* and that the issue should be regulated simply by bilateral investment treaties.

13. Mr. ADDO said that, in his view, it was sufficient to codify draft article 17. Draft article 18, subparagraph (b), had no firm foundation that could be codified and should be abandoned. He might be able to accept draft article 18, subparagraph (a), if he received an explanation concerning the role of the liquidator.

14. Mr. RODRÍGUEZ CEDEÑO, congratulating the Special Rapporteur on his introduction of an excellent report, said the basic issue facing the Commission was whether it should follow *Barcelona Traction* in particular and, if so, to what extent. Despite subsequent criticisms, including those reflected in the separate opinions of some judges and detailed in paragraphs 8 *et seq.* of the report, that judgment had been a milestone in the consideration of the issue of the protection of legal persons.

15. In drafting rules, account must be taken of developments since 1970 in international economic relations in general and in the matter of foreign investments and their protection in particular. The internal legal system created in response to those developments had a major influence on international legal relations, as reflected in bilateral and multilateral protection agreements. Such agreements had become important and in some cases indispensable for attracting capital to developing countries, although such countries were no longer the only recipients of foreign investment. As investments in the United States by the Venezuelan corporation CITGO demonstrated, investments could flow in either direction.

16. There was an important relationship between the internal legal system and investment protection agreements on the one hand and the general rules of diplomatic protection on the other. Unlike other members, however, he believed that the relationship should not be residual, since that would give a greater role to internal legal systems and bilateral agreements in establishing norms for the protection of foreign investments. Instead, the relationship should be complementary. The development of treaty mechanisms to protect foreign investors should not replace diplomatic protection, which was still the overall legal framework.

17. The Special Rapporteur was proposing several options on which the Commission might base the draft articles. The most acceptable, option 1 reaffirming the *Barcelona Traction* principle that only the State of nationality was entitled to exercise diplomatic protection, was reflected in draft article 17, paragraph 1, which could be referred to the Drafting Committee. The Committee could incorporate into the Spanish version the change proposed by Mr. Sepúlveda, namely, to replace the words *tendrá derecho a ejercer* by *está facultado para ejercer*. Paragraph 2, which should be placed in a future article on definitions, was also acceptable. The State of nationality of a corporation was the State in which it was "incorporated", rather than "registered". The two words might appear to be synonymous, but ICJ had rightly used the former in various paragraphs of the *Barcelona Traction* judgment.

He believed that the square brackets in paragraph 2 should be removed, although that would not resolve the important issue of whether the criteria of incorporation and registered office were cumulative or alternative. The Special Rapporteur believed that they were cumulative, but other members of the Commission, such as Mr. Momtaz, had suggested that they were alternative. Clearly, the matter needed to be given more thought.

18. The issue of the diplomatic protection of shareholders, discussed in paragraphs 57 *et seq.* of the report, differed significantly from that of the protection of the corporation as a legal person. The relevant general principles of international law, confirmed by widespread practice, did not allow the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Draft article 18, paragraph 1, reproduced that principle and was based on the ruling by ICJ in the *Barcelona Traction* case that the Belgian Government could not intervene on behalf of Belgian shareholders in a Canadian company, even though the shareholders were Belgian. To accept, as a principle, the possibility that the State of nationality of the shareholders might intervene on their behalf, thereby paving the way for a multiplicity of competing claims, could create a climate of confusion and uncertainty in international economic relations. The principle could be subject to exceptions, however. In *Barcelona Traction*, the Court had considered whether an exception could be made for the Belgian Government on grounds other than the legal personality of the corporation. In the present case, the proposed exceptions were based on bilateral agreements between the investor and the host State, or between the latter State and the State of nationality of the corporation, agreements that contained provisions on jurisdiction and on the settlement of disputes arising from the host State's treatment of corporations that invested in it.

19. The Court had clearly stated that the first exception, reflected in draft article 18, subparagraph (a), was when the corporation had ceased to exist or been rendered economically defunct, a significant expansion of the criterion. The second exception envisaged in the *Barcelona Traction* decision was when the corporation's State of nationality was not entitled to act on its behalf. Subparagraph (a) was generally acceptable, although a corporation's "ceasing to exist" should be construed in a broad sense, namely, as going beyond bankruptcy to include situations in which it could no longer act for other reasons, and that should be specified in the commentary.

20. Like others, he favoured doing away with the second exception, despite the recommendation in paragraph 87 of the report. He did not agree with the Special Rapporteur's statement in paragraph 65 that the only relief for a company on the international plane lay in action by the State of nationality of the shareholders. It was in the context of a company under internal law, governed by a domestic legal regime, that claims and compensation should be envisaged. To open the door to the possibility that a State might intervene in such cases would be dangerous, even though some conclusions could be drawn from international judicial decisions like the *ELSI* case, in which the shareholding companies were foreign companies. Nevertheless, he had trouble accepting the usefulness of such an exception, especially in the context of foreign investment in developing countries.

21. Mr. GALICKI congratulated the Special Rapporteur on a report addressing one of the most controversial problems connected with the topic of diplomatic protection. Draft article 17, paragraph 1, formulated the principle that States had the right to exercise diplomatic protection for corporations that held their nationality, and that principle was largely uncontested, but there was a lack of unified State and judicial practice to support a similar principle of non-exercise of such protection on behalf of the shareholders of corporations, or possible exceptions from such a principle.

22. In paragraph 22 of the report the Special Rapporteur underlined the fact that the *Barcelona Traction* decision was not sacrosanct, but in paragraph 3 admitted that the decision dominated all discussion of the topic and no serious attempt could be made to formulate rules without a full consideration of the decision, its implications and the criticisms to which it had been subjected. Paragraph 96 of the decision contained the crucial point that, by "opening the door to competing diplomatic claims", the adoption of the theory of diplomatic protection of shareholders could "create an atmosphere of confusion and insecurity in economic relations" [p. 49].

23. In paragraph 70 of the decision, the Court stated that the right of diplomatic protection of a corporate entity was traditionally attributed to the State of incorporation and in which it had its registered office, two criteria that had been confirmed by long practice and numerous international instruments. It also admitted, however, that "further or different links are at times said to be required in order that a right of diplomatic protection should exist" [p. 42]. The Special Rapporteur had presented a broad review of the possible options regarding which State could be entitled to exercise diplomatic protection in respect of injury to a corporation. The choice of the State of nationality criterion, reflected in draft article 17, paragraph 1, seemed fully justified. Indeed, the Commission's article 3 on the diplomatic protection of natural persons, in the second part of the draft articles,<sup>7</sup> designated the State of nationality as the State entitled to exercise diplomatic protection. Logically, the same criterion of a legal bond of nationality should be applied to any legal person directly affected by an injury arising from an internationally wrongful act. Such a unified approach would make it possible to apply other rules to be formulated by the Commission to both natural and legal persons in respect of diplomatic protection.

24. The definition of the State of nationality of a corporation proposed in draft article 17, paragraph 2, seemed acceptable, with perhaps one correction. The bracketed phrase mentioning the State in whose territory the corporation had its registered office should be retained, in addition to the State in which it was incorporated: in *Barcelona Traction* ICJ had used both those criteria on an equal basis. As part of the progressive development of international law, however, the conjunction "and" could be replaced by "or". To require that both criteria be fulfilled together seemed impractical, especially in the light of the different internal legal regulations of States on the basis of which such incorporation or registration was usually carried out. In addition, as Mr. Sreenivasa Rao had correctly

<sup>7</sup> See footnote 1 above.

noted, the terms “registration” and “incorporation” were often used alternatively.

25. By accepting that the link of nationality between a corporation and the State of its incorporation or registration was sufficient to entitle that State to exercise diplomatic protection, the Special Rapporteur left aside all the other options presented, such as those of the State of genuine link, the State of domicile and the State of economic control. As Mr. Sreenivasa Rao had rightly emphasized, States did not often present claims on behalf of corporations unless conditions other than incorporation or registration were fulfilled. Perhaps all the criteria other than incorporation or registration should not be rejected *in toto*. The possibility of combining criteria was supported by scholars and even some judges in their separate opinions in the *Barcelona Traction* case and would obviate the lack of effectiveness for which the criterion of place of incorporation had been criticized by Mr. Koskenniemi.

26. In the *Barcelona Traction* case ICJ had ruled that a State whose nationals held the majority of shares in a company could not present a claim for damage suffered to the company itself. Draft article 18 followed the Court’s approach, and subparagraphs (a) and (b) reflected the two exceptions, also laid down by the Court, in which the State of nationality of the shareholders was entitled to exercise diplomatic protection. Despite all the criticism of the Court’s position in *Barcelona Traction*, it should still be treated as the foundation for the Commission’s codification work. The opposite stance taken by the Court in the *ELSI* case might be justified for a number of reasons given in paragraph 25 of the report, but should not serve as a basis for a general principle of codification. General recognition of the possibility that the State of nationality of shareholders could exercise diplomatic protection could lead to the serious problem of competing competencies among the two categories of States entitled to exercise diplomatic protection: the State of nationality of a corporation and the State of nationality of its shareholders. The problem might be additionally complicated by the possibility of competing competencies among different States of nationality of different groups of shareholders.

27. Again, the nationality of shareholders or of a majority of shareholders could change and hence could not serve as a stable criterion for granting the right to exercise diplomatic protection. Finally, recognition of the general possibility of the exercise of diplomatic protection by the State of nationality of shareholders would have a strong negative economic and political effect. It could give some categories of persons specific international protection based on economic grounds, namely the ownership of shares, and not on the traditional grounds of nationality. In extreme situations, it could favour the right of the State of nationality of shareholders to exercise diplomatic protection, to the detriment of that of the State in which corporations were incorporated or registered.

28. While the possibility of diplomatic protection of shareholders could be rejected as a general rule, it seemed reasonable and practical to accept the existence of some exceptional situations in which protection could be exercised by their States of nationality. He fully agreed with that stance, reflected in subparagraphs (a) and (b) of draft article 18, which covered two different situations in which

States of nationality of corporations could exercise diplomatic protection of those corporations. The exercise of diplomatic protection in a complementary way by the States of nationality of shareholders that could otherwise be left without any State protection of their just interests seemed fully warranted in such cases. Mechanisms offered by bilateral and even multilateral agreements for the protection of foreign investments might not always be sufficient.

29. The criticism voiced regarding draft article 18, subparagraph (b), was difficult to accept, since it was hard to imagine that a State that had caused injury to a corporation possessing its nationality would be eager to exercise diplomatic protection of that corporation. In the *Barcelona Traction* case, ICJ had signalled its general support for the exception set out in subparagraph (b) by saying that considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. As was said in paragraph 87 of the report, that exception enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Even if it was still not fully ripe for codification, the exception should be considered favourably in the context of progressive development of international law.

30. He reserved the right to give a final evaluation of draft articles 17 and 18 once draft articles 19 and 20 had been presented. In no way, however, did that reservation change his favourable opinion about the proposals made by the Special Rapporteur. He was convinced that draft articles 17 and 18 should be referred to the Drafting Committee.

31. Mr. GAJA, referring to Mr. Galicki’s proposal to use the word “or” in the bracketed portion of draft article 17, paragraph 2, thereby transforming the *Barcelona Traction* criterion into two alternative criteria, noted that in that case the State concerned could choose one of the two criteria. Even then, however, the possibility would be open for a corporation to have double protection, thereby creating the situation of conflicting interventions to which Mr. Galicki had referred. A corporation, if it was keen on having diplomatic protection, could then have a registered office in a State that used the registered office as a basis for diplomatic protection but be incorporated in a State that used the place of incorporation for that purpose. The danger of introducing the alternative would be that a plurality of States would be entitled to exercise diplomatic protection on the basis of nationality.

32. Mr. PELLET said he entirely agreed with Mr. Galicki and remained unmoved by Mr. Gaja’s arguments. He was firmly convinced that the single criterion of incorporation was not sufficient. In a draft like the present one, of merely marginal importance in terms of the essential problem of the nationality of corporations, there was no reason to compel States to apply the registered office or the incorporation system. Mr. Gaja’s reasoning could be inverted: if the conjunction currently in the text, “and”, was retained, there was a risk of denial of justice, in that, if a company did not meet the two criteria, it could not receive diplomatic protection.

33. Mr. GALICKI said he endorsed those points. In extreme situations, the cumulative requirement might mean that no State was entitled to exercise diplomatic protection



of a corporation incorporated in one State with registered offices in another.

34. Mr. KAMTO said he was entirely in agreement with Mr. Gaja. In considering the possibility that the criteria might be combined, the Commission had to envisage situations in which a corporation might not be able to benefit from diplomatic protection. One such situation was when a State that had capitalized on its investments in a given country had every interest in establishing its registered office elsewhere, for fiscal or other reasons. As currently formulated, draft article 17, paragraph 2, had the merit of taking a stance against that practice, in which States were engaging more and more frequently. Reliance on domestic legislation did not entirely solve the problem. A State's domestic legislation could proclaim that if a corporation was registered in that State, it had the right to exercise diplomatic protection, while that of the State of incorporation might say the same thing. That was why he believed the Commission was facing a choice based on principle, not merely legal considerations: What signals did it wish to send to countries that were incorporated in Bermuda but had their registered office in London? Personally he thought the *Barcelona Traction* decision could be used as a basis, since it envisaged the combination of criteria, not their application as alternatives.

35. Mr. GAJA said he was one of many who favoured deleting the bracketed words altogether. He was not in favour of combining the two criteria. However, States generally had no obligations under international law with regard to national corporations, so there was no question of denial of justice. One did not necessarily have to identify a State that could in all circumstances exercise diplomatic protection of a corporation.

36. Mr. ADDO said he supported Mr. Gaja's views. If a company, after incorporation in one country, was registered in another, what form should that registration take? The State of registration should not, in his view, be able to provide diplomatic protection to the company.

37. Mr. CHEE commended the Special Rapporteur on a well-organized report containing a wealth of references to authority and precedents. Thirty years had now passed since the ruling in the *Barcelona Traction* case, and it had been held to represent confirmation of the traditional rule of public international law that diplomatic protection should be extended only to the national companies of the protecting State, not to foreign shareholders. As the Special Rapporteur pointed out in paragraph 22 of the report, the decisions of ICJ were not binding on the Commission. The *Barcelona Traction* ruling had been subjected to much criticism, especially by academics. In the meanwhile, international economic relations had greatly developed owing to the free flow of foreign investment.

38. Briggs had rightly pointed out in 1970 that international law had not evolved further in the protection of shareholders' interests, particularly in light of the growth of foreign investments and the activities of multinational holding companies in the past half-century.<sup>8</sup>

39. Several devices had come into being since *Barcelona Traction* to protect foreign investment and shareholders, for example, bilateral investment treaties, dispute settlement procedures, including arbitration, and ICSID, which provided individuals and corporations with a forum for bringing a suit against a wrongdoing State to enforce a contract. Under the lump-sum settlement procedure, which was another possibility, the individual could settle his claim within national bodies, for example, the Foreign Claims Settlement Commission of the United States. The United Kingdom had a similar arrangement. Other machinery that protected the property of foreigners was a mixed form of arbitration known as the Iran-United States Claims Tribunal, which had functioned much like the General Claims Commission constituted between the United States and a number of Latin American States in the 1930s.

40. The Commission should give serious consideration to choosing one of the Special Rapporteur's seven options set out in paragraph 28 of the report. With regard to the application of the genuine link doctrine to corporations (option 2), the Special Rapporteur had stressed in paragraph 18 of his report that in the particular field of diplomatic protection of corporate entities, no absolute test of genuine connection had found general acceptance. ICJ had ruled out the applicability of the genuine link doctrine to corporations. He drew attention in that connection to the observation of Judge Jennings that the analogy between the nationality of individuals and the nationality of corporations might often be misleading and that those rules of international law which were based upon the nationality of individuals could not always be applied without modification in relation to corporations.<sup>9</sup>

41. He said that he had no objection to draft article 17 and thought that the square brackets at the end of paragraph 2 should be removed. ICJ had added a registration requirement to the requirement of incorporation to prevent fraudulent commercial transactions.

42. As to article 18, he supported the "ceased to exist" test over the "practically bankrupt" test. However, under article 878 of the Spanish Commercial Code, cited by Mann in an article in the *American Journal of International Law*,<sup>10</sup> once bankruptcy had been declared, the bankrupt was to be incapacitated from administering his property, and all his acts of disposal and administration subsequent to the time to which the effects of the bankruptcy were retroactive were to be null and void. Thus, support for the "practically bankrupt" test over the "ceased to exist" test was also justified and should be given due consideration.

43. The *Barcelona Traction* judgment was based on procedural grounds, namely the issue of *locus standi*, and not on the merits. The facts had been sacrificed to the logic of law, and that had been a travesty of justice. The case had involved a large sum of money, and some 88 per cent of the shareholders had been Belgians and had been deprived of their proprietary and other rights on the procedural ground that Belgium lacked *locus standi*. It was

<sup>8</sup> H. W. Briggs, "Barcelona Traction: the *jus standi* of Belgium", *AJIL*, vol. 65 (1971), p. 341.

<sup>9</sup> See *Oppenheim's International Law*, 9th ed., vol. I, Peace, R. Jennings and A. D. Watts, eds. (Harlow, Longman, 1992), p. 860.

<sup>10</sup> F. A. Mann, "The protection of shareholders' interests in the light of the Barcelona Traction case", *AJIL*, vol. 67 (1973), p. 261.



difficult to imagine that Spain had been unaware of the nationality of the *Barcelona Traction* corporation. He was reminded in that context of a comment by Justice Holmes to the effect that the definition of law depended on the experience of life, not the logic of law. It was thus high time to reconsider *Barcelona Traction* in the light of recent developments. In an article published in *International Law: Theory and Practice* in 1998, in which Dinstein had stressed that in an era of international investments on a massive—and growing—scale, local subsidiaries acted as the long arms of foreign parent companies, that injury to the local subsidiary actually constituted injury to the foreign parent company, that international law must allow the “lifting of the veil” of the local subsidiary in order to give effective protection to the property of foreigners, and that only the “lifting of the veil” exposed the true circumstances in which a local company was owned by a foreign parent company or other shareholders.<sup>11</sup> As he saw it, that point was most appropriate for assessing *Barcelona Traction* in the context of current international economic relations.

44. Mr. ECONOMIDES said that, in an excellent report, although the Special Rapporteur had been quite critical of ICJ for its *Barcelona Traction* judgment, he had fully adopted the principles enunciated there in draft article 17 and sought to introduce exceptions to them, relying chiefly on what the Court seemed to have accepted implicitly in 1970. There was some inconsistency between such criticism and the integral adoption of the Court’s solution, especially since the Special Rapporteur noted in paragraph 27 of his report that *Barcelona Traction* was, 30 years later, widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but as a true reflection of customary international law. Furthermore, he personally disagreed with the Special Rapporteur’s statement in paragraph 22 of the report that the Court’s decisions were not binding on the Commission. On the contrary, the decisions of the Court, when it ruled on and applied international law, including customary law, bound the Commission as the body responsible for the codification of international law. The Commission could only depart from a particular customary solution in the interest of the progressive development of law; in so doing, it must explain why it was opting in favour of a new rule.

45. For a better assessment of recent trends in diplomatic protection concerning corporations and shareholders, it would have been preferable to have more extensive information than that provided in paragraph 17 of the report on the number of agreements concluded following *Barcelona Traction* and their specific solutions.

46. He endorsed draft article 17, paragraph 2, provided the State in which the corporation was incorporated was the same as the one in which it had its registered office. But in the exceptional case in which a corporation was established in one State and its registered office was in another, that would cause problems, because neither of the two States could meet the two conditions required by paragraph 2, and thus the provision could not be applied.

In such cases, the corporation would not have a State of nationality that could exercise diplomatic protection on its behalf, which would be an unacceptable situation. Replacing the word “and” by “or”, as had been proposed, would confer the right to exercise diplomatic protection on two States simultaneously: the State in which the corporation was incorporated and the State on whose territory its registered office was located. It would not be a wise course, given the reasoning of ICJ in *Barcelona Traction*. He failed to see why virtually all corporations should have only one State of nationality, whereas some, presumably the more clever ones, could have two. The most prudent and convenient solution would be to endorse the Special Rapporteur’s proposal, retaining only the first criterion, and to explain in the commentary that the other criterion was superfluous because a corporation’s registered office was almost always located in the same State. A reference should also be added to the effect that, if a corporation had its registered office in another State, it was the first criterion that took precedence over the second, and hence the State of nationality of the corporation was the one in which it was incorporated and not the State in whose territory it had its registered office.

47. Draft article 18, subparagraph (a), was too narrow. He proposed that the words “*de jure* or *de facto*” should be inserted between “exist” and “in the place of”. The words “*de facto*” would cover the case of a corporation in such dire straits that, although legally speaking it had not yet been dissolved, in reality it was no longer in a position to defend itself as a legal person. On the other hand, he had reservations about draft article 18, subparagraph (b), which did not constitute an exception, but a new rule that came under the heading of progressive development of the law. Such a new rule, which would certainly be applied more frequently than the basic rule in draft article 17, went beyond the proposed aims and could cause trouble; it was controversial and should be deleted, especially since, as Mr. Sepúlveda, Mr. Sreenivasa Rao, Mr. Addo and others had rightly pointed out, the guarantees provided under international arbitration in respect of investments and municipal law were more than sufficient.

48. In his view, the draft articles on diplomatic protection should contain a special clause stipulating that the articles were not applicable if binding international texts for the protection of human rights or of investments existed and provided special avenues of recourse.

49. Draft article 17 could be referred to the Drafting Committee, as could draft article 18 along with draft article 19, for it might be possible to combine the two, and so they should be considered together.

50. Mr. FOMBA said that the Special Rapporteur’s excellent report addressed four substantive issues: the definition and attribution of the nationality of corporations; diplomatic protection for corporations; diplomatic protection for the shareholders of corporations; and the relevance of the solutions proposed in draft articles 17 and 18.

51. With regard to the first point, the basic principle involved was the same as that governing the nationality of natural persons, namely that the territorially sovereign State alone had the power to determine a corporation’s nationality. There were two criteria for conferring nationality:

<sup>11</sup> See Y. Dinstein, “Diplomatic protection of companies under international law”, K. Wellens, ed., *International Law: Theory and Practice* (The Hague, Martinus Nijhoff, 1998), p. 505, especially p. 515.

the place of the registered office, used in civil-law countries, and the place of incorporation, favoured in common-law countries. In *Barcelona Traction*, ICJ had formally recognized the existence of those criteria, but without expressing a preference for one or the other.

52. International law did not consider the effectiveness of the corporation's link to the territorial State; ICJ had thus adopted a different approach from that followed in the *Nottebohm* case. The Court's formal approach in *Barcelona Traction* had been discarded to a certain extent by international law, as well as by the Convention Establishing the Multilateral Investment Guarantee Agency and bilateral treaties on the protection of private foreign investment.

53. On the question of the diplomatic protection of corporations as such, ICJ had introduced the rule that the State in which a corporation was constituted had the sole right to exercise diplomatic protection if that corporation had suffered injury. The rule reflected customary international law, without prejudice to the development of the dialectical link between it and the treaty process.

54. In the *Barcelona Traction* judgment ICJ had ruled out the possibility of diplomatic protection of shareholders, for reasons that were open to criticism in a number of respects. Such protection would appear to be legitimate, not as a principle in itself, but as an exception applicable in certain particular circumstances.

55. Overall, draft article 17 was acceptable. Since *Barcelona Traction* had recognized the two criteria set out in paragraph 2, the square brackets should be deleted and the word "and" replaced by "or", so as to reflect the two alternatives. Draft article 18, too, was acceptable in the main, reflecting the principle of the legitimacy of shareholder protection in exceptional circumstances. Subparagraph (a) should be amended by deleting the words "in the place of its incorporation"; and the exception provided for in subparagraph (b) should be maintained.

56. Mr. Kamto had raised the question of whether it was necessary to provide for time limits. As Mr. Pellet had said, this was a pervasive problem in international law. But in the current context there might be a case for specifying the scope *ratione temporis* of the right to exercise diplomatic protection.

57. In the matter of form, Mr. Melescanu had proposed merging draft articles 17 and 18, as a means of stressing the link between the rule and its exceptions. His own preference would be to retain the provisions as two separate articles. In his opinion, both articles should be referred to the Drafting Committee.

58. Mr. PELLET said he found the reactions to the Special Rapporteur's fourth report very disturbing. Like others, he endorsed all the draft articles submitted and wished to see them referred to the Drafting Committee. That being said, he found that the Special Rapporteur erred on the side of honesty. There could be no doubt that it was the duty of special rapporteurs to provide the Commission with all the necessary information to enable them to form an opinion. In that respect the present Special Rapporteur was beyond reproach, providing all those elements with honesty and rigour. Yet he provided them indiscriminate-

ly, without offering guidance or explaining why he had opted for one solution in preference to another. Thus, for instance, on draft article 17, paragraph 2, the Special Rapporteur proposed that the Commission should endorse the principle adopted by ICJ in the *Barcelona Traction* case. Yet in the process of reaching that conclusion the Special Rapporteur examined no fewer than seven options, considering their advantages and drawbacks, but without justifying his preference—well grounded as that preference was.

59. He would attempt to explain why he shared the Special Rapporteur's preferences. First, he agreed that *Barcelona Traction* was the inescapable starting point for any consideration of the subject under discussion. In its judgment of 1970 ICJ had discussed every aspect of the problem in detail and had even pronounced, by way of an *obiter dictum*, on questions not central to its findings—a commendable approach which, regrettably, it had latterly abandoned. The Court's position had been elucidated by lengthy pleadings dissecting every facet of the case. Like the Special Rapporteur, he considered that the *ELSI* case could throw light on certain particular aspects of *Barcelona Traction*, but that the solution nonetheless rested on a *lex specialis* which made it difficult to generalize.

60. As the Special Rapporteur had explained, in delivering its judgment ICJ had referred to the twofold criterion of the place of incorporation and/or the place of the registered office (the question of "and/or" was one to which he would revert). Quite apart from purely technical considerations, to which he would also revert, the sole genuine competitor to that criterion was the admittedly somewhat formalistic criterion of economic control.

61. And, at first sight, that criterion was defensible. After all, in the modern world, investment—particularly foreign investment—constituted a fundamental component of the wealth of nations. And what counted was economic reality: it mattered little whether a Belgian, French or Nigerian investor used a company registered in Canada or the Bahamas in order to invest in Spain, the United States or Chad. If that investment was the victim of an internationally wrongful act on the part of the host country, it was ultimately the real State of origin of the investment, in other words, the State of the shareholders whose economy would suffer injury, as had been pointed out by ICJ in paragraph 86 of its judgment. Several of the pleadings in the case demonstrated that point strikingly, even though that economically oriented, neoliberal and capitalist line of reasoning had been less prevalent 30 years ago than it had since become.

62. *Pace* the Special Rapporteur's assertion in paragraph 36 of his report, he did not think that the developing and industrialized nations had fundamentally divergent interests in that regard. The real reasons for discarding the criterion of economic control lay elsewhere, and, curiously, those two reasons were not clearly spelled out by the Special Rapporteur, although ICJ had set them forth in the clearest possible manner in its 1970 judgment.

63. The first of those reasons was purely practical and a matter of common sense. In the contemporary capitalist system, it was extraordinarily difficult, if not downright impossible, to "track" the true origins of a company's

capital. Most of the shareholders in Barcelona Traction had been Belgian, but they had not necessarily been natural persons, and the companies participating in the capital of those “Belgian” shareholder companies might well have been French, United States or Indian companies. In paragraph 87 of its judgment ICJ had found that: “it must be proved that the investment effectively belongs to a particular company. This is ... sometimes very difficult, in particular where complex undertakings are involved” [p. 46]. It continued, in paragraph 96: “The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands” [p. 49]. That was even truer now than it had been in 1970.

64. The second reason why economic control should, in principle, be rejected as a criterion was more a political or moral than a practical issue. The Special Rapporteur seemed to express concern, *inter alia* in paragraphs 10 and 21 of his report, that the criterion of incorporation and/or registered office could leave shareholders without protection. That seemed to show excessive scrupulousness. Shareholders, in their capitalist wisdom, could opt to incorporate a company in a State other than their own, with a view to maximizing profits; and, indeed, it was their prerogative to act in their own best interests in the best of all possible capitalist worlds. But they could not have their metaphorical cake (usually in the form of a more favourable tax regime) and at the same time eat it (by benefiting from a “proximity” to their State of nationality that would afford them more active and effective exercise of the right—the *right*, not the obligation—of the State to grant diplomatic protection (*cf.* para. 94 of the *Barcelona Traction* judgment)). As ICJ had also rightly noted in paragraph 99 of the judgment, a passage not cited by the Special Rapporteur:

It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders. [p. 50]

65. It was those considerations, rather than those put forward by the Special Rapporteur, that led him to fully support the Special Rapporteur’s conclusions that had taken concrete form as draft article 17.

66. As to the wording of that provision, he had no difficulty with paragraph 1, with the proviso that the injury must have been caused by an internationally wrongful act. That, however, was presumably implicit and would be spelled out in the commentaries.

67. As for the justification of the wording of draft article 17, paragraph 1, in paragraph 51 of the report the Special Rapporteur referred to “the pessimistic assessment of the situation by Kokott” that “the traditional law of diplomatic protection has been to a large extent replaced by a

number of treaty-based dispute settlement procedures”,<sup>12</sup> a state of affairs also mentioned by ICJ in paragraph 90 of the *Barcelona Traction* judgment. That trend was indisputable, but he could see no reason to characterize it as pessimistic. On the contrary, the conclusion of bilateral agreements clearly establishing the rights of the various participants in international investments and creating effective and efficient dispute settlement mechanisms was a good thing in itself, even if he had ideological reservations regarding some of the rules contained in contemporary investment protection conventions. That reservation, did not, however, affect his approval of draft article 17, paragraph 1, as proposed by the Special Rapporteur.

68. Draft article 17, paragraph 2, also posed no problems of principle. But, as he had already said on several occasions, he was extremely concerned about placing the expression “and in whose territory it has its registered office” in square brackets. Some members of the Commission appeared to see themselves as internal, as opposed to international, legislators—an approach that he found entirely unacceptable. Despite some members’ stated views, determination of the nationality of corporations was essentially a matter within States’ domestic jurisdiction. That was true of natural persons, as ICJ had found in the *Nottebohm* case; and also of corporations, as it had also found in the *Barcelona Traction* judgment, in paragraphs 39 to 43 of which it stated that the legal status of corporate entities was a matter for municipal law and even essentially within domestic jurisdiction. Just as the nationality of individuals was determined by two main alternative criteria, *jus soli* and *jus sanguinis*, referred to in draft article 3, so too the nationality of corporations depended on two alternative systems, namely, place of incorporation and place of registered office, though many States borrowed to varying extents from one or the other system. Despite the Special Rapporteur’s assertion in paragraph 53 of the report, the Court’s insistence on the requirement of a registered office in parallel to that of incorporation had not been “misplaced”. In so doing it had simply respected the legal systems of States, which used one or the other of those two criteria, or a combination of the two. Unlike the Special Rapporteur and other members of the Commission who wished to impose their own system—that of incorporation—on the rest of the world, the Court had also respected the principle set forth in paragraph 38 of its 1970 judgment—which, furthermore, the Special Rapporteur cited in paragraph 54 of his report—that recognition of the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction required that international law must refer to the relevant rules of municipal law.

69. Contrary to what some members wished to believe or to assert, municipal laws were not uniform in that regard. Broadly speaking, the Anglo-Saxon countries and their epigones relied on the system of incorporation, and the civil-law countries tended towards the registered office or the real headquarters system. In passing, it was worth noting that the description in the *Barcelona Traction* judgment was not satisfactory in English, as the term *siège social* would more properly be rendered as “headquarters”. It was true that Italy, under the enlightened in-

<sup>12</sup> Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 377.



fluence of Mr. Gaja, had gone over to the incorporation system; but that was no reason to indirectly oblige other States to align themselves with Anglo-American law. The Commission should leave that question to UNCITRAL, and should take due note that two systems existed, as ICJ had wisely done in 1970.

70. Admittedly, the formulation that ICJ had used in paragraph 70 of its judgment and that the Special Rapporteur cited, albeit only partly, in paragraph 52 of his report posed problems. The Court wrote: "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office" [p. 42]. The conjunction was indeed "and". However, a reading of the passage in which the sentence occurred raised doubts as to whether even the Court might not have had in mind two alternative criteria. That, at any rate, was his own view of the matter.

71. He therefore strongly urged the Special Rapporteur and the Drafting Committee to retain the phrase currently enclosed in square brackets and to eliminate the ambiguity created by the formulation used by ICJ in *Barcelona Traction*, by replacing the conjunction "and" with "or", as Mr. Galicki and others had proposed. That was the only way to respect the essentially national jurisdiction of States in one of the rare domains in which it still existed. And he most emphatically did not see on what grounds his Anglo-Saxonophile colleagues should impose the criterion of incorporation upon States that remained attached to the *siège social* ("headquarters") system, one which, contrary to what Mr. Gaja had just asserted, was much less formalistic than the incorporation system, even if those States were in a minority and were not among the economically strongest; even if technically one could maintain that the incorporation system was preferable—a matter on which he was not able to pronounce and which, as an international lawyer, he dismissed out of hand, as it was not within the Commission's mandate to accord one system preference over another. The Commission's task, like that of the Court in 1970, was to note that States had a measure of freedom in that regard, and he did not see why it should arrogate to itself the possibility of reining in that freedom. The only other possibility would be to say nothing at all, by simply deleting paragraph 2 and stressing in the commentaries that determination of the nationality of corporations was essentially a matter for States' jurisdiction.

72. Draft articles 18, 19 and 20 constituted totally acceptable and endorsable exceptions to the principle of article 17, bearing in mind that it was ICJ itself that had mentioned those exceptions in its 1970 *Barcelona Traction* judgment, relatively cautiously and again in the form of *obiter dicta*, as none of those exceptions was applicable to the circumstances of the case.

73. The exception covered by draft article 18, subparagraph (a), concerned the scenario in which the corporation had ceased to exist in the place of its incorporation. Again he had no problem of principle, but he was somewhat perplexed by the drafting of the provision. Obviously, if the corporation had ceased to exist, the State of which it had the nationality—by virtue either of incorporation or of registered office—could no longer protect it. One could not protect a dead body; at best one could protect

its beneficiaries, who, in the case in point, were, *mutatis mutandis*, the shareholders. That being so, he wondered whether the criterion adopted by ICJ in *Barcelona Traction*, which, as the Special Rapporteur explained in paragraphs 59 and 60 of his report, was stricter than the one applied previously, was not too rigid. Like Mr. Brownlie, cited by Judge Jessup, like Paul de Visscher, cited by Judge Fitzmaurice, like Mr. Riphagen, whose personal opinions on the matter he had reread, he thought it preferable to adhere essentially to the idea of effectiveness of the legal entity. Admittedly, diplomatic protection rested on a fiction: a corporate entity was itself in some respects a legal fiction. But when that fiction no longer corresponded to any reality whatsoever, when the legal entity no longer had any effectiveness, when it was "practically defunct", one had to abandon fiction and revert to reality. The whole question was whether the corporation was or was not still in a position to act in pursuit of its rights and to defend its interests. If it was, there was no reason to abandon the principle laid down in draft article 17. If it no longer was, then the exception under draft article 18, subparagraph (a), was necessary; but as presented by the Special Rapporteur, basing himself on the idea, if not the formulation, of *Barcelona Traction*, that exception seemed decidedly too narrow and formalistic. It would be better to say that diplomatic protection could be exercised on behalf of shareholders when "the possibility of a remedy available through the company" [p. 41, para. 66] was ruled out, or when the company was no longer in fact in a position to act to defend its rights and interests.

74. On the other hand, he had no objection to adding, as proposed by the Special Rapporteur, the words "in the place of its incorporation", thereby making it possible to avoid ambiguities. For instance, in the *Barcelona Traction* case, the fact that that company could not act in Spain should not be taken into consideration, at any rate under the criterion of nationality; that incapacity to act in Spain concerned only the other condition for exercise of diplomatic protection, namely, exhaustion of domestic remedies.

75. He did not share some other members' concerns regarding subparagraph (b) of draft article 18. Admittedly, the Special Rapporteur showed that ICJ had not firmly upheld the rule whereby diplomatic protection could be exercised on behalf of the shareholders of a company if that company had the nationality of the State responsible for injury caused to it. The Special Rapporteur had also shown that the precedents were ambiguous, even though he seemed to have exaggerated the extent of the scope for ambiguity. But the *ELSI* case confirmed that opinion, though the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy<sup>13</sup> had not played an exclusive role in the Chamber's reasoning. As the Special Rapporteur stressed in paragraph 84 of his report, and as several speakers had pointed out to further substantiate their criticisms of the Court's *obiter dictum* of 1970 in the *Barcelona Traction* case, the United Kingdom and the United States had pronounced in favour of that exception. But the fact that the United States was in favour of a rule of international law—or of what it allowed to remain of it—did not mean

<sup>13</sup> See 2757th meeting, footnote 6.



that the rule was necessarily a bad one. Furthermore, it was now reflected not, as some members claimed, in a few bilateral investment conventions, but in thousands of such conventions concluded by all States of the international community, regardless of their level of development or ideological orientation. That state of affairs consolidated the principle set forth by the Court in its *obiter dictum*.

*The meeting rose at 1 p.m.*

## 2760th MEETING

*Wednesday, 21 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI said that, in his thorough and objective study of the topic of diplomatic protection of legal persons, the Special Rapporteur had rightly raised the question of the nationality of those persons and had opted for a reaffirmation of the centrality of the decision of ICJ in the *Barcelona Traction* case. He proposed that, for the purposes of diplomatic protection, the State of nationality of a corporation was the State in which the corporation was incorporated and in whose territory it had its registered office—the latter condition, however, being enclosed in square brackets. Many bilateral or multilateral investment protection agreements established other arrangements for

the benefit of the corporations, shareholders and other parties concerned, but, in the absence of such an agreement, the *Barcelona Traction* judgment remained the correct expression of the law.

2. On draft articles 17 and 18 specifically, the first posed very few problems and should be referred to the Drafting Committee, although the phrase “and in whose territory it has its registered office” was not very helpful. Admittedly, that was a criterion adopted by ICJ in the *Barcelona Traction* case, but in practice the headquarters was in the place of incorporation and a corporation had the nationality of the State in which it was incorporated. If that phrase was retained with the conjunction “and”, the corporations—perhaps few in number—whose registered office was located in a State other than the State of incorporation were in danger of losing the right to diplomatic protection on the grounds that they failed to meet both of the conditions that would be laid down in draft article 17. If the conjunction “and” was replaced by “or”, that could lead to dual nationality and competition between several States wishing to exercise diplomatic protection. The phrase in question should thus be omitted from draft article 17, paragraph 2.

3. Draft article 18 laid down the principle that the State of nationality of the shareholders of a corporation was not entitled to exercise diplomatic protection on behalf of those shareholders when an injury was caused to the company, but then established two exceptions to that principle which some members of the Commission had considered superfluous—especially the exception provided for in subparagraph (b). Admittedly, as those members pointed out, diplomatic protection was seldom invoked in practice because local remedies were usually sufficient and multilateral or bilateral arrangements could be invoked, but those two arguments were perhaps not always valid for all countries. As the Special Rapporteur said, however rare those cases might be, they should be provided for in the draft articles. Article 18 should thus also be referred to the Drafting Committee.

4. Mr. PELLET reiterated his belief that incorporation and registered office represented two different systems whereby nationality could be conferred on corporations. It was thus incorrect to say that only the first was determining and that the second merely flowed from it. Replacing the conjunction “and” with “or” in draft article 17, paragraph 2, would raise the problem of dual nationality, but international law had ways of dealing with that problem. In the case of natural persons, the Commission had noted the different systems whereby nationality was conferred without seeking to impose one of them—*jus soli*, for example. It could thus proceed in the same way in the case of legal persons. As for the cases, referred to by the Chair, of States that applied neither of the two systems and did not recognize the notion of nationality of corporations, it seemed difficult to imagine a case in international law in which a State refused to let its corporations have a nationality, and, if such were the case, that would call article 17 as a whole into question.

5. Mr. GAJA said that, in the *Barcelona Traction* judgment, a distinction was drawn between the “registered office” (*siège* in French) and the “seat” (*siège social* in French). Paragraph 71 of the judgment also introduced

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

the expression *siège statutaire* as a rendering of “registered office”. It could be seen from the use of those terms in the judgment that what ICJ had initially referred to as the “seat” was a formal structure resembling the “registered office”, little more than an address. It thus made little difference whether the criterion of incorporation or the criterion of registered office was adopted, as the former was simply the one more frequently used in practice.

6. Mr. BROWNLIE said that the Commission had run up against two major difficulties. The first, fundamental source of difficulty was that the nationality of corporations was always established by municipal law, with international law coming afterwards, either to recognize the determinations made by municipal law or to apply its own standards. The Commission seemed not to have fully faced up to that problem. The second difficulty related to the application of the *Nottebohm* principle. In the *Barcelona Traction* case, ICJ had not taken a firm grip on the question. It had considered that it could leave the problem aside by adding to the criteria of the incorporation of the company and the place of its registered office a series of other links between the company in question and Canada, so that the Court had in fact decided, but without saying so, that the *Nottebohm* principle applied, *mutatis mutandis*, to companies. With respect to the *Nottebohm* case, the synthesis in paragraph 71 of the Court’s judgment in *Barcelona Traction* was that the element of free choice was very important and that the relevant persons chose with what jurisdiction they wished to establish a connection. It should also be noted that, even in the case of individuals, naturalization was a very strong voluntary link. There was thus no need to apply the *Nottebohm* principle in such a way as to artificially remove the nationality of corporations.

7. Mr. DUGARD (Special Rapporteur) said that the formulation he had proposed for draft article 17, paragraph 2, rested on the idea that the place of incorporation of the company was the most important factor and that the registered office, which was also important, was the natural consequence of incorporation. In Mr. Brownlie’s view the term “registered office” was important in that it indicated the existence of a connection between the company and the State of incorporation. In paragraph 71 of its judgment in the *Barcelona Traction* case, ICJ described the elements constituting that connection (registered office, accounts, register of shareholders). One could thus interpret the term “registered office” in draft article 17 as designating the connection thus described by the Court. More problematic would be, on the other hand, the similarity between the term “registered office” and the term *siège social*. In some legal systems, the *siège social* referred to the “headquarters”, in other words, the place where the company conducted its business. And, in paragraph 70 of the aforementioned judgment, the Court had found against the criterion of the *siège social*, or place where the company had its centre of control. With regard to the problem of dual nationality, the Court’s judgment seemed to be opposed to the notion of dual or secondary protection, considering that only one State could protect the corporation. To change the word “and” to “or” in draft article 17, paragraph 2, would be tantamount to introducing a principle that was not supported by the judgment. Most members of the Commission seemed to favour the

use of the sole criterion of incorporation, but it would be wise to retain the phrase “registered office” so as to give effect to the connection between the State and the corporation that was to be found in paragraph 71 of the Court’s judgment.

8. Mr. CHEE said that the two criteria in draft article 17, paragraph 2, were taken word for word from paragraph 70 of the judgment by ICJ. Was the Commission proposing to challenge the Court’s decision by invoking the municipal law of sovereign States? As for the doctrine of the genuine link referred to by Mr. Brownlie, in paragraph 70 of its judgment, the Court noted the absence of clear criteria. While the Commission should not blindly follow the Court’s decision, when the choice was between the jurisdiction of sovereign States and that of the Court, to whose Statute those States had acceded, since it was an integral part of the Charter of the United Nations, the Commission must clearly decide which choice it must make.

9. Mr. BROWNLIE said it was not fair to say that the Special Rapporteur had departed from *Barcelona Traction*. On the contrary, he had taken it as his general guide. However, ICJ had not really been required to rule on the issue of nationality, which had not been contested by the parties. In the relevant passages of its judgment, the Court had referred to the principles of incorporation and registered office, but also to the company’s other connections with the State of nationality. Also, it must not be forgotten that the concept of nationality of corporations did not exist in the municipal law of some States. That was why a sufficiently broad criterion of international law was needed to cover the various possibilities. Draft article 17 should refer to the State where the company was incorporated and/or in whose territory it had its registered office and/or with which it had other appropriate links.

10. Mr. YAMADA said that he could accept both of the criteria proposed in draft article 17, paragraph 2, on condition that they were cumulative. A company could be incorporated in Japan only if its headquarters were in that country. He asked the Special Rapporteur whether there was any legal system under which a company’s registered office could be located in a country other than that of incorporation. If the two criteria were taken as alternatives, there was a danger that a company might have dual nationality, yet the report seemed to rule out that possibility.

11. Mr. AL-BAHARNA asked Mr. Pellet how French law regarded the situation of a company incorporated in another country that had its headquarters in Paris and whether, in practice, France would accord it diplomatic protection.

12. Mr. DUGARD (Special Rapporteur) emphasized that the question of nationality of corporations was guided by rules of municipal law. The difficulty was that such rules differed, with some countries emphasizing incorporation, others economic control, yet others registered office and still others having no specific criteria. He agreed with Mr. Brownlie and Mr. Yamada that the criteria of incorporation and registration should be combined. A consensus seemed to be emerging on that subject, but he remained concerned about the possibility that diplomatic protection might be exercised by two different States, something which seemed incompatible with *Barcelona*

*Traction*. That would be the case if the company could be protected both by its State of incorporation and by the State where it had its headquarters. However, the concepts of incorporation and registration were indissociable in most systems.

13. The CHAIR, speaking as a member of the Commission, said that the Commission must find a satisfactory definition of nationality that recognized the company's link with the State. In that connection, the Commission could draw on the definition of nationality given in draft article 3, paragraph 2, with respect to individuals. The Special Rapporteur might consider that idea.

14. Mr. KAMTO said that he found Mr. Brownlie's interpretation convincing. In the *Barcelona Traction* case, the influence of *Nottebohm* was clear, in that ICJ listed the elements of fact demonstrating the company's connection with Canada, namely, incorporation and place of registered office. In that spirit, the second criterion should be retained in draft article 17, paragraph 2, preceded by the conjunction "and", and without the square brackets. If the first criterion alone were retained, the nationality requirements for a legal person would be less strict than those for an individual, and that would be a departure from the court's jurisprudence. In order to take account of certain elements of national legislation, however, a formulation such as "with which it has a genuine link" might be inserted. It would then be for the courts to weigh those elements of connection in the event of competing claims by two States.

15. Mr. BROWNLIE said that it would be too restrictive to combine the criterion of registered office with another criterion. Moreover, unlike the Special Rapporteur, he did not think that the question of the nationality of corporations was governed by municipal law. Such law could attribute nationality, but any conflict must be settled by international law. *Barcelona Traction* did not say that nationality should be governed by municipal law. The issue in *Barcelona Traction* was not nationality but the power to exercise diplomatic protection, which was a matter of international law. In *Nottebohm*, ICJ had drawn an enlightening parallel with the issue of territorial waters. The existence of such waters was determined by the legislation of the coastal State, but international law imposed limits on what the coastal State could do in that regard. Accordingly, he felt that a more general principle than the two criteria in the draft article should be used.

16. Mr. CHEE said that, while the municipal law of each State might stipulate conditions for the incorporation of companies, the question was: In the event of a conflict between municipal and international law, which had precedence? Since the Statute of the International Court of Justice was an integral part of the Charter of the United Nations, it was important to comply with the Court's decisions.

17. Mr. PELLET, responding to Mr. Al-Baharna, said that he did not know enough about the applicable law to give a detailed answer, but that, under French law, the criterion of "headquarters" referred to the actual situation and to the corporation's actual activities. France's practice in the area of diplomatic protection was difficult to

ascertain, since such action was necessarily shrouded in secrecy.

18. On the point under debate, he agreed with Mr. Brownlie that *Barcelona Traction* did not provide an answer, since ICJ had not had to rule on the problem of nationality. On the other hand, the Court had stated clearly that the very existence of corporations was not governed by international law and that legal persons were defined by municipal law. That was because, unlike individuals, legal persons were simply creations of internal law. The State attributed a nationality to such persons, but that nationality was not necessarily recognized by other States because, as *Nottebohm* pointed out, there must be a genuine link between the person and the State of nationality. Following that logic, he wondered whether the draft articles should reintroduce the idea of a genuine link that would make it possible to exercise diplomatic protection. Such a link could be determined according to various criteria, such as the place of incorporation, headquarters, registered office and probably others. Satisfactory wording would have to be found to convey that idea.

19. Mr. DUGARD (Special Rapporteur) asked whether that meant that Mr. Pellet had abandoned the idea of dual protection.

20. Mr. PELLET said he believed that there was nothing to prevent several States from being entitled to exercise diplomatic protection on behalf of a corporation if the latter had a genuinely strong link with more than one State. Nevertheless, for the purposes of the progressive development of international law, the Commission could say that only one State—the one with which the company had the strongest link—could exercise such protection.

21. Mr. GAJA observed that *Barcelona Traction* could not be said to have ignored international law. He quoted the first sentence of paragraph 70 of that judgment, in which ICJ noted: "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals" [p. 42]. The judgment referred to municipal law only with respect to incorporation of companies and not with respect to nationality, a concept which did not always exist in municipal law where legal persons were concerned. Since the legislation applied to corporations envisaged a wide variety of criteria, it was necessary to find a criterion under international law while not forgetting the genuine link issue. Place of registered office was not an element of that link.

22. Mr. ECONOMIDES welcomed the turn taken by the debate. He suggested that draft article 17, paragraph 2, should be formulated in more general terms—for instance, by saying that diplomatic protection was exercised by the national State, such State to be determined by internal law in each case, provided that there was a genuine link or connection between the national State and the company concerned. That would obviate the need for the Commission to discuss the various criteria, which could be mentioned in the commentary, yet would retain the "genuine link" condition.



23. Mr. PAMBOU-TCHIVOUNDA requested that Mr. Economides produce his proposal in writing, as it would be of interest as the discussion proceeded.

24. Mr. ECONOMIDES said he could certainly comply with that request, but that Mr. Brownlie might be in a better position to do so.

25. The CHAIR invited the Special Rapporteur to introduce articles 19 and 20 of the draft articles on diplomatic protection.

26. Mr. DUGARD (Special Rapporteur) said that draft article 19 was a saving clause designed to protect shareholders whose own rights, as opposed to those of the company, had been injured. As ICJ had recognized in the *Barcelona Traction* case, the shareholders had an independent right of action in such cases and qualified for diplomatic protection in their own right.

27. The Chamber of ICJ had also considered the issue in the *ELSI* case, but it had failed to expound on rules of customary international law on that subject. The proposed article left two questions unanswered: the content of the right, or when such a direct injury occurred, and the legal order required to make that determination.

28. The Court in *Barcelona Traction* had mentioned the most obvious rights of shareholders, but the list was not exhaustive. That meant that it was left to courts to determine, on the facts of individual cases, the limits of such rights. Care would have to be taken to draw clear lines between shareholders' rights and corporate rights, however. He did not think it was possible to draft a rule on the subject, as it was for the courts to decide in individual cases.

29. As to the second question, it was quite clear that the determination of the law applicable to the question whether the direct rights of a shareholder had been violated had to be made by the legal system of the State in which the company was incorporated, although that legal order could be supplemented with reference to the general principles of international law. He had not wished to draft a rule, but simply to state the one recognized by ICJ in the *Barcelona Traction* decision, namely, that in situations in which shareholders' rights had been directly injured, their State of nationality could exercise diplomatic protection on their behalf.

30. Turning to article 20 on continuous nationality of corporations, he pointed out that State practice on the subject was mainly concerned with natural persons. In that connection, he recalled that the Commission had adopted draft article 4<sup>3</sup> on that subject at its fifty-fourth session in 2002. The principle was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when the latter had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

<sup>3</sup> See footnote 1 above.

31. If the corporation ceased to exist in the place of its incorporation as a result of an injury caused by an internationally wrongful act of another State, however, the question that arose was whether a claim had to be brought by the State of nationality of the shareholders, in accordance with draft article 18, subparagraph (a), or by the State of nationality of the defunct corporation, or by both. The difficulties inherent in such a situation had been alluded to in *Barcelona Traction*, and some of the judges had considered that both States should be entitled to exercise diplomatic protection.

32. He agreed with that view, as it would be difficult to identify the precise moment of corporate death, and there would be a "grey area in time" during which a corporation was practically defunct but might not have ceased to exist formally. In such a situation, both the State of incorporation of the company and the State of nationality of the shareholders should be able to intervene. He was aware that, in the *Barcelona Traction* case, ICJ had not been in favour of such dual protection, but it seemed that that solution might be appropriate.

33. Finally, he did not think it was necessary to draft a separate rule on continuous nationality of shareholders; since they were natural persons, the provisions of draft article 4 would apply to them.

#### **Reservations to treaties<sup>4</sup> (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>5</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

#### **DRAFT GUIDELINES ADOPTED BY THE DRAFTING COMMITTEE**

34. The CHAIR invited the Chair of the Drafting Committee to introduce the draft guidelines relating to reservations to treaties adopted by the Committee (A/CN.4/L.630).

35. Mr. KATEKA (Chair of the Drafting Committee) said that the Committee had completed its consideration of the 15 guidelines the Commission had referred to at its preceding session.

#### **Explanatory note**

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

[...]

#### **2.5 Withdrawal and modification of reservations and interpretative declarations**

##### **2.5.1 Withdrawal of reservations**

<sup>4</sup> For the text of the draft guidelines provisionally adopted to date by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>5</sup> See footnote 2 above.



Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

#### 2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

#### 2.5.3 *Periodic review of the usefulness of reservations*

1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

#### 2.5.4 [2.5.5] *Formulation of the withdrawal of a reservation at the international level*

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without the person's having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and ministers for foreign affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

#### 2.5.5 [2.5.5 bis, 2.5.5 ter] *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

#### 2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

#### 2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

1. The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

#### 2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

#### Model clauses\*

##### A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

##### B. Earlier effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

##### C. Freedom to set the effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

#### 2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(b) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations.

#### 2.5.10 [2.5.11] *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

#### 2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

\*For the commentary see...

36. He drew the Commission's attention to a new section, which would be entitled "Explanatory note" and would be placed at the beginning of the draft guidelines. In considering the model clauses relating to draft guideline 2.5.9, the Drafting Committee had concluded that it would be useful to retain them, but had been uncertain as to where they should be placed: in the text of the Guide to Practice itself, either just after the relevant draft guideline or in a footnote; in an annex to the Guide; or in the commentary to the relevant draft guideline to explain the circumstances in which the clauses could be used. After having eliminated a number of possibilities, and in view of the fact that the Special Rapporteur intended to submit more model clauses for future guidelines, the Drafting Committee had concluded that the best and most practical solution would be to keep the model clauses in the guidelines to which they related and place an explanatory note at the beginning of the Guide to Practice, explaining the function of the model clauses. In addition, a footnote would refer the reader to the relevant commentary. The explanatory note would also be used to explain other issues in relation to the Guide to Practice that might arise in the future. In fact, it would serve as a general introduction to the Guide.

37. Referring to draft guideline 2.5.1 (Withdrawal of reservations), he said the Drafting Committee had made no changes to the guideline originally proposed by the Special Rapporteur.<sup>6</sup> Its wording was identical to that of article 22, paragraph 1, of the 1986 Vienna Convention. The phrase "unless the treaty otherwise provides", which was also found in the Convention, had been maintained, although it was understood that *all* the draft guidelines had a purely residual character and could thus be followed in the absence of any other treaty provisions.

38. Draft guideline 2.5.2 (Form of withdrawal) had been provisionally adopted by the Drafting Committee, as proposed by the Special Rapporteur, without any modification. The wording was identical to that of article 23, paragraph 4, of the 1969 Vienna Convention. On the basis of the debate in plenary, the Drafting Committee had considered whether mention should be made of "implicit" withdrawals, which resulted from the obsolescence of internal legislation or developments in general international law. Reference had been made to the view that a State announcing its intention to withdraw a reservation should be bound to act accordingly even before the reservation had been formally withdrawn. The Committee had nevertheless decided that, for the sake of legal certainty and security of treaty relations as well as consistency with the 1969 and 1986 Vienna Conventions, such "implicit" withdrawals should not be admitted.

39. Draft guideline 2.5.3 (Periodic review of the usefulness of reservations) had received almost unanimous support in plenary. Several observations had been made about the use in English of the term "internal legislation" with reference to international organizations. The possibility of mentioning treaty-monitoring bodies explicitly had also been recalled. The view had been expressed that developments in internal legislation were not the only reason

why reservations should be reconsidered: developments in international law or other factors could also play a role. The Drafting Committee had carefully considered all those views and had decided that the words "in particular" should be inserted before the words "in relation" in paragraph 2 in order to indicate precisely that those developments were a factor among others.

40. The Drafting Committee had replaced the words "internal legislation" by the words "internal law" so that they would be equally applicable to international organizations. The words "rules of the international organization" as used in article 46 of the 1986 Vienna Convention were also recalled, but the Committee had considered that that reference would be better placed in the commentary. In the same paragraph, the word "special" had replaced the word "particular" and the word "retaining" had been added before the words "the reservations", while the word "careful" had been deleted, since it no longer had a *raison d'être* after the addition of the words "in particular" further on.

41. With regard to the treaty-monitoring bodies, it had been agreed that, despite their special role, they should not be singled out in that context, since other legislative bodies (for example, the United Nations General Assembly or the Parliamentary Assembly of the Council of Europe) often made similar recommendations for the withdrawal of reservations. It had been decided, however, that the issue should be addressed in more detail in the commentary. Finally, in the context of that guideline, the fact that all the draft guidelines were recommendations had again been stressed, in order to dispel any fear that, in the context of such a periodic review, States might think that reservations could be made easily.

42. Draft guideline 2.5.4, which dealt with the persons competent to formulate the withdrawal of a reservation at the international level, had originally been guideline 2.5.5, for which the Special Rapporteur had proposed two alternatives, one short and one long. The plenary had preferred the longer version, and, in view of the pedagogic function of the Guide to Practice, it was that version that had been retained by the Drafting Committee. The draft guideline had also needed to be brought into line with draft guideline 2.1.3 (Formulation of a reservation at the international level), to which it corresponded. That was why the title had been changed to "Formulation of the withdrawal of a reservation at the international level". In addition, the square brackets around paragraph 2 (c), which corresponded to paragraph 2 (d) of draft guideline 2.1.3, had been deleted.

43. Draft guideline 2.5.5 was a merger of guidelines 2.5.5 *bis* and 2.5.5 *ter*, as originally proposed by the Special Rapporteur. It corresponded to draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). The Drafting Committee had brought the wording of paragraph 1 (former guideline 2.5.5 *bis*) into line with that of draft guideline 2.1.4 and replaced the words "internal law of each State or international organization" by "or the relevant rules of each international organization". That change, which might seem to be inconsistent with guideline 2.5.3, was deliberate and justified. In the view of the Drafting Committee, the words

<sup>6</sup> For the text of the draft guidelines proposed by the Special Rapporteur in his seventh report, see *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1-3.

“internal law” in guideline 2.5.3 had a broader and more general meaning, whereas, in guideline 2.5.5, the “rules of the organization” referred to a more specific issue, that of competence to withdraw reservations. Another question had been raised with regard to the effect of the withdrawal of a reservation resulting in reduced obligations for all the parties to a treaty. It had, however, been pointed out that that problem related more to draft guideline 2.5.7 and it would be enough to mention it in the commentary. Finally, the title of guideline 2.5.5 was that of former guideline 2.1.4.

44. Draft guideline 2.5.6 (Communication of withdrawal of a reservation) had also been proposed by the Special Rapporteur in two versions, one shorter and one longer. The Drafting Committee had preferred to retain the shorter version, which referred to draft guidelines 2.1.5, 2.1.6 and 2.1.7 dealing with the communication of reservations and the functions of depositaries [already adopted by the Committee at the Commission’s fifty-fourth session<sup>7</sup>]. It would be recalled that the procedure determined for the communication of reservations (draft guideline 2.1.6), including the use of electronic mail or facsimile, was equally applicable to the withdrawal of reservations.

45. Draft guideline 2.5.7 (Effect of withdrawal of a reservation) was the result of the merger of guidelines 2.5.7 and 2.5.8, as originally proposed by the Special Rapporteur. The original text would not have been applicable when one objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization. As currently drafted, paragraph 1 of the new draft guideline 2.5.7 corresponded to the text of the former draft guideline 2.5.7, whereas paragraph 2 corresponded to the former draft guideline 2.5.8.

46. Taking into account observations made in plenary, the Drafting Committee had replaced the words “of the treaty” in the first sentence of paragraph 1 by the words “of the provisions on which the reservation had been made”. The commentary should explain that the plural “provisions” could also refer to a single provision, and it should also refer to draft guideline 1.1.1 (Object of reservations) pertaining to certain specific aspects of reservations to the treaty as a whole.

47. The Drafting Committee had retained the words “whether they had accepted or objected to the reservation” at the end of paragraph 1, which made it clear that the guideline covered two separate cases. For the sake of clarity, it had been thought better to add the words “by reason of that reservation” at the end of paragraph 2.

48. Draft guideline 2.5.8 was the former guideline 2.5.9, as originally proposed by the Special Rapporteur. It closely followed article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions. The Drafting Committee had adopted it with only a minor change in the French version, the word *autrement* having been added in the first line to bring it into line with the text of the provision in the Conventions.

49. That draft guideline was accompanied by model clauses. The Drafting Committee had had an extensive debate on the exact placement and function of such clauses.

It had eventually decided to retain the model clauses in the guideline and to refer to their function in the explanatory note at the beginning. As had been agreed, the model clauses would also be accompanied by a footnote referring the reader to the commentaries, where the appropriate use of model clauses would be explained. The Drafting Committee had placed the general heading “Model clauses” immediately after draft guideline 2.5.8. The text of the clauses followed, preceded by the letters A, B and C. The Drafting Committee had not made any changes to the model clauses themselves, except to move the square bracket before the word “depository” to include, more appropriately, the words “to” or “by”.

50. The text of draft guideline 2.5.9 (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation) was essentially as proposed by the Special Rapporteur. The Drafting Committee had considered the proposal that the words “the situation of the withdrawing State” should be replaced by the words “the content of the obligations of the other contracting States or international organizations”. It had been argued that that substitution was justified because it was not possible to determine unilaterally the effect of the withdrawal of a reservation. Consequently, if the reserving State or organization was allowed to do so, the other contracting parties should be protected from any change (for the worse) of their obligations as a result of that unilateral determination of the effect of the withdrawal. In that context, the view had also been expressed that the obligations mentioned should be those of the withdrawing State rather than those of the other contracting States or international organizations. Those two views were not necessarily the same, since it could be argued that the obligations of the other contracting parties were almost always affected by the withdrawal of a reservation. In order to clarify the guideline further, it had been suggested that the words “in relation to the withdrawing State” should be added at the end of subparagraph (b).

51. According to the first view, however, there could be situations when the withdrawal of a reservation (relating, for example, to legal cooperation in the field of political and civil rights) did not really affect the obligations of the other contracting parties even if it had a retroactive effect. In the course of the debate, it had been felt that, if the content of obligations was mentioned, the content of rights could be included as well. It had then been pointed out that the initial word “situation” covered both rights and obligations. It had been agreed that the best formulation to signal that the withdrawing State did not disadvantage the other contracting parties was the wording adopted, namely, “add to the rights of the withdrawing State or international organizations in relation to the other contracting States or international organizations”. In the final analysis, the withdrawing State or international organization should not be able to put itself in an advantageous position *vis-à-vis* the other contracting parties.

52. There had been no other changes (from the original wording) in that draft guideline. The Drafting Committee had decided to retain the words “withdrawing State” on the understanding that it could be explained in the commentary that that meant the State (or organization) withdrawing a reservation and not the State (or organization) withdrawing from a treaty.

<sup>7</sup> See *Yearbook ... 2002*, vol. I, 2733rd meeting, para. 2.



53. Draft guideline 2.5.10 (Partial withdrawal of a reservation) corresponded to draft guideline 2.5.11 as proposed by the Special Rapporteur. Taking into accounts comments made in plenary, the Drafting Committee had decided to reverse the two paragraphs for logical reasons and to deal with definition before procedure.

54. The Drafting Committee had replaced the words “modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty” by the words “limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty”. The Drafting Committee had found the word “modification” misleading, since it might also indicate an extension of the reservation. It was therefore preferable to set out clearly what the partial withdrawal of a reservation did—namely, limit the legal effect of the reservation.

55. There had also been a discussion regarding the words “achieves a more complete application of the provisions of the treaty”, which had eventually been adopted because they better reflected the idea that the partial withdrawal of a reservation achieved a more complete application of the treaty by its very existence. As a consequence of that change, the word “withdrawing” had had to be added before “State or international organization”. The title of the draft guideline remained unchanged.

56. Draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation) corresponded to guideline 2.5.12 as originally proposed by the Special Rapporteur. The guideline had been modified to take account of two observations made during the debate in plenary. The first observation had referred to the possibility that an objection to a reservation which was partially withdrawn continued to have its effects to the extent that the objection did not apply exclusively to that part of the reservation which had been withdrawn. The second sentence of the draft guideline had been modified accordingly. The second observation had referred to the possibility that the partial withdrawal of a reservation might have a discriminating effect. In such a case, an objection could be made to the reservation resulting from the partial withdrawal. A last sentence had therefore been added stating exactly that possibility.

57. The first sentence of the draft guideline remained unchanged—only the word “effects” had been changed to the singular “effect”, since the plural had been unnecessary.

58. In closing, he said that the Drafting Committee recommended that the Commission should adopt the draft guidelines before it.

59. The CHAIR thanked the Chair of the Drafting Committee. Noting that the originals of the report of the Drafting Committee were in English and French, he recommended that those members of the Commission who used the other official United Nations languages should examine the translations carefully and communicate any remarks to the Chair of the Drafting Committee.

60. Mr. ECONOMIDES said that he had a number of suggestions to make concerning the French version. In draft guideline 2.5.2, the words *doit être formulé* were

wrong. Either the *request* was *formulated* in writing or the *withdrawal* was *made* in writing. At the end of draft guideline 2.5.3, it would be preferable to replace the words *qu’il a subies* by the word *intervenues*, which was more neutral. In paragraph 1 (b) of draft guideline 2.5.4, the word *pertinentes* should be inserted after the word *circonstances*. In draft guideline 2.5.9, he failed to see how the withdrawal of a reservation could add to the rights of the withdrawing State or international organization.

61. The CHAIR, speaking as a member of the Commission, said that the title of draft guideline 2.5.4 should be changed to read “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), which seemed to him to be more in line with the content. He also had a number of comments on the Spanish version which he would communicate to the secretariat in due course in the appropriate manner.

62. Mr. GAJA, referring to a point of grammar, said that, at the end of the first paragraph of the English version of draft guideline 2.5.7, it would be preferable to say “whether they had accepted the reservation or objected to it”.

63. Mr. MOMTAZ said that, in paragraph 1 of the French version of draft guideline 2.5.10, the words *assurer plus complètement l’application* should be replaced by the words *assurer une plus large application*.

64. Mr. ROSENSTOCK suggested that a comma should be added after the words “international organization” in the introduction to draft guideline 2.5.9 of the English version.

65. Mr. PELLET (Special Rapporteur) reminded members that the consideration of the report of the Drafting Committee was not meant as an opportunity to catch up on substantive matters. With regard to draft guideline 2.5.2, its wording was perfectly in line with that of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, as the Chair of the Drafting Committee had pointed out. As to draft guideline 2.5.4, he reminded the Chair that he himself had proposed using the word *compétence* in connection with draft guideline 2.1.3, but his suggestion had not been followed up. It therefore seemed inevitable that draft guideline 2.5.4 must be brought into line with draft guideline 2.1.3. He did not object to adding the word *pertinentes* after the word *circonstances*, although he regarded it as superfluous.

66. In respect of draft guideline 2.5.8, he said that, in the French version of model clause A, the square brackets should be placed between *notification* and *au* and not before *dépôt*.

67. In formulating his comment on draft guideline 2.5.9, subparagraph (b), Mr. Economides had reopened a very long discussion which had taken place in plenary and in the Drafting Committee during the previous session. At that time, Mr. Gaja had put forward the idea of the possibility of a discriminatory withdrawal. If he thought about that, Mr. Economides should easily be able to see the real scope of subparagraph (b).



68. With regard to paragraph 1 of draft guideline 2.5.10, he said that he was not enthusiastic about the words *une plus large application* because they might suggest problems of either interpretation or territorial application. In his view, the word *complètement* was more appropriate.

69. The CHAIR, speaking as a member of the Commission, pointed out that the French and English versions of paragraph 1 of draft guideline 2.5.10 were not identical. There was a difference between “limits” and *vise à atténuer*; it would be preferable to say “aims at limiting”.

70. Mr. PELLET (Special Rapporteur) proposed “purports to limit”.

71. Mr. KATEKA (Chair of the Drafting Committee) said that he had no objection to the title “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), but he agreed with the Special Rapporteur that the wording of draft guidelines 2.5.4 and 2.1.3 should be consistent.

72. The CHAIR, speaking as a member of the Commission, said that he understood the need for consistency, but, on second reading, the title of a draft guideline could at least be brought into line with its content.

73. Mr. DAOUDI, referring to the differences between the French and English versions, asked which of the two the other language versions should follow.

74. The CHAIR and Mr. PELLET (Special Rapporteur) said that the French version was to be followed.

75. Mr. PELLET, speaking as a member of the Commission, said he hoped that the Chair would not press for the amendment of the title of draft guideline 2.5.4 because draft guideline 2.1.3 would then have to be amended as well.

76. The CHAIR, speaking as a member of the Commission, said that he would not insist any further. Speaking as Chair of the Commission, he said that, if he heard no objection, he would take it that the Commission adopted the draft guidelines submitted by the Chair of the Drafting Committee, subject to the comments and changes made during the debate.

*It was so decided.*

*The meeting rose at 1.10 p.m.*

## 2761st MEETING

*Thursday, 22 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr.

Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MELESCANU said that diplomatic protection of corporations and their shareholders was the most interesting aspect of the topic from the intellectual and practical standpoints. Diplomatic protection dated back to the last decades of the nineteenth century, but most investments were now made through corporations, rather than by natural persons—the situation covered by the *Nottebohm* case.

2. No more important problem confronted the developing countries and countries in transition than the problem of attracting investment, and one of the key aspects was providing the requisite guarantees for foreign investors. The debate on regulating the issue was more political than legal, tending to favour corporations, even multinational corporations, rather than the interests of the developing countries and countries in transition. It needed to be acknowledged, however, that those countries were currently engaged in a harsh struggle to attract foreign investment. Accordingly, they could benefit from the development of an internationally applicable regime governing investment. Without such a regime, there would be no alternative but to fall back on bilateral agreements negotiated with economically powerful countries, agreements that would inevitably grant less favourable terms to the countries seeking to attract investment.

3. Furthermore, paradoxically, despite the fact that most investment was now made through corporations, corporations were less well protected than were natural persons, who were able not only to seek diplomatic protection but also to invoke their human rights. Corporations, on the other hand, had no such protection, as *lex mercatoria* was a field of law still in its infancy.

4. The debate on the subject under consideration thus crystallized around one issue: Should the Commission confine itself to codifying existing international law on the basis of *Barcelona Traction*, or should it decide in favour of a new approach encompassing not only corporations but also their shareholders? In his view, there were

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

no grounds for concluding that any dramatic change in the latter direction had taken place. Accordingly, he favoured an approach based on the philosophy of law, rather than on judicial practice.

5. An analogy could be drawn between the present topic and the topic of the responsibility of international organizations, and between international organizations as subjects of public international law and corporations as subjects of municipal law. In both cases, it was agreed that there was a distinction between collective subjects (international organizations and corporations) and individual subjects (States and natural persons), provided those collective subjects had legal personality and a personality distinct from that of their creators. In his view, the logical conclusion was that the decision in the *Barcelona Traction* case was correct and must be used as the basis for the Commission's work. As ICJ had stressed, companies were characterized by a clear distinction between the company and its shareholders. Consequently, the draft articles should clearly indicate that diplomatic protection in the case of corporations fell to the State of nationality of the corporation and not to the State of nationality of the shareholders. That was the general conclusion emerging from the debate, and he thus supported draft article 17, paragraph 1, as the Commission was faced with a task of codification based on clear judicial practice, namely, the *Barcelona Traction* case.

6. The crux of the debate, however, was how to determine the nationality of corporations. Mr. Pellet had identified the matter, pointing out that the Commission was faced not merely with the task of codifying international law on the basis of the *Barcelona Traction* judgment, but also the task of progressively developing public international law by trying to establish under what conditions a corporation could truly claim the diplomatic protection of a State of which it was a "national". The judgment of ICJ had recognized Canada's right to exercise diplomatic protection, considering that there had been a genuine link between the company and the State inasmuch as the company had been incorporated in the State in question and had had its registered office in that country—cumulative conditions in the *Barcelona Traction* judgment. In that case as in others, reference had also been made to other elements, such as the company's principal place of economic activity, economic control, and the nationality of the majority shareholders. The Commission's task was now to decide how the question of nationality was to be regulated in future.

7. The question of the nationality of corporations, like that of the nationality of natural persons, the regime of foreigners or the territorial sea, was a domain essentially within national jurisdiction. The simplistic solution would be to refer directly to the provisions of municipal law. However, in all such domains international law must lay down guidelines. Accordingly, he did not support the proposal to delete the words "and in whose territory it has its registered office" from draft article 17, paragraph 2. It would be better to list illustrative conditions, rather than a single criterion or cumulative conditions, as State practice was very diverse. For instance, in the United States, for the purposes of diplomatic protection, a corporation was regarded as "national" if it was incorporated in the United States and at least 50 per cent of the shareholders

were United States citizens. In Switzerland, on the other hand, protection was granted to any corporation a majority of whose shareholders were Swiss citizens. On the basis of those considerations, of the debate at the previous meeting, and of the example of the rules adopted on the nationality of natural persons, he would propose that draft article 17, paragraph 2, should read:

"For the purposes of diplomatic protection, the national State of a corporation is the State in which the corporation is incorporated or in which it has its registered office or its domicile, or in which it has its basic economic activity or any other element recognized by international law as reflecting the existence of a genuine link between the corporation and the State in question."

A formulation of that type would allow the courts the flexibility to accept several criteria as a means to establish the existence of a genuine link, the only fundamental criterion of relevance to the nationality of corporations, as indeed to that of natural persons.

8. He had not included among those illustrative elements the criterion of "economic control", one of the Special Rapporteur's possible options. He shared the view expressed in paragraph 33 of the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) that that criterion accorded more with the economic realities of foreign investment. However, its use might destroy the entire logical edifice of the Commission's approach by introducing, as it were through the back door, diplomatic protection based on the State of nationality of the shareholders rather than of the corporation. For, in referring to economic control, one was referring to the State in which the majority of the shareholders resided, because it was they who exercised economic control.

9. The second task was to decide whether shareholders could be afforded diplomatic protection and, if so, when. ICJ had recognized that right in principle, but had considered that in *Barcelona Traction* those conditions had not been met. Despite certain arbitral decisions, such as the *Delagoa Bay Railway* and *Orinoco Steamship Company* cases and certain lump sum agreements, positive international law was silent on that matter. A first possible scenario involving protection of shareholders was the one in which shareholders had suffered direct injury as a result of an internationally wrongful act. In his view, draft article 19 covered that matter in a satisfactory manner.

10. A second possible scenario was one in which the shareholders had suffered injury caused by the corporation itself, as in the case of expropriation or where the corporation had ceased to exist in the place of its incorporation. He was in favour of the exception provided for in draft article 18, subparagraph (a), provided the provision was drafted so as to eliminate the possibility of the shareholders deciding to wind up the corporation as a means of enjoying the diplomatic protection of their State.

11. He also supported the Special Rapporteur's proposal to protect corporations against malpractice and abuses of law on the part of States. Draft article 18, subparagraph (b), was an interesting point of departure in that regard, for without provision for such an exception, the corpo-

ration in question might be entirely without diplomatic protection.

12. Finally, he supported the proposal that draft articles 17 to 20 should be referred to the Drafting Committee, with a view to finalizing acceptable texts as soon as possible.

13. Mr. DUGARD (Special Rapporteur) thanked Mr. Melescanu, Mr. Brownlie and Mr. Economides for their drafting suggestions. He was attracted to Mr. Brownlie's proposal, as he did not think it departed from the spirit of the *Barcelona Traction* decision. However, he was troubled by Mr. Economides' and Mr. Melescanu's proposals, which seemed to revert to the test of the genuine link. In *Barcelona Traction*, Belgium had argued that it had *locus standi* because the majority of the company's shareholders were Belgian, so that there was a more genuine link between Belgium and the company than between Canada and the company. ICJ had not accepted the Belgian argument. Though Mr. Melescanu claimed that he did not wish to introduce the test of economic control through the back door, that was precisely what he was doing because it would then be necessary for a court to examine which State controlled the company, something which would in turn entail its determining who had the majority shareholding. Thus, the Commission must guard against adopting a formulation in draft article 17, paragraph 2, which achieved that purpose. A much more cautious approach was needed, and Mr. Brownlie's proposal, subject to modification, provided an answer to many of the questions raised, including Mr. Pellet's call for a broader test than that of the registered office. In any case, it would be very unwise to introduce the notion of genuine link in that provision.

14. Mr. MELESCANU said he had referred to the notion of genuine link for two reasons, the first of which was logical and the second practical. Regarding the first, if one was to list a series of illustrative criteria in draft article 17, paragraph 2, it would also be necessary to include an indication for the courts as to what relative weight was to be assigned to each criterion. Without an indication of how to choose among the criteria listed, a court might be tempted to place the whole burden of a decision on the shoulders of the judges of ICJ.

15. The second, practical argument was that investors in countries in transition were often foreign companies whose shareholders were nationals of the country in which the investment was made. For example, a company incorporated in Switzerland and with its registered office in Switzerland, but whose sole shareholder was Romanian, might set up a bank in Romania whose activities were conducted solely in Romania. In such a situation, without at least a reference to a genuine link in draft article 17, paragraph 2, the result might be that what was to all intents and purposes a Romanian corporation was protected by another State. That case was applicable not just to Romania but to all the countries in transition, since they had created more favourable regimes for foreign than for national investors. In those circumstances, the temptation for any capitalist worthy of the name would be to cash in on those advantages by incorporating the company in a foreign country. The Commission should not encourage such behaviour. While Mr. Brownlie's proposed formulation was ingen-

ious, it must also be acknowledged that the difference between the "genuine" link he himself proposed and the "appropriate" link proposed by Mr. Brownlie was not very significant.

16. Ms. ESCARAMEIA asked whether Mr. Brownlie's intention in using the word "appropriate" in his proposal was to expand the possibilities of diplomatic protection. In adopting the criteria of incorporation and registered office to determine nationality, ICJ in the *Barcelona Traction* case had recognized the customary international law and treaty law prevailing at the time. Since then, however, national laws had changed dramatically. Mr. Melescanu had even described a situation where the nationality of the majority shareholders was the most important criterion. Had national laws changed so much that the Commission, by using general principles of international law, might arrive at a rule very different from that enunciated in *Barcelona Traction*?

17. Mr. BROWNLIE emphasized that he had deliberately avoided using any wording from the *Nottebohm* principle: that was the whole point. It would be highly problematic to apply *Nottebohm* to the present case and even more problematic to try to codify every possible kind of substantial or effective link. The use of "appropriate" was intended to be constructively vague.

18. *Barcelona Traction* was of no direct assistance, either. The issues raised by the present draft articles had not been central to *Barcelona Traction*, where the statement of ICJ on the nationality of the corporation had been limited to what was sufficient for that case. The Court's reference to the corporation's links with Canada had been descriptive, not normative, and the Commission could not deduce from *Barcelona Traction* what to do in the present instance. Using the word "appropriate" would enable members who disagreed with *Nottebohm* to opt for the necessary flexibility. Municipal legislation was very varied. Even the registered office and other criteria mentioned were not universal. Moreover, to apply *Nottebohm* rigorously, as Mr. Economides had suggested, would in fact limit the possibilities of diplomatic protection. The wording needed to be vague enough to broaden those possibilities and ensure that none of the very diverse cases that might arise was excluded.

19. Mr. ECONOMIDES said that one purpose of draft article 17, paragraph 2, was to define the State of nationality. Under internal law, various criteria were available: the State of nationality could be the State of incorporation, the State of registered office or the State whose nationals controlled the corporation. That meant that a corporation could have three nationalities, and that three States might claim the right to exercise diplomatic protection. The other purpose of paragraph 2, therefore, was to prevent competing claims. There were two possible solutions: either to consider the various criteria under internal law and decide which one was predominant, as the Special Rapporteur had done, in which case the remaining criteria became secondary, or to give all those criteria equal weight while imposing an international criterion of "genuine link", leaving it to the courts to decide, on the basis of that criterion, which State was the State of nationality.



20. Mr. CHEE noted that, in paragraph 70 of the *Barcelona Traction* judgment, ICJ defined how nationality was to be acquired, namely, by incorporation and registration. It also stated that in the particular field of diplomatic protection of corporate entities, no absolute test of the “genuine connection” had found general acceptance. That seemed to rule out the application of the “genuine link” test. In that connection, he agreed with Jennings that the analogy between the nationality of an individual and that of a corporation was often misleading and that rules of international law based on the nationality of individuals could not always be applied to corporations without some modification.<sup>3</sup> Jennings had also argued that the “genuine link” test could not be applied to ships, since ships were chattels, not individuals.<sup>4</sup> In all three cases there were very diverse situations, and he endorsed Mr. Brownlie’s proposal to use the term “appropriate links” in order to take account of that diversity.

21. Mr. MOMTAZ, responding to Mr. Melescanu’s statement, said he disagreed that the territorial sea was a matter essentially for the jurisdiction of States. Coastal States could enact laws relating to the territorial sea, but such laws must conform to international law.

22. In the discussion of draft article 17, paragraph 2, it had been said that States could enact their own laws governing the registration of corporations. States could also enact their own laws for the registration of ships. Under international law, most notably the United Nations Convention on the Law of the Sea, however, in order for a State to be able to authorize a ship to fly its flag, a “substantial link” must exist between the ship and the State (art. 91). Although attempts to clarify the criteria for the existence of such a link under the law of the sea had failed, he felt that the term “substantial link” might be appropriate in the present case.

23. Mr. PELLET said that he supported in spirit the three proposals put forward with regard to the definition of nationality of corporations in draft article 17, paragraph 2. In his fourth report on nationality in relation to the succession of States,<sup>5</sup> the Special Rapporteur, Mr. Mikulka, had defined clearly the criteria applied with regard to the nationality of corporations and had demonstrated convincingly that States applied a multiplicity of criteria. He understood the Special Rapporteur’s concern about including an express reference to “genuine link”, but felt that the proposals by Mr. Economides and Mr. Melescanu must not be interpreted as reintroducing the criterion of control, which presented more disadvantages than advantages. Instead, their proposals must be interpreted as referring to a genuine “legal” link, which could be established only by internal laws. Internal laws differed considerably and might include the criterion of “preponderant legal interest”. If there was an internal legal provision that referred to such a preponderant legal interest, it could be taken into account internationally. Given the very nature of legal persons, international law could not ignore provisions of internal law.

24. It could be seen from the range of criteria which States apparently applied in granting nationality to legal persons, especially corporations, that the links were, as Mr. Mikulka had said, very diverse. The Commission’s discussion seemed to imply that there were two criteria for according nationality: incorporation and registered office, on the one hand, and effective seat of business, on the other. In the light of Mr. Mikulka’s report, he wondered whether the Commission should in the present case even speak of “nationality”, especially in view of the attitude some countries displayed towards the very notion of nationality. What was important was that a “genuine” or “appropriate” legal link existed between the corporation and the State such that diplomatic protection could be exercised, and it might be going too far to speak of nationality in paragraph 2 when some internal legal systems might object to such a reference.

25. In paragraph 85 of the report, in the commentary to draft article 18, subparagraph (b), Mr. Brownlie was quoted<sup>6</sup> as criticizing the exception proposed by the Special Rapporteur. Earlier in the present session, however, Mr. Brownlie had considerably reduced the scope of his criticism by explaining that in the passage in question he had been referring to shareholders who were nationals of the State in question, namely, the State of nationality of the corporation. In that case and that case alone, he agreed with Mr. Brownlie that there was no logic in allowing another State to exercise the diplomatic protection of national shareholders. However, in other cases, namely, those involving shareholders who were nationals of the State that committed the internationally wrongful act, it was logical and equitable that diplomatic protection should be exercised on their behalf. For instance, if a company which was a national of State A and whose foreign shareholders were nationals of State B was the victim of an internationally wrongful act on the part of State A, those of its shareholders who were nationals of State A obviously could not be protected by a third State. However, there was no reason why the shareholders who were nationals of State B could not be protected by their own State since an internationally wrongful act had been committed against them. That was not the situation in *Barcelona Traction* where, as ICJ had stated repeatedly in its judgment, the State of nationality of the corporation could exercise diplomatic protection. Unless one accepted the hypothesis in draft article 18, subparagraph (b), one would be deliberately creating a situation where, unlike *Barcelona Traction*, no State could exercise diplomatic protection. Subparagraph (b) was entirely acceptable. Not only did it not contradict the general principles of the *Barcelona Traction* case, but it was in fact in line with the Court’s reasoning in that case, namely, that only one category of international protection was needed, but there must be one. If one generalized Mr. Brownlie’s objection, there would be no protection at all in the event of an internationally wrongful act. When the State of nationality of the corporation committed the internationally wrongful act, the only possible protection was that afforded by the State(s) of nationality of the shareholders. Since that was precisely the situation envisaged in draft article 18, subparagraph (b), he fully supported the drafting proposed by the Special Rapporteur.

<sup>3</sup> See 2759th meeting, footnote 9.

<sup>4</sup> *Ibid.*, p. 732.

<sup>5</sup> *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489.

<sup>6</sup> See 2757th meeting, footnote 3.



26. Draft article 19 dealt with another exception envisaged in the *Barcelona Traction* judgment, as cited in paragraph 88 of the report. He had no problem with the analysis in paragraphs 88 to 92 of the report, except that, in his view, the judgement of ICJ in that regard was less relevant than the separate opinions of certain judges, especially Judges Oda and Schwebel in the *ELSI* case. The question was, what were the shareholders' own rights as distinct from the rights of the corporation? According to the Court, such rights could include the right to control and manage the company, an important issue which in his view went beyond the rights of shareholders *per se* to those of managers and directors. That did not have to be specified in the text of draft article 19, but it should perhaps be specified in the commentary. Some shareholders had special responsibilities towards the corporation, and the State of nationality of the manager also had the right to exercise diplomatic protection.

27. The *Barcelona Traction* jurisdiction reflected in draft article 19 was not the only jurisprudence in that regard. Earlier arbitral awards, such as that in *El Triunfo Company*, had taken the same position.

28. Draft article 20 posed more problems than did draft article 19. He agreed with members who were opposed to the rule of continuous nationality of individuals. Since the injury was deemed to be caused to the State rather than to the protected person—by virtue of the very principle of the legal fiction on which diplomatic protection was based—only the nationality of the protected person at the time of the internationally wrongful act was relevant. By the same token, he was opposed to continuous nationality of legal persons. However, the Commission had taken a different position in draft article 4,<sup>7</sup> cited in paragraph 93 of the report, going so far as to accord an apparent preference to acquired nationality over nationality of origin. Although he disagreed with that position, it would be absurd to adopt a different line of reasoning with respect to legal persons, and he was prepared, regretfully, to defer to that position in the interests of consistency. He was not at all convinced by the Special Rapporteur's arguments in paragraph 95 of his report against extending to legal persons the exception provided in draft article 4, paragraph 2, for individuals. He did not see why the reasons given in paragraphs 6 to 8 of the commentary to article 4 should not apply also to legal persons, including corporations. Extending the exception in article 4, paragraph 2, to legal persons seemed all the more necessary when one considered that the Special Rapporteur's reasoning in paragraph 95 was based essentially on the erroneous belief that the only criterion for determining the nationality of a corporation was its place of incorporation. That belief was based on the abusive generalization of a given legal system, when internal laws differed on that score as they did on the legal personality of individuals.

29. He was, if not in agreement with, at least resigned to referral of the first part of draft article 20 to the Drafting Committee, on the understanding that wording equivalent to that in draft article 4, paragraph 2, would be incorporated. That provision referred to a "person", not a "natural" person or individual, and, as he had suggested in 2001 and 2002, the text should perhaps be revised, especially in

view of the Commission's present efforts regarding corporate persons.

30. He was in favour of retaining the bracketed portion of draft article 20, first because he had been won over by the arguments in paragraphs 98 *et seq.* of the report, and second, because it was the only solution compatible with draft article 18, subparagraph (a), for which he had already expressed support. That support was nonetheless tempered by his conviction that neither in draft article 18, subparagraph (a), nor in draft article 20 was the corporation's having ceased to exist in law the important element. What mattered more was that it should be actually and practically incapable of defending its rights and interests. If the Commission and/or the Drafting Committee agreed with the views he had outlined at the 2759th meeting, draft article 20 could be aligned on the wording, thus corrected, of draft article 18.

31. He agreed with the Special Rapporteur's statement in paragraph 105 of his report that it was unnecessary to draft a separate continuity rule for shareholders, but not with the assertion that the continuity rule in respect of natural persons covered shareholders. That was true only in some cases. In other, much more numerous cases, the shareholders of a corporation were corporate persons and were covered by draft article 17. Just as a door could only be open or closed, a person could only be natural or corporate.

32. Subject to the reservations he had expressed and the small additions he had suggested, he was in favour of referring draft articles 17 to 20 to the Drafting Committee. The French text of the fourth report was inaccurate in many instances, and, although he knew that the translation services worked under intense pressure, he would like to see the errors corrected. To give but one example: the phrase *succession d'État* was used in paragraph 97, but it should always be written *succession d'États*.

33. Mr. BROWNIE said that, because he shared Mr. Pellet's views on many of the major issues of principle and policy, he was surprised to hear his position on draft article 18, subparagraph (b). The *Barcelona Traction* decision was extremely dismissive of the principle enunciated in subparagraph (b), which was described as a "theory" that was not applicable to the case. At the Commission's 2759th meeting, Mr. Pellet had made some very significant remarks about how a corporation attached itself to a State's domestic system, and about the nature of incorporation. That process brought into play the will of the persons who took certain economic decisions. In *Barcelona Traction*, ICJ had emphasized that the incorporation of the company was an act of free choice, which was precisely the subject of article 18, subparagraph (b): when a group of persons decided to invest in State A which required them to form a local company, they took a decision based on free choice. Yet Mr. Pellet did not favour or lend credence to the operation of free choice on the part of a foreign company in the particular context of subparagraph (b).

34. Mr. GAJA said that a central element of Mr. Pellet's argument was the assumption that an internationally wrongful act had taken place and that, unless a State other than the corporation's State of nationality was allowed to

<sup>7</sup> See footnote 1 above.

intervene, no State would be entitled to give protection. Yet States did not have obligations with regard to their own national corporations under general international law, apart from obligations relating to human rights, which concerned all the other States.

35. As to whether a broad interpretation could be given to the rights of shareholders, such as to include the right to manage, in his opinion paragraph 70 of the *ELSI* judgment yielded little more than an indication that under the relevant treaty provision the shareholders' right to manage might include something more than just a formal right and involved the right to manage the assets of the company, which would be affected by the requisition of the company assets.

36. Mr. KAMTO said the Commission seemed to be straying farther and farther from the substance of the rule in draft article 17, paragraph 2. In paragraph 70 of the *Barcelona Traction* decision, the company's place of incorporation was given as the main criterion, and domestic laws had no bearing whatsoever on the problem. In respect of the nationality of ships, international law left it to the State to choose the criteria under which the ship was registered. For the purposes of draft article 17, paragraph 2, the Commission simply had to decide whether wording that would permit various factors of attachment to be taken into account should be inserted after the word "and". He had been somewhat surprised by the example cited by Mr. Melescanu. The main criterion must be that of the State of registration or incorporation: that was the case for the nationality of ships, and he saw no reason to do anything different with regard to corporations. The phrase "nationality of corporations", which had been used throughout the *M/V "Saiga" (No. 2)* case, was perfectly acceptable and should be retained. Draft article 20 could be improved by replacing the phrase "which was incorporated under its laws" by "which had its nationality", something that would remove all ambiguity and should resolve Mr. Pellet's concern about whether a single criterion or several should be applied.

37. Mr. PELLET, replying to Mr. Kamto's comments, said the fact that something existed under a domestic legal regime was not a good reason for it to be used elsewhere. As to Mr. Gaja's first remark, the existence of an internationally wrongful act was posited by definition in the draft—in draft article 1, paragraph 1.<sup>8</sup> Perhaps diplomatic protection could be exercised in other contexts, but they fell outside the purview of the draft. Concerning Mr. Brownlie's comments, in *Barcelona Traction* ICJ had declined to pronounce itself on the matter now covered in draft article 18, subparagraph (b). Mr. Brownlie laid great emphasis on free choice, yet the fact that a person chose to travel in a State did not absolve that State from responsibility for an internationally wrongful act that it might commit against that person. If domestic remedies had been exhausted, there was no reason why the State should not be called to account internationally through the mechanism of diplomatic protection. That was why he upheld draft article 18, subparagraph (b), with all his might.

<sup>8</sup> *Ibid.*

38. Mr. MANSFIELD said he had been prompted to speak because the focus of the discussion seemed to be shifting. The basic issue was who could exercise diplomatic protection for a corporation. The Special Rapporteur's report, and the *Barcelona Traction* case, showed that the only State that could do so was the State in which the corporation was incorporated or perhaps, following Mr. Pellet's comments, with which it had a formal link, a link equivalent in the State's domestic law to the link of incorporation. As Mr. Brownlie had pointed out, in *Barcelona Traction* ICJ had not had to decide which particular element of the formal link had to be present. On the other hand, the Court had made it clear that it was not in the business of lifting the corporate veil and trying to find where the company's essential economic interest lay: it had been looking at the formal links.

39. Where did that leave tax haven companies? That was not much of a problem, in his opinion. If a company decided to incorporate in a tax haven, it was a legitimate choice, but the corollary was that if the company needed diplomatic protection, it was unlikely to receive it from such a State. It could, and many companies did, conclude a bilateral investment treaty to cover it if things went wrong. The Commission could certainly codify on that basis, in which case it would be codifying an essentially residual rule, and it would probably not be particularly relevant to the way companies actually did business.

40. Two other angles seemed to have emerged from the discussion. The first was that the State that could exercise diplomatic protection must be one which had some form of genuine link with the company. Yet if the Commission went in that direction, it would have to attempt to lift the corporate veil in one way or another. That would create difficulties not merely for courts but also for States of investment, which would have to decide whether to receive diplomatic representations or claims from States which believed that a company with which they had a genuine link had been injured. It placed the onus on those States to try to find out whether there was in fact a genuine link. In reality, the genuine link test with respect to ships had done nothing to solve the problem of flags of convenience flown by ships which roamed the world's oceans doing untold damage to endangered fish stocks and changing their registration whenever it looked like somebody might catch up with them.

41. The third position that seemed to be emerging from the discussion was that there was no need to be unduly precise about which State could exercise diplomatic protection in respect of a particular company and that it was acceptable for more than one State to be able to do so. That was fine from the company's standpoint, but for the State of investment it could present the difficulties he had just mentioned: deciding whether to receive diplomatic representations, claims, and the like. Such a State needed to be able to assess its obligations and determine whether there were one or several States that could make representations. Tact was required on the part both of the State making the claim and of the one receiving it, since their relations could be affected. For example, if a country rejected diplomatic representations of a given State, the rejection could have adverse repercussions on relations with the State endeavouring to make the representations.

42. Those three lines in the Commission's thinking had led him to seek guidance from the Special Rapporteur. He had originally thought the Commission was focused very firmly on draft article 17, paragraph 2, and that a formal link, not a lifting of the corporate veil, was being viewed as the basis for deciding who could exercise diplomatic protection. The only issue had been whether actual, formal incorporation was adequate for all circumstances as a test for a formal link. If that was still the trend, then it might be possible to emphasize the formal link of incorporation in a fairly restrictive way, so as to avert the possibility that numerous States might exercise diplomatic protection. If anything other than the formal link of incorporation was taken as the basis, however, then the Commission must take care to preclude a multiplicity of claims. By lifting the corporate veil, it would be opening a rather large Pandora's box, and he was not sure what might pop out of it.

43. Mr. MONTAZ said that, in his view, draft article 19 did not pose problems. As the Special Rapporteur indicated, it was designed to protect shareholders against injury of their direct rights through wrongful acts of States. It was based on the decision by ICJ in the *Barcelona Traction* case, which recognized that shareholders were entitled to diplomatic protection in their own right, independently of the right to recourse of an injured company. The decisions of the European Court of Human Rights went in the same direction.

44. He agreed with the Special Rapporteur that it was not necessary to look into the content of the shareholder's rights, but he would nevertheless be interested in an answer to an interesting question. When a company ceased to exist because it had been nationalized and consequently could not undertake any action on behalf of its shareholders before the local courts, could the rights of the shareholders be considered direct rights? Would article 18, subparagraph (b), of the draft articles apply to that situation, or was it rather article 19 that came into play—in other words, did the shareholders have an independent right of recourse? Unquestionably, international law recognized the right of States to nationalize companies, so the act of nationalization in itself was not wrongful, but the owners of property that had been nationalized were owed compensation in accordance with terms now established under international law.

45. He experienced no difficulties regarding draft article 20, but the arguments made by the Special Rapporteur in paragraph 95 of his report were not very persuasive. There was no reason to adopt an approach other than the one used in article 4 of the draft articles for continuity of nationality of natural persons. The phrase in square brackets at the end of the article should be retained.

46. Mr. GALICKI said that the Commission now had four proposals for draft article 17, paragraph 2: from the Special Rapporteur, Mr. Brownlie, Mr. Economides and Mr. Melescanu. That should be enough to produce a definition. The Commission must define diplomatic protection for legal persons in the same way as it had done for natural persons, namely on the basis of nationality. The problem was how to do so. The definition in *Barcelona Traction* was inadequate, because it did not reflect later developments.

47. He sympathized with Mr. Brownlie's proposal, although it created an additional problem, because the Special Rapporteur cited two criteria, both based on *Barcelona Traction*, whereas Mr. Brownlie's proposal contained three. Were they to be understood separately or jointly? The linkage proposed by Mr. Brownlie was "and/or". He did not see how that would operate in practice. The reference to "other appropriate links" raised the danger of multiple nationality. He took it the Commission agreed that multiple nationality should not be possible in the case of corporations. The adverse impact of such multiple entitlement would outweigh the benefits. If a State exercised diplomatic protection on the basis of place of incorporation, place of registered office or other appropriate links, might that not prevent other States from exercising their diplomatic protection on another basis? The three new proposals all went beyond the Special Rapporteur's, which was based solely on the criterion of place of incorporation and, perhaps, the territory of the registered office. That was very clear, but not realistic. The three new proposals widened the variety of conditions for entitlement to diplomatic protection. Perhaps a sentence should be inserted in paragraph 2 to exclude the possibility of multiple nationality and multiple entitlement to exercise diplomatic protection.

48. Mr. BROWNLIE said that multiple nationality was something of a bugbear. Certainly, a corporation might qualify for diplomatic protection from more than one State. That was real life, and he did not see any rule-making way of avoiding it. It would be far worse if the Commission produced highly restrictive formulations and, in so doing, severely limited the possibilities of diplomatic protection. If by rule-making the Commission sought to ensure that there were no cases of multiple nationality, it would fail and would move in the wrong direction.

49. As to the wording of his proposal, to make it easier to understand he suggested simply removing all the "ands". Putting the "ands" back in did no harm, of course, if the corporation had all those links. But in order to make the proposition clear, both "or" and "and" should be left in. The proposal was meant to be inclusive, not exclusive.

50. Mr. ADDO said that Mr. Brownlie seemed to be advocating multiple nationality for corporations. Did that mean that the Commission was veering away from *Barcelona Traction*?

51. Mr. BROWNLIE said that the judgment in *Barcelona Traction* did not deal with that particular question. ICJ had clearly stated that the question of the company's Canadian nationality had not been disputed by either Belgium or Spain. It had then listed, purely as a matter of fact, all the connections which existed, which went well beyond a corporation's place of registration and head office. In describing all those connections, it happened to use the word "and", but that was not prescriptive; the Court was merely describing the facts which confirmed the Canadian nationality. In analytical terms, it was saying that those were sufficient connections; it left open the question of what were legally necessary connections. That was an area in which the Commission could not simply say that it was following *Barcelona Traction*, because on that point the judgment did not take a legal position.



52. Ms. ESCARAMEIA said she agreed with Mr. Brownlie that *Barcelona Traction* cited other criteria and that the corporation's links with Canada were irrelevant. But apart from rather formal links, such as meetings in a certain place, paying taxes and so on, the more substantive links seemed to have been excluded by ICJ, and that was why the Belgians had lost the case. She referred in that context to a sentence in paragraph 70 of the judgment: "However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance" [p. 42]. Thus, the Court had decided that, in the case in point, the genuine connection was not valid. After all, it had turned down the argument that the capital had been held in Belgium, although that had certainly been a real link. Under Mr. Brownlie's proposal, the Commission would accept the genuine connection, because a genuine link was an appropriate, and even the *most* appropriate, link, because it was the Belgians who had suffered the most. So the decision was a political one: Did the Commission want, or did it not want, to protect the shareholders?

53. If a court could choose from any of a whole range of appropriate links, it would mean that corporations had more protection than individuals. The ownership of property by an individual in the territory of another State was not regarded as an adequate link for the individual to be granted the nationality of that State. Corporations had activities everywhere, any of which might then be considered to be an appropriate link. That would increase the protection of corporations enormously.

54. Mr. BROWNLIE, responding to Ms. Escarameia's comments, said he was not proposing that the Commission should depart from the *Barcelona Traction* judgment. ICJ had not decided on that point, because it had not been required to, and because the two parties had not been disputing the Canadian nationality of the corporation. That was why, in the key paragraph, the Court had noted that in any case there had been numerous links, a matter that had not been in dispute. Since the point had been left open by the Court, there was no question of departing from anything.

55. Mr. ADDO said that, as he understood it, *Barcelona Traction* had rejected dual nationality. If the Commission wanted to allow multiple nationalities, it was departing from the judgment by ICJ. It was important to have a basis as a point of departure. As matters stood, he failed to see what direction the Commission was taking.

56. Mr. ECONOMIDES said he agreed with Ms. Escarameia and Mr. Addo. The crucial issue was whether the Commission believed that a corporation should have one sole nationality or that it could have several nationalities on the basis of various criteria of municipal law. In the latter case, several States would be able to exercise diplomatic protection. Did the Commission intend to regulate the situation, or would it allow a chaotic situation to remain? In *Barcelona Traction*, ICJ had decided that the existence of competing claims was inadmissible. Hence the need to find criteria to ensure that such a situation did not occur. For that reason, the Court had agreed with the Canadian position and rejected the Belgian argument. Notwithstanding Mr. Pellet's opinion, corporations should have no more than one nationality. That question could

be resolved either by reference to certain criteria of municipal law—the *Barcelona Traction* approach—or by making a general reference to municipal law and stressing that, although there could be several criteria, a genuine link was the only valid one. Anything else would be skirting the issue.

57. Mr. KAMTO said the Special Rapporteur had proceeded in draft article 17, paragraph 2, on the assumption that the starting point was the criterion of the company's place of incorporation; only after that assumption had been accepted could the question of the genuine link be posed. The Commission must find a general, flexible formulation which allowed an assessment of factors for establishing the genuine link, such as the *siège social* or the payment of taxes. That was what the *Barcelona Traction* decision said. He disagreed with those who thought that *Barcelona Traction* had mixed everything up while deciding nothing and that the Commission must produce a wording which left everything open.

58. Mr. BROWNLIE, replying to those who were worried about multiple nationality, said that, to a considerable extent, the question was academic, since in most cases of action by means of diplomatic claims, arbitration or litigation on such matters, there was no finding, because no one had any interest in raising the issue that the nationality of the corporation in question was nationality X *erga omnes*. Of course, there were cases in which it was in the interest of the respondent State or respondent party in arbitration to raise the issue of a third or fourth nationality. He was not in favour of multiple nationality, but the Commission should be careful not to make a mess of things. Multiple nationality was very difficult to avoid, especially in regard to corporations. The alternative was to have very restrictive rules in which the *Nottebohm*-type principle acted as a sort of censorship of nationality, cutting it down too much.

59. Mr. MELESCANU said that considerable disagreement clearly remained on the interpretation of *Barcelona Traction*. Even if, intellectually speaking, Mr. Kamto was right, what did he propose to do if real life turned out to be different? In Switzerland, it was not the place of incorporation that counted, but the nationality of shareholders. Some might say that was unfortunate, but Mr. Kamto's position was contradicted by practice. In real life, some States recognized other criteria. ICJ had not ruled that such criteria were invalid; it had simply recognized that they existed.

60. There was no such thing as multiple nationality. There were claims of multiple nationality, but ultimately a court would decide on the basis of one single nationality. He agreed with Mr. Brownlie that it was not possible to prevent a corporation from trying to cite a number of criteria to prove its link to several States. But ultimately, the basis of the *Barcelona Traction* was the recognition that the diplomatic protection of corporations could be exercised only by one State, the State of nationality. The whole debate focused on how to decide what that State was. The Commission should leave aside arguments drawn from *Barcelona Traction* and try to imagine a situation which was consistent with practice in international law; that could probably be done in the Drafting Committee.

61. The CHAIR, speaking as a member of the Commission, said the State that exercised diplomatic protection



on behalf of an entity which, or an individual who, had suffered injury as the result of an internationally wrongful act must have a genuine link with the victim of that act. In the case of a natural person, the most obvious link was that of nationality. For corporate entities, it was also important for there to be a genuine link between the State seeking to exercise diplomatic protection and the victim. The Commission referred to that as nationality, but could also call it something else. The problem was the link between the State trying to exercise diplomatic protection and the victim of the internationally wrongful act. For that reason, he endorsed a flexible formulation such as the one proposed by Mr. Brownlie. The usual wording used to designate that link was “State of nationality”, the State with which, in accordance with its municipal law, the corporation had established a genuine link, whether by virtue of incorporation of the corporation, the establishment of its *siège social* or any other way consistent with international law. In a case in which several States claimed that they had that genuine link, it would be necessary to consider which genuine link took precedence. The Commission could not allow for all the scenarios that might arise. It must remain flexible and produce a wide range of criteria which could then be identified case by case.

*The meeting rose at 1 p.m.*

## 2762nd MEETING

*Friday, 23 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. YAMADA, following up on the discussion on draft article 17, paragraph 2, on the definition of the State

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of nationality of a corporation, thanked Mr. Economides, Mr. Brownlie and Mr. Melescanu for introducing the element of a genuine, effective or appropriate link. He recognized that the current trend in international private law was to focus more on the domicile of a corporation than on its nationality as an element indicating its link with a State. However, as Mr. Brownlie had pointed out, the main question in the field of international private law was the applicable law, not the nationality of the corporation.

2. For the purpose of diplomatic protection, however, the Commission must spell out a clear rule of international law which set out criteria for the nationality of corporations. Article 1, paragraph 1, as provisionally adopted by the Commission at its fifty-fourth session, in 2002,<sup>3</sup> stipulated the basic principle that it was the State of nationality which was entitled to exercise diplomatic protection both for natural persons and for legal persons. Accordingly, regardless of whether municipal law recognized the nationality of a corporation or not, a rule of international law must be written that defined such nationality.

3. The question was therefore whether draft article 17, paragraph 2, which the Special Rapporteur in his fourth report (A/CN.4/530 and Add.1) had based on *Barcelona Traction* and which set out both “incorporation” and “registered office” as criteria, adequately reflected customary law, or whether there was a legal vacuum which must be filled with a view to the progressive development of international law.

4. While he recognized the rationale for relying on the element of a link between the corporation and the State, whether it was “genuine”, “effective” or “appropriate”, he hesitated to consider it an independent, alternative element. When the Commission had defined the State of nationality of natural persons in article 3, adopted in 2002, it had not introduced the link concept. The Commission should follow the same approach for the nationality of corporations, since introducing the link element would cause complications. For instance, Microsoft, an American corporation incorporated in the State of Washington and with its registered office in Redmond, Washington, earned 27 per cent of its revenue from activities outside the United States and had very close links with 58 other States and territories. Again, the Hong Kong and Shanghai Banking Corporation (HSBC), a British corporation with its headquarters in London, still had its *de facto* headquarters in Hong Kong and, together with Chartered Bank, had even functioned as a central bank of Hong Kong until Hong Kong reverted back to China. It maintained 9,500 offices in 80 States and territories on every continent. All those States could be said to have an appropriate link with Microsoft and HSBC. Furthermore, it was most likely that a corporation would suffer injury as a result of an internationally wrongful act of the State with which it had the closest link and in the territory of that State. If that State was deemed to be the State of nationality of the corporation because of that link, the regime of diplomatic protection ceased to function. He had a problem with Mr. Brownlie’s formulation referring to “an appropriate link”, while the formulation proposed by Mr. Economides relied on municipal law, which did not always recognize the nationality of corporations. Mr.

<sup>3</sup> See footnote 1 above.

Melescanu's formulation also brought in the link element as an alternative criterion and he had cited the case of a Swiss corporation with majority Romanian shareholders. He understood why Mr. Melescanu would not want the Swiss Government to exercise diplomatic protection in that case, but assumed that what Mr. Melescanu had had in mind was a case where injury had occurred in Romania. He wondered what his position would be if the injury had been caused in Japan. In any case, if the Commission decided to introduce a link element as an alternative criterion, it would have to address the question of multiple nationality and formulate a new article dealing with that situation.

5. He had no problem with draft article 19. He took it that the Special Rapporteur had formulated that article separately from draft article 18 because, unlike article 18, it dealt with a situation that was not an exception to draft article 17, paragraph 1. He had difficulty visualizing a case where the corporation was not injured and the shareholders were injured directly, but article 19 appeared to assume that case. Since the question of diplomatic protection of the corporation did not arise in that case, article 19 was not an exception to article 17. Article 18, subparagraph (b), also envisaged a situation where the question of the diplomatic protection of the corporation did not arise. For example, if Sony Corporation of Japan suffered an injury in Japan as a result of a wrongful act of the Japanese Government, that fell outside the scope of the diplomatic protection of legal persons as defined in article 1. It could therefore not be an exception to article 17. That left the question of the diplomatic protection of Sony's foreign shareholders. If that were to be dealt with, it would be more appropriate to move article 18, subparagraph (b), to article 19.

6. Turning to draft article 20, he had no problem with the substance of the first sentence, although its formulation would have to be brought into line with the final formulation of article 17, paragraph 2. However, the proviso in square brackets seemed to contradict article 18, subparagraph (a). According to subparagraph (a), the State of nationality of the corporation was no longer entitled to exercise diplomatic protection when the corporation had ceased to exist, whereas according to the proviso in article 20, the State of nationality was still eligible to exercise diplomatic protection on behalf of the defunct corporation. That proviso should therefore be deleted.

7. Mr. CHEE said that he could support draft article 17, paragraph 1. He also endorsed article 17, paragraph 2, which was consistent with *Barcelona Traction*. He recalled that ICJ had not viewed the "genuine link" as an alternative criterion for determining the State of nationality of a corporation, but as an element additional to the two criteria of incorporation and registered office.

8. With regard to draft article 18, he could accept the wording chosen by the Special Rapporteur for subparagraph (a), which was consistent with the customary formulation used by the Court, although he would have preferred it to speak of the corporation going bankrupt rather than of it ceasing to exist. As to subparagraph (b), he believed that shareholders in both the subsidiaries and the parent company should be protected from injury caused by the internationally wrongful act of a State.

9. He endorsed article 19 as drafted by the Special Rapporteur because, as the latter had pointed out, it was a savings clause that provided an additional source of law to ensure that shareholders' rights and interests were protected by their State of nationality. He also endorsed article 20 as it stood, although, like Mr. Brownlie, he would prefer to replace the criterion of the date of official presentation of the claim by the date on which a judgement was awarded, which seemed more appropriate in the case of legal persons.

10. Finally, he recommended that draft articles 17 to 20 should be referred to the Drafting Committee.

11. Mr. BROWNLIE, commenting on Mr. Yamada's argument as illustrated by the example of Sony Corporation, said that, if the Commission focused exclusively on one or the other of the two criteria given in article 17, paragraph 2, namely, incorporation or registered office, rather than attaching the same importance to the link element, it might overly restrict the incidence of nationality. Moreover, if it insisted that both those criteria should be met, that would exclude many cases and restrict the possibilities for a State to exercise diplomatic protection on behalf of a corporation. There was no easy answer, for it was impossible to list criteria in advance. That was why he had suggested the idea of "appropriate link", which made it possible to envisage other situations where the exercise of diplomatic protection would be permissible.

12. He did not agree with Mr. Chee's comment that the choice of the two criteria mentioned in article 17, paragraph 2, was justified by *Barcelona Traction*. In that case, ICJ had not decided on the nationality of the Canadian corporation because it had had to do so.

13. Mr. YAMADA, replying to Mr. Brownlie, recognized that he had been referring to an extreme case and acknowledged the need to strike a balance between the two extremes.

14. Mr. CHEE said that he was not at all eager to merge the two criteria of State of incorporation and State of registered office and had no objection to their being treated separately. He recalled that draft article 17 established a general rule concerning the link between a State and a corporation.

15. Mr. MELESCANU explained that, in his proposal, "link" was not an additional criterion, but simply an element to be taken into account when examining other criteria. He did not understand the concern aroused by the example he had cited of a Swiss company whose majority shareholders were Romanian, and he feared that, by dwelling on the idea of the nationality of a corporation, the Commission might find itself adopting a decision that brutally contradicted the provisions adopted on the diplomatic protection of natural persons.

16. Mr. ECONOMIDES said that the savings clause in draft article 19 did not resolve the question of the right of the State of nationality of the shareholders to protect the latter's own rights in that it excluded the question to which it referred from the scope of codification. It would be better to deal with that question either in a separate provision or as an exception to article 19.

17. Mr. DAOUDI joined in congratulating the Special Rapporteur on his fourth report. He agreed with the view expressed by Mr. Kamto in 2002 that it was international law that stipulated the rule of nationality and municipal law that governed the attribution of nationality. The “genuine link” criterion could indeed restrict the scope of diplomatic protection and leave many corporations unprotected, unless the national State of the shareholders was allowed to protect them or the corporation when the link of nationality was not established. Draft article 18 guaranteed that right in the event of two exceptions taken from *Barcelona Traction*, whereas draft article 19 indicated that that was a proper right of the shareholders, not the corporation. That left a number of corporations without diplomatic protection. Some members wanted to give the State of nationality of the shareholders the right to exercise diplomatic protection on behalf of the corporation, but the amendments proposed to draft article 17, paragraph 2, did not do that. It was therefore preferable to clarify that point before referring the paragraph to the Drafting Committee.

18. With regard to draft article 18, he had no objection to providing for an exception in the two situations specifically cited by the Special Rapporteur in two separate articles, but he agreed with the Special Rapporteur about competing claims by States for the exercise of protection. Draft article 19 posed no problem since it codified the most common situation, that of an individual shareholder whose subjective right had been harmed, which corresponded to the general rules set forth in the part of the draft articles devoted to the diplomatic protection of natural persons. With regard to draft article 20, he felt that the draft articles should not accord more favourable treatment in the matter of continuous nationality to legal persons than to natural persons. He therefore supported its referral to the Drafting Committee.

19. Mr. RODRÍGUEZ CEDEÑO, referring to draft article 17, paragraph 2, said that the concept of the State of nationality of a corporation should be construed fairly broadly, even if that meant departing from the *Barcelona Traction* judgment. The criteria for determining nationality should be sought in municipal law, but in some cases that could give rise to the problem of multiple nationality. It must therefore be made clear that there could be only one State that had the right to exercise diplomatic protection as the State of nationality of the corporation, even though there might be many claims relating in one way or another to a single case. That solution might be difficult to translate into a rule, but it could be explained in the commentary. The pre-eminence of the State that was deemed to be the State of nationality should be based on a genuine link with the corporation, but with a fairly broad interpretation of that link and bearing in mind, as Mr. Brownlie had recalled, that ICJ had not gone to the heart of the matter because the issue of the nationality of a corporation had not come up in the *Barcelona Traction* case. Perhaps a working group should look into all those questions before draft article 17 was referred to the Drafting Committee.

20. Draft article 19 could be viewed as yet another exception to the rule in article 17—one which related to direct injury suffered by shareholders and which could

be included in article 18. That provision was acceptable, but its scope should be defined, and a clear-cut distinction must therefore be drawn between the infringement of the rights of shareholders owing to injury suffered by the corporation and the direct infringement of the rights conferred on shareholders by statutory rules and company law, of which examples were given in the *Barcelona Traction* judgment (para. 47). The commentary might be the place to explain that problem as well. As to the matter of which legal order would be called on to decide on those rights of shareholders, it must be the municipal law of the State in which the corporation was incorporated, including when the corporation was incorporated in the wrongdoing State, in which case the Special Rapporteur believed that the general principles of the law could be invoked.

21. Mr. ADDO said that draft articles 19 and 20 were acceptable as long as the words in square brackets at the end of article 20 were deleted.

22. Ms. ESCARAMEIA said that the informal proposal by Mr. Gaja on draft article 17 had the merit of solving at least two problems for those who did not want to expand the diplomatic protection of corporations: the connection with municipal law and the States whose municipal law did not assign nationality to corporations. Since the positions of members of the Commission were deeply split over draft article 17, paragraph 2, however, a working group should perhaps be asked to deal with that provision. Draft article 18, on the other hand, could now be referred to the Drafting Committee.

23. Draft article 19 raised one problem of form and several of substance. The problem of form concerned its relationship to other provisions. Draft article 19 was explicitly presented as an exception to articles 17 and 18, although in reality it was an exception on the same level as those in article 18. The Special Rapporteur dealt with that exception separately because he was extremely faithful to the *Barcelona Traction* decision and because the exception related to a slightly different situation, one that could even be dealt with in the part of the draft on natural persons. It would be preferable to transpose it to article 18, however, or at least to reconsider the relationship between the three provisions.

24. On the substance of draft article 19, the Special Rapporteur was right not to enunciate the content of the direct rights of shareholders, but it should nevertheless be explained in the commentary that it was for the laws of the State in which the corporation was incorporated to determine the content of those rights. As to which legal system was to determine that there had been a violation of the rights of shareholders, the Special Rapporteur was again right in saying that it should be the State of incorporation there as well, although, referring to the *ELSI* case, he also considered the possibility of invoking the general principles of law in certain cases. The Commission should give some thought to that possibility because some national systems might not define very clearly what constituted a violation of those direct rights, and it might therefore be useful to refer to general principles of law taken from several common systems of law. Sometimes companies incorporated under the law of a given State but, for certain aspects such as dispute settlement, decided to adopt the law of another State or international law. It should perhaps



be stated in the commentary that, if the injury to the direct rights of the shareholders related to those aspects, it was system of law chosen by the founding shareholders that should apply. With the inclusion of those clarifications in the commentary, article 19 could be referred to the Drafting Committee.

25. For draft article 20 on the continuous nationality of corporations, the Special Rapporteur applied the same criteria as for continuous nationality of natural persons, while adapting them to take account of the fact that corporate persons changed nationality much less easily than natural persons. That approach might cause problems, however, if, in relation to draft article 17, paragraph 2, the strict rule of incorporation was abandoned in favour of an appropriate link, which might result in the designation of the State of nationality of the shareholders or of a majority of them as the State of nationality of the corporation. Shares were traded frequently and majorities changed, however, hence the need for caution in respect of the criteria for determining the nationality of corporations. The proviso set out in square brackets in article 20 was justified by the “grey area in time” which the Special Rapporteur mentioned in paragraph 104 of his report, and during which both the State of nationality of the corporation and the State of nationality of the shareholders could bring claims. Article 20 should thus be referred to the Drafting Committee with the square brackets around the final part deleted and with the necessary clarifications given in the commentary.

26. Mr. GALICKI, referring to draft article 17, paragraph 2, said there was agreement on the rule that the State of nationality of a corporation was the State in which the corporation was incorporated. He therefore proposed that the disputed part of the provision, which introduced the criterion of registered office, should be replaced by the phrase “or which, in another way, recognizes the acquisition of its nationality by that corporation”, which was similar to the wording proposed by Mr. Brownlie. The text proposed by the Special Rapporteur for draft article 19 was entirely acceptable. Draft article 20, on the other hand, raised first of all a problem of language. If nationality was considered to be the decisive factor, then the phrases “a corporation which was incorporated under its laws” and “the State of incorporation of the defunct company” should be replaced by the words “a corporation which has its nationality” and “the State of nationality of the defunct company”, respectively. But article 20 also posed a problem of substance owing to the fact that, as had been pointed out, the proviso in square brackets might be at variance with draft article 18, subparagraph (a). In respect of a single situation, namely, when a corporation “ceases to exist as a result of the injury”, subparagraph (a) stipulated that the State of nationality of the shareholders could exercise diplomatic protection, thereby automatically excluding the State of incorporation, since there could not be multiple nationality, yet the second part of article 20 stated that the State of incorporation could continue to present a claim in respect of the corporation. One way of removing that contradiction might be to divide article 20 into two paragraphs, the second to consist of the bracketed part of the text, from which the words “provided that” would be deleted, and to add the words “with the exception provided in article 20, paragraph 2”

at the end of draft article 18, subparagraph (a), after the word “incorporation”. Of course, the right accorded to the State of incorporation in paragraph 2 would prevail over the right granted to the State of the nationality of the shareholders in draft article 18, subparagraph (a).

27. Mr. FOMBA said that draft article 19 raised, *inter alia*, the question of the distinction between rights and interests and the procedural consequences of that distinction, as well as the more fundamental question whether there was always a very clear-cut distinction between the rights of a corporation and the rights of the shareholders. There was room for doubt in that regard if reference was made to paragraphs 88 and 91 of the report of the Special Rapporteur, as well as to paragraph 89, which indicated that, even in the *ELSI* case, ICJ had failed to expound on the rules of customary international law on the rights of the shareholders to organize, control and manage a company. Did such rules really exist, and were they not primarily rules of municipal law? In paragraph 90 of his report, the Special Rapporteur indicated that the proposed text left unanswered the questions of the content of the shareholders’ rights and of the applicable legal order. On the first question, starting from the observation that the *Barcelona Traction* decision mentioned only the most obvious rights of shareholders by way of illustration, the Special Rapporteur took the view that it was for the courts to determine, in each individual case, the limits of such rights. On the second question, paragraph 92 of the report contained intellectually stimulating arguments, but raised questions that were difficult to resolve in practice.

28. The main question raised in draft article 20 was that of the situation of practice with regard to the admissibility, establishment and application of the principle of the continuous nationality of corporations. It was the answer to that question that should be given consideration and that must determine the course to be followed. There were two possibilities. The first was that, by its nature, content and functioning, nationality was the same for both natural and legal persons and was equally important in both cases, so that parallels could be drawn and identical solutions found; the second was that no such parallels existed and a cautious and clear-sighted approach had to be taken in establishing the same rule for the two categories. Contrary to what the Special Rapporteur stated in paragraph 103 of his report, the issue was thus much more one of logic than one of equity. Article 20 appeared to be based on an analogy in relation to the sociological and legal issues underlying the nationality of natural and legal persons, but only a more in-depth analysis of practice would show whether that was really true.

29. In conclusion, he believed that the proposals made by the Special Rapporteur in draft articles 19 and 20 were not without theoretical and practical importance, but that they should be examined more closely and carefully, taking into account the conclusions to be reached by the Commission on the questions raised during the discussion and, if necessary, within the framework of a working group.

30. Mr. AL-BAHARNA noted that, in his fourth report, the Special Rapporteur dealt extensively with the *Barcelona Traction* decision and the underlying principles. In that decision, ICJ had distinguished between two entities, the company and the shareholders. Establishing a close



and permanent connection between the company and, in the case in question, Canada, the Court had expounded the principle that the right of diplomatic protection in respect of a corporation might be exercised by the State under the laws of which the corporation was incorporated and in the territory of which it had its registered office. While rejecting the applicability of the *Nottebohm* principle, the Court had nevertheless accepted that in two exceptional situations, diplomatic protection could be exercised by the State of nationality of shareholders, although it had declined to recognize the existence of a secondary right of diplomatic protection, even when the State of incorporation declined to exercise that right. The Special Rapporteur recognized that the Court's decision had been subjected to criticism and that it might be necessary to depart from it and to formulate a rule that accorded more fully with the realities of foreign investment and encouraged foreign investors to turn to the procedures of diplomatic protection rather than to the protection of bilateral arrangements. He also recalled that, in the decision, the Court had not been codifying international law, but settling a dispute. Nevertheless, in paragraph 27 of his report, the Special Rapporteur characterized the *Barcelona Traction* decision as an accurate statement of the law on the diplomatic protection of corporations, a contradiction which led him to provide seven options for the Commission in relation to the nationality of corporations and the formulation of rules on the diplomatic protection of companies and/or shareholders.

31. In his view, option 1 (the State of incorporation) was the best one because it was the safest one in that it adopted the rule expounded in *Barcelona Traction*, whereas option 4 (the State of economic control), which some members seemed to support, had disadvantages, as explained in paragraphs 32 to 36 of the report. He therefore endorsed the text proposed by the Special Rapporteur for draft article 17, paragraph 2, the phrase in square brackets being retained—and the square brackets thus being deleted—with the word “and”. The criterion of registered office was perhaps superfluous, since registration was the natural consequence of incorporation, but, for the sake of consistency with the wording used by ICJ, it should be maintained.

32. With regard to draft article 18, he proposed that the word “place” in subparagraph (a) should be replaced by the word “State”. Draft article 19 was acceptable, as was draft article 20, subject to removal of the square brackets at the end. He was open to a more flexible definition of the link between corporations and their State of nationality that went beyond *Barcelona Traction*, but the proposals by Mr. Brownlie and Mr. Gaja were not helpful. Mr. Brownlie's proposal was very wide, whereas a definition must be precise and succinct.

33. Mr. GAJA read out his proposal for a new text for draft article 17:

“A State according to whose law a corporation was formed and in which it has its registered office is entitled to exercise diplomatic protection as the State of nationality in respect of an injury to the corporation.”

34. The proposal aimed to take into account the concerns expressed about the fact that some States might not

have any rules on the nationality of corporations. Another purpose was to establish a rule for the sole purpose of diplomatic protection and not to superimpose new criteria of nationality on those used by member States.

35. Mr. PELLET said that Mr. Gaja's proposal did not meet his concerns at all. Mr. Brownlie's proposal was more conducive to a compromise, as were those of Mr. Economides and Mr. Melescanu.

36. The CHAIR invited the Special Rapporteur to sum up the debate on draft article 17.

37. Mr. DUGARD (Special Rapporteur) pointed out that draft article 17, paragraph 1, reaffirmed the basic principle of *Barcelona Traction*. Most of the members had endorsed it; the discussion on the subject had dealt with drafting questions. He therefore recommended that it should be referred to the Drafting Committee.

38. As far as draft article 17, paragraph 2, was concerned, however, the debate had taken a new turn, and it had now been suggested that criteria other than State of incorporation, registered office and *siège social* should be adopted. Some of the proposals, such as Mr. Gaja's, were cautious. That was also the case with Mr. Brownlie's, which he interpreted as making criteria more flexible so as to cover the *siège social*, but not including a reference to the State of nationality of the shareholders. The proposals by Mr. Economides and Mr. Melescanu were more radical and implied lifting the corporate veil in order to identify the State with which the corporation was most closely connected and which thus established the locus of the economic control of the corporation. That approach would be difficult to reconcile with *Barcelona Traction*; it would be in line with the *Nottebohm* case, which emphasized the principle of the link with the State. As the Commission had not followed the *Nottebohm* test in draft article 3 with regard to natural persons, however, it might be illogical to do so for legal persons.

39. The other problem which had been raised related to dual protection, or situations where both the State of incorporation and the State of the *siège social* exercised diplomatic protection for the same corporation, a notion which had been supported by several judges in the *Barcelona Traction* case. In any event, there would not be a multiplicity of States able to act, contrary to what might be the case if the Commission were to recognize the State of nationality of the shareholders, and, as had been noted by Judge Jessup, whom he had cited in paragraph 104 of the report, “the Respondent can eliminate one claimant by showing that a full settlement has been reached with the other” [p. 200]. In its judgment in *Barcelona Traction*, however, ICJ had clearly been hostile to the notion of dual protection or of a secondary right to protection in respect of the corporation and shareholders, a point which had been made in paragraph 88 of the judgment, which stated that “where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim”. That might be interpreted to mean that there were several national States which alone might make a claim, or that only one State might make such a claim.

40. To pursue its work on paragraph 2, the Commission could either continue the debate in plenary, which he did not recommend, or refer the paragraph to the Drafting Committee or a working group on the subject. Many members had supported the underlying idea in paragraph 2, if not necessarily as formulated, namely a provision which emphasized formal links between the corporation and the State exercising diplomatic protection. However, if many members supported the proposal to include the notion of genuine link, notably by establishing the place of the economic control of the corporation, then the issue should be examined in a working group. He thought that it would be useful to take a vote on whether the matter should be referred to the Drafting Committee or to a working group.

41. Following a vote on whether draft article 17, paragraph 2, should be referred to the Drafting Committee or whether a working group should be set up to consider the matter in depth, the CHAIR said that, since a slight majority was in favour of the second option, the matter would be considered by an open-ended working group, which the Special Rapporteur would chair.

*It was so decided.*

42. Mr. DUGARD (Special Rapporteur) said that, in the light of Mr. Gaja's proposal that the two paragraphs should be merged, it might be wise to withhold a final decision on draft article 17, paragraph 1, until the working group had reached a decision. He urged the members of the Commission to attend the working group to avoid reopening the debate on the entire issue later in plenary.

43. Mr. KAMTO said that it would be preferable for the working group to focus exclusively on paragraph 2, even if it meant that the Drafting Committee would consider later whether or not the two paragraphs should be merged. The concept of nationality was at the heart of diplomatic protection, as was clearly shown in paragraph 1, which adopted the wording used in *Barcelona Traction*. He therefore hoped that the Commission would not lose sight of that fundamental idea, which absolutely must be included in the draft article.

44. The CHAIR confirmed that the working group would focus on draft article 17, paragraph 2.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/529, sect. D, A/CN.4/531<sup>4</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

45. Mr. Sreenivasa RAO (Special Rapporteur), introducing his first report on the legal regime for allocation of loss in case of transboundary harm arising out of haz-

ardous activities (A/CN.4/531), said that the report was divided into three parts, which he would consider one by one.

46. Part I of the report summarized the work of the Commission on the question of international liability and, in particular, the work of the two previous special rapporteurs on the topic, Mr. Quentin-Baxter and Mr. Barboza. The draft articles prepared in by the Working Group of the Commission at its forty-eighth session, in 1996, had dealt, *inter alia*, with a regime of negotiated liability aimed at reaching an equitable settlement on the basis of "the principle that the victim of harm should not be left to bear the entire loss".<sup>5</sup>

47. In the course of the Commission's work, differences of opinion had arisen on four important aspects of the issue that remained unresolved, the first of which was the linkage between prevention and liability in the approach adopted by Mr. Quentin-Baxter and Mr. Barboza. However, that question had been resolved by a decision of the Commission at its forty-ninth session to deal with the two topics separately.<sup>6</sup> As a consequence, the Commission had been able to adopt, at its fifty-third session, in 2001, the draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities.<sup>7</sup> The other three issues had been (a) State liability and the role of strict liability as the basis for creating an international regime; (b) the scope of activities and the criteria for delimiting "transboundary damage"; and (c) the threshold of damage.

48. First, it had been felt that the emphasis placed on State liability was misplaced. It had been feared that, in the absence of established scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the suggested approach could amount to absolute liability for non-prohibited activities, which would be unacceptable to States (para. 18 of the report). It had also been felt appropriate not to place undue emphasis on strict or absolute liability at the international level, where States adopted a more pragmatic approach to compensation, without relying upon any one consistent concept of liability.

49. The two previous special rapporteurs had been careful to limit the scope of activities, placing the emphasis on the physical consequences of transboundary activities. To that end, while it had decided not to draw up a list of activities to which the draft articles would apply, the Commission had set clear delimiting criteria, excluding from the scope of the articles, *inter alia*, harm caused to the global commons and leaving that issue for possible subsequent examination on the basis of a separate mandate from the General Assembly. He referred to that matter in paragraph 28 of his report.

50. With regard to the threshold of damage triggering the obligations imposed by the regime of prevention, the Commission had considered that the threshold should be "significant" harm. Given that there was a wide consensus in favour of fixing such a threshold under any model

<sup>5</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 102 (art. 21).

<sup>6</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

<sup>7</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97, pp. 146–148.

<sup>4</sup> See footnote 2 above.

of allocation of loss in case of injury arising from hazardous activities, the report recommended accepting the same threshold of “significant harm” for triggering the obligation to compensate. As the Special Rapporteur stated in paragraph 37 of his report, the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law set up at the Commission’s fifty-fourth session, in 2002, to settle the direction of the work remaining on the subject of international liability had recommended that the Commission should limit the scope of the topic to the same activities as were covered by the regime of prevention, but that it should also concentrate on harm caused for a variety of reasons, but not involving State responsibility; that it should deal with the topic of allocation of loss among different actors involved in the hazardous activities; and that it should include within the scope of the topic loss to persons, property (including the elements of State patrimony and national heritage), and the environment within national jurisdiction.<sup>8</sup>

51. Finally, part I of the report noted three broad policy considerations which had been the basis for consideration of the topic of international liability, namely: (a) that each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) that the protection of such rights and interests required the adoption of measures of prevention and, if injury occurred, measures of reparation; and (c) that, insofar as was consistent with the two preceding principles, the innocent victim should not be left to bear his or her loss or injury unaided (paras. 43–46). The draft articles adopted in 2001<sup>9</sup> already addressed the first objective and, partially, the second. The challenge now facing the Commission was to address the remaining elements of the policy, namely, encouraging States to conclude international agreements and adopt legislation and implementing mechanisms for prompt and effective remedial measures, including compensation in case of significant transboundary harm.

52. While there was general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim was not left to bear the loss resulting from transboundary harm arising from hazardous activity, it was nevertheless acknowledged that full and complete compensation might not be possible in every case, for a variety of reasons. At the same time, any regime for allocation of loss should be intended to provide incentives for all those concerned with the hazardous operations to take preventive or protective measures in order to avoid damage; to compensate damage caused to any victim; and to serve an economic function, by internalizing costs.

53. In accordance with the recommendations of members of the Commission and States in the General Assembly, section A of part I of the report began with a review of sectoral and regional treaties and other instruments providing for sharing of risk and costs of economic loss resulting from any transboundary harm (paras. 47–113). Those included the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,

of 1993, which had not yet been ratified, but which, as a model, offered important pointers for the Commission’s work, particularly on the definition of damage; the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal; and instruments establishing the liability regimes governing damage from oil pollution and nuclear activities and the liability regime governing outer space activities.

54. New instruments were being negotiated, particularly in the European context. Other international and regional instruments in force providing for the creation of liability and compensation regimes included the Convention on Biological Diversity and its Cartagena Protocol on Biosafety and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, to cite only a few.

55. Those instruments, some of which were not yet in force or had not been widely ratified, nevertheless had a number of common features, addressed in section B of part II of the report (paras. 114–121), namely:

(a) That State liability was an exception, accepted only in the case of outer space activities;

(b) That liability in the case of damage which was not nominal or negligible but more than appreciable or demonstrable was channelled through a single entity and, in the case of stationary operations, to the operator of the installation. However, other possibilities existed. For instance, in the case of ships, the owner, not the operator, bore liability. The real underlying principle did not seem to be that the “operator” was always liable, but that it was the party with the most effective control of the risk at the time of the accident who was made primarily liable;

(c) The liability of the person in control of the activity was strict, but limited, in the case of hazardous or dangerous activities. That was justified as a necessary reflection of the “polluter pays” principle, which, however, could in certain cases be replaced by the principle of equitable sharing of risk, with a large element of State subsidy;

(d) Where the obligation to compensate was based on strict liability, it was also usual to limit the liability to amounts that would be generally insurable. Under most of the schemes, the operator was obliged to obtain insurance and other suitable financial securities in order to take advantage of the scheme. The scheme of limited liability was, of course, open to criticism as not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits were set too low, it could even become a licence to pollute. Furthermore, the system might not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury;

(e) Most liability regimes concerning dangerous activities provided for additional funding sources to meet claims of damages. States took a share in the allocation of loss. The other shares, however, were allocated to a common pool of funds created by contributions either from operators of the same type of dangerous activities or from

<sup>8</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 448.

<sup>9</sup> See footnote 7 above.



entities for whose direct benefit the dangerous or hazardous activity was carried out;

(f) Strict liability had been recognized in a number of countries around the world belonging to all the legal systems. It was arguably a general principle of international law or, in any case, could be considered as a measure of progressive development of international law. In the case of activities which were not dangerous but still carried the risk of causing significant harm, there was perhaps a better case for liability to be linked to fault or negligence;

(g) On its own merits, fault-based liability might perhaps better serve the interests of the innocent victims and should be retained as an option for liability. It was not unusual in such cases to give the victim an opportunity to have recourse to liberal rules of evidence and inference. By reversing the burden of proof, the operator might be required to prove that he had taken all the care expected of a reasonable and prudent person, proportional to the risk of the operation.

56. Section C of part II of the report (paras. 122–149) addressed a few important questions concerning the regimes of civil liability, which were rooted in the development of the law in each State and its application by their domestic jurisdictions, which varied considerably from State to State, depending upon the system of law prevailing.

57. Thus, the question of the causal link between the damage caused and the activity alleged to have given rise to it and the related issues concerning foreseeability, proximity or direct loss were not treated uniformly. It was to be noted that there was no support for providing for liability for damage to the environment *per se*. Furthermore, in the case of damage to the environment or natural resources, there was agreement to recognize a right of compensation or reimbursement for costs incurred by way of reasonable or, in some cases, “approved” or “authorized” preventive or responsive measures of reinstatement (para. 131). The “reasonableness” criterion was defined to include those measures found in the law of the competent court to be appropriate, proportionate and cost-effective.

58. An analysis of the civil liability regime showed that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. The outcome would also depend on the jurisdiction in which the case was instituted and the applicable law. While it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, it was, in his view, not possible to draw any general conclusions on the system of civil liability. Such an exercise, if it was considered desirable, would properly belong to forums concerned with the harmonization and progressive development of private international law.

59. It was against that background that, in part III of the report (paras. 150–153), he put forward a few submissions for consideration. While the schemes examined had common elements, each was tailor-made for its own context. It did not follow that in every case the best solution was to negotiate a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if considered appropriate, by allowing the plaintiff to sue in the most favourable jurisdiction or

by negotiating an *ad hoc* settlement. It was best to give States sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss that the Commission might wish to endorse should be both general and residual.

60. Having regard to the earlier work of the Commission on the topic, in paragraph 153 of his report, he put forward various submissions with a view to developing that model. If those recommendations were generally acceptable, they could provide a basis for formulating more precise draft articles on the topic of international liability, with a view to the Commission’s fully discharging its mandate. Members might also like to comment on the type of instrument that would be suitable and the manner in which the Commission could best discharge its mandate. One possibility would be to draft a few articles and to recommend that they should be adopted as a protocol to the draft framework convention on the regime of prevention. However, he would go along with any suggestions that met with the approval of most members.

*The meeting rose at 1 p.m.*

## 2763rd MEETING

*Tuesday, 27 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

### **International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA said she hoped that the viability of the entire project would not again be at issue, in view of

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



the results of the work of the Working Group established at the previous session<sup>2</sup> and the endorsement of the Sixth Committee.<sup>3</sup>

2. The first report of the Special Rapporteur (A/CN.4/531) was well-structured, but the tone of the introduction was too pessimistic. After all, the Special Rapporteur had had the support of the Commission in 2002 and of the Sixth Committee, as was reflected in the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session (A/CN.4/529). The General Assembly had reacted positively to Mr. Quentin-Baxter's suggestion many years earlier regarding a number of preventive measures and the right of the affected State to receive reparation from the State that was the source of the injury. Mr. Barboza's suggestion of additional guarantees had also been well received. A reference had been made to the 1996 Working Group, and apparently most members had endorsed its conclusions. It was puzzling to see that those conclusions had not immediately been taken further, and it would have been useful if the Special Rapporteur had informed the Commission in greater depth about difficulties encountered so that the Commission could try to overcome them.

3. As to the recommendations of the 2002 Working Group, the term "innocent victim"<sup>4</sup> was inappropriate, especially with regard to the environment or the global commons, to which such moral qualities as innocence hardly applied. Moreover, the Working Group had discussed the threshold of "significant"<sup>5</sup> harm, but for the purpose of compensation it was sufficient to speak of "appreciable" harm.

4. In the discussion of policy considerations, according to paragraph 43 of the report, the Commission should direct its effort towards encouraging States to include international agreements and adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures. However, the Commission's task was much broader, namely, to draft rules. Although it could not impose such rules on States, the Commission should not merely produce "soft" recommendations or very general guidelines.

5. Paragraph 44 gave the impression that the innocent victim would always have to bear part of the loss, something that might be unavoidable in practice in view of the difficulty in quantifying such loss. The Commission should not, for all that, depart from the assumption that the victim should not have to pay anything.

6. The Special Rapporteur's analysis of model schemes of allocation of loss was very useful, the conclusion being that, apart from space activities, State liability was highly exceptional. In her opinion, the State almost always had a residual role, either directly (for example, in conventions which stipulated that the State would bear the loss that could not be covered by the operator) or indirectly (in the form of funds set up by parties that were States). True, the

primary liable entity should be the operator. However, she endorsed the Special Rapporteur's comment to the effect that it was not the operator that should be liable, but the entity that controlled the activity. It was worth pointing out that several conventions spoke of "the operator", yet the person in question might well be the entity in control. Article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, for instance, extended the notion of "operator" to anyone who was in control of a particular stage of a procedure.

7. The Special Rapporteur had said he would be presenting models of liability and compensatory schemes, but she hoped he would do rather more. States had a duty to provide arrangements for equitable allocation of loss. Hence the need to draft general rules, albeit of a residual nature.

8. With regard to the Special Rapporteur's submissions in paragraph 153 of his report, any regime recommended should indeed be without prejudice to claims under civil liability as defined by national law (subpara. (a)), but she would add the proviso that it should not always be necessary to exhaust national remedies before resorting to international mechanisms. Under some systems, it was possible to refer directly to international mechanisms. The Commission should perhaps say that civil liability was available, but not that it must be exhausted before turning to international mechanisms for dispute settlement and allocation of cost. Moreover, several national jurisdictions should be available, at least in the State of origin of the injury and in the State of the injury.

9. Subparagraph (b) was wholly acceptable, and she agreed with the submission in subparagraph (c) that the scope should be the same as in the draft articles on prevention. Nevertheless, the threshold should be lower, namely "appreciable" rather than "significant" harm.

10. As for subparagraph (d), the assertion that State liability was an exception needed to be qualified—it was an exception when the State had a primary role, but not when it had a residual role. Even the Convention on Third-Party Liability in the Field of Nuclear Energy and the draft directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage,<sup>6</sup> although not yet in force, pointed in that direction, and funds and other mechanisms also did so indirectly. As could be seen from paragraph 171 of the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session, most delegations in the Sixth Committee were in favour of residual liability for the State. The fact that the State had duties to fulfil encouraged it to take preventive measures, which in turn promoted compliance with the draft articles on prevention of transboundary harm arising out of hazardous activities.<sup>7</sup>

11. Clearly, the causal link should be based solely on reasonableness (subpara. (e)) but on the issue of harm caused by several sources (subpara. (f)), a regime of joint

<sup>2</sup> *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.

<sup>3</sup> General Assembly resolution 57/21 of 19 November 2002, para. 2.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 450.

<sup>5</sup> *Ibid.*, para. 452.

<sup>6</sup> *Official Journal of the European Communities*, C 151 E, of 25 June 2002, p. 1322.

<sup>7</sup> See 2762nd meeting, footnote 7.

and several liability was preferable to one of the equitable apportionment, for it gave more guarantees to the victims.

12. Whether it was limited or not, the liability of the operator (subpara. (g)) should always be supplemented by additional funding mechanisms, but the word “limited” posed some difficulty. Even if there was complete liability, the operator might be financially unable to pay compensation, and hence the need for other sources of compensation. The Commission must also consider cases in which insurers were not willing to insure the activity. While the operator might have complete liability, no one would compensate the victim for his loss. Obviously, such a situation required the guarantee of additional funds.

13. With regard to subparagraph (h), States must certainly put in place domestic schemes relating to prevention, protection and national funds, but the Commission should not at the present stage discard the obligation to arrange for some sort of dispute settlement mechanism, such as arbitration, and it should discuss whether or not the mechanism should be mandatory.

14. She agreed fully with the consideration discussed in subparagraph (i). As to subparagraphs (j) and (k), damage to the environment *per se* should be compensated, and not simply as damage to persons or property. Such was the position taken in both the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European Union draft directive.<sup>8</sup>

15. She was opposed to the Special Rapporteur’s suggestion that general rules should be drawn up as a protocol to the articles on prevention, a course that would emphasize prevention as a main obligation and compensation as a mere accessory. They should be on an equal footing. The best thing was to have a convention in two parts, one on prevention and the other on compensation for harm, with rules enunciating general principles on liability. That idea was supported by the Sixth Committee, as could be seen from paragraph 179 of the topical summary.

16. Mr. PELLET commended the Special Rapporteur for his report, the erudite and excellent quality of which merely confirmed that the topic was not one conducive to codification and progressive development of the law. He wondered just what its aim was. As the title showed, the subject focused on defining the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, although it might have been simpler to speak of compensation rather than loss, since that was what was at issue, or, as the Special Rapporteur stated more clearly in paragraph 38 of his report, “facilitating a more equitable and expeditious scheme of compensation to the victims of transboundary harm”. He would emphasize the word “transboundary”, because the Special Rapporteur did not stick fully to the topic, especially when he evoked the *Ok Tedi* case (paras. 143–149 of the report) or the Bhopal disaster (a footnote to para. 149 of the report). It was not suitable to include in an already difficult topic the question of harm caused by the activities of a transnational corporation in the territory of a host State, despite the fact that, like the Special Rapporteur (a footnote to

para. 19 of the report), he was in favour of developing a liability regime for multinational corporations.

17. For similar reasons, he was reluctant, to say the least, to see the Commission set out upon a study aimed at producing a more rapid and equitable regime for victims of transboundary harm. The report provided all the arguments needed to show it was a task that strayed from the Commission’s field of competence. The Commission’s task was to work towards the progressive development and codification of international law, and, even though it was not specifically stated in its statute, the Commission pursued that task primarily, if not exclusively, with regard to public international law. Yet the Special Rapporteur had himself acknowledged that international liability did not lend itself easily to codification and progressive development (para. 2 of his report) and any doubts that might have been voiced in the 1980s about the value or viability of the topic itself (para. 9) persisted more than ever today. The Commission had been dragging the topic around with it since the 1970s without ever having been able to complete it. Perhaps that was because, as Tomuschat had stressed (a footnote to para. 18 of the report), a global approach was not suited to yield constructive results.<sup>9</sup> The Special Rapporteur himself admitted as much in saying (para. 150) that “the legal issues involved are complex and can be resolved only in the context of the merits of a specific case”, in other words, as a function of circumstances, the nature of the harm or the risk.

18. The Special Rapporteur’s other objection (in para. 24 of his report) was that, as the Commission itself had concluded at its forty-eighth session, in 1996, “the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability”.<sup>10</sup> In 1997, the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law had considered that “the scope and content of the topic remained unclear”<sup>11</sup> (para. 33 of the report). In the final analysis, neither in the literature, nor in case law, nor in practice was there any agreement on anything, and it emerged from the many conventions cited by the Special Rapporteur that “there could be no single pattern of allocation of loss” (para. 46 of the report). That was true at the international level and at the level of the domestic law of States, as was repeatedly pointed out in the report—for example, in one of the footnotes corresponding to paragraph 117 or in paragraph 125. It would be noted in passing, with regard to domestic law, that under French law, and probably under other systems that distinguished between administrative law and civil law, no-fault liability had grown considerably in the context not only of civil liability but also of administrative liability, and on a basis not referred to by the Special Rapporteur but one to which the Commission might give some consideration, namely

<sup>9</sup> C. Tomuschat, “International liability for injurious consequences arising out of acts not prohibited by international law: the work of the International Law Commission”, F. Francioni and T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London, Graham and Trotman, 1991), pp. 37–72, at p. 55.

<sup>10</sup> Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 127 (para. 32 of the commentary to art. 5).

<sup>11</sup> *Yearbook ... 1997*, vol. II (Part Two), para. 165.

<sup>8</sup> See footnote 6 above.

the principle that a public burden should be shared equally by all citizens.

19. Whether in connection with causation, the duty of care, the definition of damage or proper jurisdiction, the Special Rapporteur acknowledged that no particular solution was widely favoured (para. 128) and that no general conclusions could be drawn (para. 150). Of course, there were a number of good ideas, such as the creation of national or international compensation funds, but that did not come under codification or progressive development; rather, it was a matter of negotiation between States. It might be worth investigating possibilities in the area of the development of uniform laws or in that of private international law, but that was a matter for the bodies involved in the codification of private law, above all UNCITRAL, and not the Commission.

20. Others would probably say that the Sixth Committee wanted the topic, but he was not so sure, and he wondered whether the Commission had not forced its hand. In any case, nothing prevented the Commission from explaining to the Sixth Committee that it was on the wrong track. If the Commission really decided that it should set out upon that “mission impossible”—and one that was probably pointless—the report was the best basis for doing so. But to go where? It was still a mystery.

21. To conclude on a more positive note, subject to some adjustments when it came to examining the Special Rapporteur’s conclusions at future sessions—if that was indeed necessary, which he doubted—he wished to single out a few details of substance for comment. First, the Commission must avoid references to “civil liability”, as inclusion of the adjective “civil” would trouble jurists from countries that drew a distinction between administrative law and civil law. It would be a good idea to include harm caused to the State itself, as was proposed in paragraph 40 of the report. *Pace* Ms. Escameia, with a view to avoiding duplication of work, it would be wise to adopt the same threshold for liability in the present draft as had been adopted in the draft articles on prevention of transboundary harm arising out of hazardous activities.

22. He fully endorsed the submission in paragraph 153, subparagraph (d), of the Special Rapporteur’s report, to the effect that no general conclusions could be drawn as to the regime of liability. If that was the case, the only reasonable possibility open to the Commission—should it wish to launch itself into that task, of which he personally disapproved—would be to attempt to formulate model clauses that could serve only as alternatives. It was absolutely clear that no general rule regarding liability, including liability of the operator, was appropriate, and that no uniform rules could be adopted in that area.

23. He failed to understand why a distinction was drawn between “reasonableness” and “causality” in subparagraph (e); causality was the reasonable criterion. Submissions (f) to (k) clearly showed that the topic was not ripe for codification. Nor was it clear what form the finished product might take: certainly not a convention, though model rules might perhaps be appropriate. Finally, the present topic should not be grafted on to the topic of prevention, for, unlike the latter, it did not lend itself readily to codification.

24. Mr. GAJA said that the Special Rapporteur’s report represented a remarkable attempt to give an overview of all the issues involved in a very difficult topic. It contained an impressive amount of material which would no doubt be helpful for the continuation of the Commission’s work. In the final part of the report, the Special Rapporteur briefly outlined some tentative submissions and awaited the Commission’s reaction. Given the divisions within the Commission regarding the feasibility of the work proposed, it might have been wiser if the Special Rapporteur had left it to the Commission to react before taking any further steps. Instead, he had created difficulties for the reader.

25. The main difficulty in responding to the Special Rapporteur’s suggestions was that it was not yet clear what kind of end product was envisaged. It was not clear whether, on the one hand, the “model of allocation of loss” was a model for a treaty regime or for parallel national legislation, or whether, on the other, it was a set of recommendations or guidelines enabling States and other persons concerned to comprehensively assess the issues when setting up a regime. For the time being, it seemed that the latter model was the one proposed; indeed, that might be the easier way out.

26. Part II of the report showed the existence of a series of treaty regimes, mostly intended to cover specific risks. Their great variety reflected the needs of the specific sector involved and cast doubt on the usefulness of an attempt to outline a general and residual regime. As Mr. Pellet had recalled, the Special Rapporteur himself had noted in paragraph 46 of the report that those treaties “indicate that there could be no single pattern of allocation of loss”. Before they were taken as a source of inspiration, those treaty regimes should first be assessed in terms of their adequacy for the specific sector. The number of ratifications of the relevant treaty was not necessarily decisive for that purpose: a treaty might be widely ratified simply because it said little. Furthermore, not all the treaties concerned the intended subject matter of the Commission’s work, namely, transboundary harm, and thus their contents might prove not to be transposable.

27. As to some of the submissions in the final part of the report, he would hesitate to recommend a regime that was “without prejudice to claims under civil liability”, as was suggested in paragraph 153, subparagraph (a). It seemed more reasonable to envisage a comprehensive regime that covered all the aspects of the allocation of losses. If the operator was held liable under a treaty or other regime, it was unreasonable to expect that another source of liability should be added. Allocation of losses should be studied in a comprehensive manner that also took account of municipal law systems.

28. The suggestion in paragraph 153, subparagraph (d), that “the person most in control of the activity” should bear the brunt might have to be reviewed in the light of the need to secure assets in the event of loss. That seemed to be the main reason why the shipowners rather than the charterers were held liable for harm caused by ships. Shipowners thus had an incentive to insure against the risk, and they might transfer the costs to the charterers.



29. In the case of activities within a State causing transboundary harm, some harm was also likely also to take place within the territory where the cause was located. In a comprehensive regime, that harm should not be ignored. Article XI of the Convention on Supplementary Compensation for Nuclear Damage sought also to protect those who suffered damage in the installation State.

30. Finally, since the amount for which the operators were liable under a strict liability regime might be inadequate to cover all the damages, a viable scheme should envisage the participation of a large number of States that could provide part of the compensation in case of harm, irrespective of their involvement in the actual hazardous activity. Such an arrangement was provided for in article IV of the Convention on Supplementary Compensation for Nuclear Damage. It would be difficult to generalize the solution adopted by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage complementing the International Convention on Civil Liability for Oil Pollution Damage, to which reference was made in paragraphs 47 and 48 of the report, since a comparable situation did not exist in other cases. If it was wished to establish a viable regime for compensation, the role of States could not be ignored.

31. Mr. MANSFIELD said that the Special Rapporteur's report not only made it clear why the Commission could not fail to deal with the topic of allocation of loss in case of transboundary harm, but also provided an excellent basis on which the Working Group established at the previous session<sup>12</sup> could take the issues forward.

32. Some members still wished to avoid the topic, but his own view was that the Commission must address it, for a number of reasons. First, it was the Commission itself that had conceived the topic of State responsibility as being limited to internationally wrongful acts. That had not been the only possible approach, as some writers of considerable standing had been at pains to point out. Nonetheless, it had been the approach chosen by the Commission. Second, the prevention and response obligations developed by the Commission were important—a matter to which he would revert; but they could never entirely eliminate the risk of an accident. Third, if loss occurred despite fulfilment of the prevention obligations, there was no wrongful act on which a claim could be founded. Fourth, unless that loss was to lie where it fell, in other words, potentially on the innocent victim, there was a gap in the Commission's work to date—a gap that was sufficiently obvious to require the Commission to address it if it was not to lose credibility.

33. The survey of existing regimes was very useful indeed. He would not comment on the different approaches adopted for loss allocation, or on the reasons behind those approaches, except to note that something common to all of them was the idea that prevention was better than cure. Admittedly, there had been various degrees of success on the prevention front in the various sectoral areas: it was a regrettable fact that in some sectors preventable accidents continued to occur all too frequently. Yet in general there was an increasing recognition by all operators engaged in

hazardous activities, whether State or private and whether in developed or developing countries, that the costs associated with accidents, irrespective of any liability to pay compensation, were very high and represented perhaps the single biggest preventable cost to their business, in terms of down time of machinery and staff, loss of production, failure to meet orders and loss of reputation. It was the recognition of those factors, rather than a legal obligation to take prevention measures or to pay compensation, that was increasingly the reason that drove operators to adopt state-of-the-art prevention techniques and seek to follow continuous improvement procedures and work against complacency. In fact, no operation involving hazardous activities anywhere in the world could any longer ignore those managerial insights and hope to stay in business.

34. There were two implications for the Commission's work, both of which were acknowledged in the Special Rapporteur's report. First, it needed to ensure that the result of its work supported the incentives for those with the effective ability to control the risk to follow best-practice risk management techniques. Second, the allocation of loss that the Commission was attempting to deal with was residual in character. It could not be part of the intention to replace existing regimes, still less to discourage the development of new tailor-made sectoral regimes or to attempt to provide some new detailed comprehensive regime that would cover all conceivable circumstances.

35. Obviously, there was much to be said for tailoring specific regimes to the specific circumstances of the activities in question. But it must be acknowledged that they had had limited success to date. More generally, it might be the case that a specific regime was intended to ensure that there was an appropriate allocation of loss in the event of accidents, and, in particular, that it did not fall on an innocent victim who had had no participation in or no benefit from the activity in question. However, there were various reasons why that result might not be achieved: the regime might not be enforced; the relevant State or States might not be party to it or covered by it; the particular risk of harm or the nature of the harm itself might not have been foreseen and not be covered by the regime; or the best-practice prevention might have proved not to be effective in the circumstances of the particular accident.

36. The Commission needed to consider carefully how there could be some residual obligations to avoid a situation in which an innocent victim was in fact left to bear the full loss without any support in circumstances where it had not been a participant in the hazardous activity and had gained no benefit from it. Nevertheless, it needed to do so without distorting the incentives to those in the best position to manage risk. It might not be satisfactory or sufficient, but at the very least there needed to be some residual obligation on the relevant States to address the issue of allocation of loss in unforeseen circumstances after the event. That, however, was a matter for further reflection.

37. He agreed with the proposition set forth in paragraph 152 of the report that the model should be general and residual in character, and he also endorsed the submissions in paragraph 153, subparagraphs (a) and (b), to the effect that the model should be without prejudice to remedies under domestic law, private international law

<sup>12</sup> See footnote 2 above.



or public international law relating to State responsibility. Although he had some reservations, he could for the moment accept the recommendation in subparagraph (c) about limiting the scope to that of the draft articles on prevention. However, at some point in its work, the Commission would need to consider further the question of harm to the global commons.

38. He agreed with the recommendation on the threshold of significant harm, even though, as a practical matter, the threshold was unlikely to be an issue at any time. In a residual regime, the character of the harm to be dealt with would never be anything less than significant. As to subparagraph (d), he had already indicated that it was the person most able to control the risk who needed to have the fullest incentive to manage the risk, including the responsibility for compensation.

39. In general, there was much to be said in support of the comments in subparagraphs (e) to (i), though some aspects of the very condensed material contained there needed further discussion in the Working Group. Subparagraphs (j) and (k) raised difficult questions that called for further thought. The world had moved a long way in its attitude to damage to the environment. The notion that such damage was a matter of concern only to the State in which it occurred was not in accordance with the growing understanding of the global interconnectedness of environmental considerations. With regard to subparagraph (k), on tourism and loss of profits, liability as such might be a difficult concept. Nevertheless, if there was a clear causal link, grounds might exist for a claim if there had been a breach of State responsibility. Furthermore, it should be acknowledged that loss of tourism might be well-nigh catastrophic for some smaller economies: the notion that they might have to bear those losses totally unsupported was difficult to square with any sense of equity. The report provided an excellent framework for further refinement of those difficult issues in the Working Group.

40. Finally, a decision on the final form of the work could, in his pragmatic view, be left to emerge from the continuing work of the Working Group.

41. Mr. BROWNLIE said that the report raised issues with which he had considerable difficulties. It was not the fault of the Special Rapporteur, who had provided a helpful overview, but the Commission needed guidance on addressing serious structural problems. The proposed regime would be both general and residual. It would not be a regime of general international law because the Commission was not codifying such law: it was inventing an entirely new regime.

42. The only treaty models available were highly political. For instance, the European nuclear regime had been designed to limit responsibility in order to protect the nascent development of civilian uses of nuclear energy. It thus represented an attempt to balance risk against the possibility of conducting a given activity. Regimes of that kind clearly had no bearing on the Commission's present task. He remained to be persuaded, therefore, as to the character of the residual regime that would emerge from the Commission's deliberations.

43. The approach taken by Mr. Quentin-Baxter in his various reports on international liability continued to exert an influence in that regard. Mr. Quentin-Baxter had made no distinction between State responsibility and other considerations, and all the examples he had cited in his reports had been straightforward examples of State responsibility.

44. The Commission would indeed have to provide for the possibility of arbitration, but he wondered what would be the applicable law in that case. Treaty regimes were self-contained and dealt with arbitration in their own way, but it remained to be seen how the Commission would tackle the issue.

45. It was clear that the Commission must address those serious structural problems and avoid causing a reaction in the Sixth Committee that might damage its existing work on State responsibility.

**The responsibility of international organizations  
(continued)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>13</sup>  
A/CN.4/L.632)**

[Agenda item 7]

REPORT OF THE WORKING GROUP

46. Mr. GAJA (Special Rapporteur), introducing the report of the Working Group, said that, in view of several criticisms made in the plenary, he had submitted to a meeting of the open-ended Working Group a revised text of draft article 2 which omitted any reference to "governmental functions". Following a discussion, the Working Group had reached a consensus on a new text that he was now submitting to the plenary for referral to the Drafting Committee.

47. The new text proposed a definition of "international organization" that was designed to cover all international organizations established by a treaty or other instrument of international law and possessing international legal personality. It made no reference to "capacity", because when an international organization breached an obligation under international law, that would in any case entail its international responsibility. The definition stressed the central role of States, although it acknowledged that members of the organization might include non-State entities, such as other international organizations, territories or private entities. The text adopted by the Working Group read:

**"Article 2. Use of terms**

For the purposes of the present draft articles, the term 'international organization' refers to an organization established by a treaty or other instrument of international law and possessing its own international legal personality [distinct from that of its members]. In addition to States, international organizations may include as members, entities other than States."

\* Resumed from the 2756th meeting.

<sup>13</sup> See footnote 1 above.

48. He thanked the many members who had attended the meeting of the Working Group for their constructive contributions.

49. Mr. PAMBOU-TCHIVOUNDA said that, since he was not a member of the Drafting Committee, he wished to express his full support for revised article 2, on condition that the phrase in square brackets was deleted.

50. Ms. XUE said she had been unable to attend the meeting of the Working Group, but it seemed the plenary was still expected to comment on the policy considerations underlying the new text. She agreed that article 2 was one of the most difficult of the draft articles. Previous conventions had used the term “intergovernmental organization” without defining it, but since the Commission had agreed that “intergovernmental organizations” were the target of the draft articles, it might be worthwhile trying to arrive at a definition.

51. She had some reservations regarding article 2 as originally proposed by the Special Rapporteur in his report (A/CN.4/532, para. 34), but the new version still contained some problematic terms. For instance, the wording “established by a treaty or other instrument of international law” did not necessarily reflect the real practice of States and international organizations. With regard to the phrase “possessing its own international legal personality”, although in the 1949 Advisory Opinion in the *Reparation for Injuries* case, ICJ had said that an international or intergovernmental organization possessed “international personality” [p. 15], it was still not clear that this phrase was meant to include “intergovernmental organizations” only. It was meant to include other types of organizations as well. However, not all international organizations necessarily possessed such personality, and including that essentially theoretical concept in the revised text made it more confusing than the original draft article. Finally, with regard to the wording “in addition to States ... may include as members entities other than States”, she felt that the organization’s composition was a matter to be decided by its constituent instrument. If the Commission retained that wording as it stood, it would have to make clear the relationship between the character of such an organization and the status of such non-State entities. Otherwise the scope might become too broad.

52. The revised version was confusing. If there was already a consensus on policy considerations, meaning that the text could be referred to the Drafting Committee, the Committee would have to work very hard to make plain what international organizations the Commission intended to include.

53. Mr. Sreenivasa RAO thanked the Working Group and the Special Rapporteur for accommodating the diversity of views on the definition of “international organization”. There was a kernel of truth, however, to what Ms. Xue had said about the drafting of the revised text. The first sentence referred to the organization’s establishment by a treaty or other instrument under international law, which did not make it clear whether such an instrument could be negotiated by non-State actors as well as States. As long as an organization was established by an instrument negotiated only among States, no problem arose if the instrument created a membership that could include

non-State entities. Otherwise, there would be a gap which the Drafting Committee would have to fill.

54. Mr. ECONOMIDES noted that the definition chose three criteria. The first, namely establishment by a treaty or other instrument of international law, posed no problems because it was true of all international organizations. The second, that of international personality, was true of all international organizations that had international powers, such powers being implicit. If an organization did not have international personality, but simply internal legal personality in the territory where it operated, the draft articles would not apply to it. The third criterion, relating to membership, was a useful addition, in that it reflected the fact that an increasing number of international organizations had non-State members. The revised text was perfectly acceptable, although the Drafting Committee might refine it further.

55. Mr. CHEE said that in the Working Group he had raised the issue to which Ms. Xue had referred, namely, what was meant by “instrument of international law”. Ms. Escameia had said that it could include a resolution of the General Assembly. The term was very broad and imprecise. He had also raised in the plenary the issue of the distinction between “international personality” and “international legal personality”, which had a bearing on the term “instrument of international law” and needed to be clarified.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to refer article 2 to the Drafting Committee.

*It was so decided.*

57. Mr. PELLET said that the definition in article 2 was excellent. He emphasized that, if the plenary referred to the Drafting Committee an article already discussed at length in the Working Group, the Committee was bound to respect the position of the full Commission and not reopen the debate on the many problems that had led to the adoption of the article in question.

*The meeting rose at 11.30 a.m.*

## 2764th MEETING

*Wednesday, 28 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

**Diplomatic protection<sup>1</sup> (continued)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)**

[Agenda item 3]

REPORT OF THE WORKING GROUP

1. The CHAIR invited the Special Rapporteur on diplomatic protection to introduce the report of the Working Group on draft article 17.

2. Mr. DUGARD (Special Rapporteur) recalled that Mr. Gaja had proposed merging draft article 17, paragraph 1, with paragraph 2 of the same article. The Working Group established to consider the matter had drafted a provision that took account of that proposal, which read:

“For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection.”

3. The Working Group had had before it proposals by Mr. Economides, Mr. Brownlie, Mr. Gaja and Mr. Pellet and had reached a consensus on the need, first of all, to cater for situations when a municipal system did not know the practice of incorporation, but applied some other system of creating a corporation, and, second, to establish some connection between the company and the State along the lines of the links enunciated by ICJ in the *Barcelona Traction* decision. At the same time, however, the Working Group had been careful not to open Pandora’s box by adopting a formula which might suggest that the tribunal considering the matter should take into account the nationality of the shareholders that controlled the corporation, something which the Court had rejected in the *Barcelona Traction* case. Several different wordings were put forward in the text submitted by the Working Group for article 17, and the Special Rapporteur proposed that that provision should be referred to the Drafting Committee.

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)\*

4. The CHAIR invited the Special Rapporteur to sum up the debate on articles 18 to 20 of the draft articles on diplomatic protection.

\* Resumed from the 2762nd meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

5. Mr. DUGARD (Special Rapporteur) said that the debate had centred, quite rightly, on criteria to be used for identifying the nationality of a corporation. Before turning to the three draft articles in question, and in response to an issue raised by Mr. Brownlie, who had said the Commission should look more closely at the status of legal persons other than corporations, he would submit an addendum on the subject to the Commission. Because legal persons came in extremely varied types, however, it was impossible to provide a generalized regime for all legal persons in international law. Some members of the Commission had in fact suggested that it was inadvisable to go further into the matter. He would therefore not go into the minutiae of the topic from the standpoint of diplomatic protection.

6. Draft article 18 set out two exceptions to the rule that diplomatic protection was to be exercised by the State in which the corporation was registered, extending that possibility to the State of nationality of the shareholders. The first exception, contained in draft article 18, subparagraph (a), posed no particular problem, the majority of the Commission’s members being in favour of the test that the corporation should have ceased to exist for the State of nationality of the shareholders to be able to exercise diplomatic protection. Other useful suggestions had been made: Mr. Kamto had proposed that a time limit should be imposed for bringing a claim, and Mr. Addo had raised the possibility that the shareholders might bring their claims against the liquidator of the corporation. He himself thought that that could be done during the period of liquidation, but that after the company had completely ceased to exist, the shareholders must have the right to persuade their State of nationality to intervene. Since there had been no serious objection to article 18, subparagraph (a), he recommended that it should be referred to the Drafting Committee.

7. Draft article 18, subparagraph (b), had given rise to a much more vigorous debate and created something of a division among members of the Commission. Fifteen members had been in favour of including subparagraph (b), namely, Mr. Al-Baharna, Mr. Chee, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Yamada and himself, and nine against, namely Mr. Addo, Mr. Brownlie, Mr. Economides, Mr. Kateka, Mr. Koskeniemi, Mr. Mansfield, Mr. Rodríguez Cedeño, Mr. Sreenivasa Rao and Mr. Sepúlveda. He himself believed that the exception set out in subparagraph (b) was part of a cluster of rules and principles which together made up the decision of ICJ in the *Barcelona Traction* case, as was attested to by the fact that the Court had raised the possibility of such an exception, although it had not been relevant to the case itself. For that reason, he thought it should be included. As to whether the exception was part of customary international law or not, the views of members of the Commission had likewise been divided. His own view was that a customary rule was developing and if the Commission wished to engage in progressive development of the law in that area, it should do so with great caution.

8. Many members of the Commission had argued that article 18, subparagraph (b), was unnecessary because the shareholders had other remedies such as domestic



courts, ICSID or the international tribunals provided for in some bilateral or multilateral agreements. That was not always true, either because there was no domestic remedy or because the State of nationality or the host State had not become a party to ICSID or to a bilateral investment treaty. He had been surprised that Mr. Sreenivasa Rao and Mr. Sepúlveda had been in favour of the availability of ICSID-type protection when neither India nor Mexico was a party to that arrangement and, indeed, many other important States, including Brazil, Canada, Poland, the Russian Federation and South Africa, were also not parties.

9. Some members were probably hostile to article 18, subparagraph (b), because of a historical opposition to foreign investment on the grounds that it was contrary to the interests of developing countries. As Mr. Kamto and Mr. Momtaz had pointed out, however, the situation had changed considerably since ICJ had handed down its decision in the *Barcelona Traction* case. The type of situation he had in mind was that of an entrepreneur who, having set up a company in a developing country at the request of its Government, had the assets of the company confiscated following a change in government and found that there was neither a domestic nor an international remedy. It was in a sense a matter of protecting the human rights of the investor.

10. Many members had stressed that the exception contained in article 18, subparagraph (b), should be used only as a final resort. He thought that that went without saying: the exception was not a remedy that should be used lightly, and it should be resorted to only when there was no other solution. He accordingly recommended that subparagraph (b) should be referred to the Drafting Committee.

11. Draft article 19 presented very few problems. Some members had taken the view that it was an exception that would be better placed in article 18. He, however, was persuaded that, with a view to conformity with the *Barcelona Traction* decision, the two articles should be separated. There had been no objections to draft article 20. There had, however, been a division of opinion over the proviso, with some members suggesting that it should be dealt with in the commentary, and he had no objections to that. It had also been rightly proposed that the text of the article should be harmonized with that of article 4. He consequently recommended that the two draft articles should be referred to the Drafting Committee.

12. Mr. Sreenivasa RAO said that India had carefully considered becoming a party to the ICSID arrangement, but that, for various domestic reasons, that action had been delayed. In any case, the opposition to or defence of draft article 18, subparagraph (b), could not rest entirely on whether a State recognized the competence of ICSID, or not as long as effective remedies were available.

13. He was in favour of the inclusion of draft article 18, subparagraph (b), in the draft on the understanding that the exception it provided for should come into play only as a last resort.

14. Mr. BROWNLIE said that a number of very important public law institutions, such as cities or universities, were treated analogously to corporations by major judicial bodies. Admittedly, not all municipal systems dealt with

those matters in the same way. He also hoped that the Special Rapporteur would reconsider his statement that the *Barcelona Traction* case supported the exception in draft article 18, subparagraph (b).

15. Mr. ECONOMIDES suggested that it should be stated, either in the body of the articles or in the commentary, that the draft articles were without prejudice to rules applicable to legal persons, other than corporations, that came under municipal law.

16. Mr. GALICKI said that he endorsed the referral of draft articles 17 to 20 to the Drafting Committee, but thought that draft article 20 should be brought into line not only with article 4, as proposed by the Special Rapporteur, but also, in respect of the second part, with draft article 18, subparagraph (a). The relationship between those two provisions might be explained either by the Drafting Committee or in the commentary.

17. Mr. PELLET said that he appreciated the resoluteness shown by the Special Rapporteur, who had not only defended his positions ably but also been receptive to other opinions. Concerning the question whether to focus on other legal persons, he said that he had always been in favour of doing so. It would be better to cover the entire subject, since the principles applicable to non-profit organizations should not be very different from those applicable to corporations. However, a savings clause like the one proposed by Mr. Economides would not suffice to settle the question, and the addendum promised by the Special Rapporteur would therefore be welcome. With regard to draft article 18, subparagraph (b), he reiterated his disagreement with Mr. Brownlie: *Barcelona Traction* was not an argument for either side. Like Mr. Sreenivasa Rao, he believed that the problem was not one of human rights, but one of law. After all, when a State committed an internationally wrongful act, someone had to be able to hold it responsible; diplomatic protection was one way of doing so when all other remedies had been exhausted.

18. He did not think that a draft article should be referred to the Drafting Committee until the questions of principle had been settled in plenary because, otherwise, that would burden the Drafting Committee with too heavy responsibilities. That was the case with draft article 18, subparagraph (b), and above all with draft article 17 as proposed by the Working Group. He was nevertheless in favour of referring those draft articles to the Drafting Committee.

19. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to endorse draft article 17 in the new form proposed by the Working Group and to refer draft articles 18 to 20 to the Drafting Committee, subject to the comments made during the debate.

*It was so decided.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-**

**boundary harm arising out of hazardous activities)  
(continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>3</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

20. Mr. KATEKA, recognizing that the Commission had embarked on a difficult subject, said he hoped that the doubts of some members about the project's viability would not prevent it from moving ahead, if only for posterity's sake. He regretted that in 1998 the Commission had decided to exclude from the scope of the draft harm caused to the environment in areas beyond national jurisdictions, as the Special Rapporteur had stated in paragraph 35 of his report (A/CN.4/531). The recent case of the *Prestige*, the Greek-operated oil tanker registered in the Bahamas which had been repaired in China and had been heading for Asia with its cargo of Russian oil, showed that the price of negligence could be high. Spain had decided to tow the damaged tanker out to sea, 270 km off the coast, and it had sunk in waters 3,500 m deep with its dangerous cargo, polluting beaches in Spain and France for several months. It was regrettable that the Special Rapporteur had excluded damage to the environment *per se* not resulting in any direct loss to individuals or the State (para. 153 (k)).

21. He commended the Special Rapporteur for reviewing various regional and international environmental instruments in his sectoral and regional analysis (paras. 47–113), but it would have been better if he had considered more national legislation from other regions of the world. It would also be useful for the Special Rapporteur to provide more details on such incidents as the *Bhopal* case, referred to in a footnote to paragraph 149 of the report, so as to elaborate on the subject.

22. In paragraphs 122 to 149, the Special Rapporteur analysed some elements of civil liability, there again preferring damage to persons and property at the expense of the environment *per se* and going so far as to say that, in certain cases, such damage could indirectly benefit the environment. He hoped that the Commission would do better than that.

23. Although he had some misgivings about subparagraphs (f), (g) and (k), he agreed with most of the recommendations made in paragraph 153, particularly on the threshold of significant harm in paragraph 153 (c). As to the form of the future draft articles, he was of the view that it was too early to decide, but he did not agree with the Special Rapporteur's idea to adopt them as a protocol to the draft framework convention on the regime of prevention because a soft-law approach, for example, might be more appropriate. The Special Rapporteur should ask himself why several of the conventions to which he referred in paragraphs 47 to 113 were still not in force. Perhaps it was due to the lack of specificity and the scope of the subject matter. The Fifth Ministerial Conference "Environment for Europe", which had been held in Kiev in May 2003, had emphasized the importance of insurance and other financial instruments for making civil liability regimes work effectively. Of course, the Commission did

not have expertise on such questions, but, as in the past, the special rapporteurs might make use of specialists.

24. Mr. PAMBOU-TCHIVOUNDA said that, although the Special Rapporteur had done an excellent job, he should perhaps have delimited the topic more precisely, because it was not certain that the report had helped "throw some useful light on the model of allocation of loss the Commission may wish to recommend", as was noted in paragraph 4. From a terminological point of view, it would be better to use only the word "damage", which was used in almost all the conventions cited in paragraphs 47 to 113 of the report, rather than the word "loss".

25. The question of prevention having been settled, the Commission should now shift the focus of its work to compensation for transboundary harm arising out of hazardous activities. One of the problems to which the topic gave rise was the result of the fact that the role of the State was built on a fiction, particularly with regard to harm arising out of hazardous activities which were not prohibited by international law and which were industrial or commercial—in other words, purely private—activities usually carried out by private individuals. They were carried out by States, without the latter losing their character as private activities, only because the States decided, on an exceptional basis, to place themselves in the same conditions as private individuals. That gave rise to consequences at the level of liability when those activities caused transboundary harm and States were affected. He had two comments to make in that regard, one conceptual and the other methodological. At the conceptual level, if those activities were not prohibited by international law, it was not because they were private activities, but because States benefited from them. The involvement of the State in a compensation process was a logical consequence of that relationship of dependence on the activity in question. At the methodological level, if the aim was a global regime of State liability, it was necessary to know which activities or sectors of activities were likely to entail the liability of the State on account of their harmful effects. He therefore wondered whether it was possible to draw up a complete or partial list of those activities or sectors of activities and whether that list could be corrected and amended and, if so, under whose authority. He also wondered to what extent such a list might influence the scope and impact of the regime of compensation and to what extent its inclusion in an annex to the draft might strengthen the regime's credibility.

26. Defining the role of the State in the compensation of transboundary harm gave rise to problems of substance before problems of form and modalities. The first case considered the risk to which the State exposed itself by assuming the obligation to compensate when it acted as the operator or carried out a hazardous activity, particularly for reasons of national security. In that case, the State would be fully liable for compensation subject to the modalities for the settlement of compensation, which, following the negotiation with the other State, might take different forms in keeping with the whole range of possibilities for dispute settlement. The second case was that of an internationally wrongful act when it was established that the State, which was not the operator of the activity in question, did not fulfil the obligations provided for in the draft articles on the prevention of transboundary harm.

<sup>3</sup> See footnote 2 above.

In that case, State responsibility was international responsibility, and mere recognition of responsibility might already constitute a form of compensation, as ICJ had stated in the *Corfu Channel* case. That was token compensation, and it supplemented that of the operator or of “the party with the most effective control of the risk at the time of the accident” (para. 114 of the report). The third case was that of the liability of the operator himself, when it was established that the State had conformed in full to the obligations of prevention. The coverage of damage would then bring other mechanisms into play, private-law mechanisms in particular. His brief three-case summary might find a place in a provisional outline of principles, and the Commission might reserve for later consideration the question of the definitive form that the principles might take. He encouraged the Special Rapporteur to work in that direction.

27. Mr. BROWNLIE said that he remained concerned about the structural relations between the Commission’s work on the topic and other areas of existing international law. He asked Mr. Pambou-Tchivounda whether he would accept that most of the cases he had described were adequately covered by State responsibility and, if so, why the concept of State liability was needed. He would also like to have the views of other members on that question.

28. Mr. PAMBOU-TCHIVOUNDA explained that he had referred to possible situations while bearing in mind those envisaged in the report. The questions were (a) whether the Commission should work towards proposing a range of generally applicable rules, and (b) whether it should first draw up an inventory or whether the examples provided by the Special Rapporteur were sufficient. As for the rationale behind the draft articles on liability arising out of acts not prohibited by international law, it might be the case that the State on whose territory the activity took place had behaved punctiliously; nevertheless, in the event of an accident, a frame of reference must be available with which to deal with compensation. Hence the value of a regime other than one of responsibility based on a wrongful act of the State.

### Cooperation with other bodies

[Agenda item 11]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

29. The CHAIR welcomed Mr. João Grandino Rodas, Observer for the Inter-American Juridical Committee, and invited him to report to the Commission on the work of the Committee.

30. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) said that he was very honoured to address the Commission, whose members were among the world’s most eminent contemporary international lawyers. The Inter-American Juridical Committee was the oldest legal body in the Americas and would be celebrating its centenary in 2006. The agenda for the Committee’s August 2003 session was divided into two sections. Section A comprised items under consideration, while section B contained follow-up items. The first item in section A concerned the Seventh Inter-American

Specialized Conference on Private International Law. The General Assembly of OAS had requested the Committee to support the consultation of governmental and non-governmental experts and to prepare such reports, recommendations and other materials as would be necessary for the consultation on that occasion.

31. The second item related to applicable law and competency of international jurisdiction with respect to extra-contractual civil liability. The documents presented by the co-rapporteurs had defined the complexity of that topic, which was compounded by the great differences in the treatment of the subject by common-law and civil-law countries. Proposed approaches to dealing with those issues had included the adoption of a convention on extra-contractual liability, specific conventions on the various categories of liability and the adoption of a model law. Discussions had centred around the kind of rules which should determine applicable law and jurisdiction, the choice being between a method that afforded a measure of predictability and one that was more flexible. A uniform approach in that area throughout the hemisphere would seem advisable. However, given the cost of preparing such a convention, account should be taken of the severity of the problem posed by the diversity of approaches to resolving the issue and the funds available, and of the likelihood of the problem being resolved in other forums and of finding a satisfactory solution in the inter-American sphere. Concerns had been expressed about the need to indicate, in addition to the internal legislation of the States, the general principles of law governing the subject and the exceptions to those principles. The generality of the criterion of *lex loci delicti* and of the exceptions presented in the context of the principles on the most significant relationship had been cited as examples. It was important to note that most of the countries in Latin America, Canada and the Caribbean, as well as 10 of the United States of America, applied some version of *lex loci delicti*, which had the virtue of predictability, although it had been pointed out that that could lead to unjust or arbitrary results. Discussion of which standards to apply involved the consideration of changing conflict-of-law rules in most countries of the hemisphere and would be difficult to accept, unless the instrument containing it was limited to a particular sub-category of extracontractual liability. The Committee had asked for a final report on the subject, taking into account the preliminary reports already submitted and the points of view expressed during the session, to the effect that, given the complexity of the subject and the broad variety of types of liability included under the category of “extra-contractual civil liability”, it would be better initially to recommend the adoption of inter-American instruments governing jurisdiction and applicable law with respect to specific subcategories of extracontractual civil liability and only later, if circumstances were appropriate, to seek the adoption of an inter-American instrument governing jurisdiction and applicable law with respect to the entire area of extracontractual civil liability.

32. The third item under consideration was cartels in the framework of competition law in the Americas. The Committee had already considered the topic of competition law in the Americas as part of the issue of the juridical dimension of integration and international trade, initially conducting a preliminary comparative analysis of exist-



ing laws and legislation on competition or protectionism in member States. Subsequently, the topic had been expanded to include a survey of international rules on competition law in the hemisphere, focusing more specifically on cartels, with particular regard to their international aspects. Specific concerns had been raised about export cartels formed to produce effects in the countries to which they exported their products, thereby creating a problem for those countries. A questionnaire had been designed requesting domestic authorities responsible for supervising competition in the OAS member States to provide information on laws, recent cases and practices concerning competition and cartels.

33. Following various initial studies, a consolidated report for the March 2003 session of the Committee had presented an overview of the evolution of competition law, focusing on the role of cartels and incorporating results of the questionnaire completed by 20 member States of the region. The report also included sections on regional and multilateral arrangements and cooperation in international forums, as well as a final section on future directions for competition and cartel policies. It was planned to publish a final, expanded version of the study in the four official languages of OAS. Concerns had been expressed regarding the fact that currently every matter relating to law on competition and cartels was governed by the internal law of States, as inter-American international law contained no provision making free competition obligatory or giving OAS the power to impose sanctions for breaches of that law. A convention on the subject would be more likely to be successful if it was consistent with what was actually provided in the national legislation of the respective States, as long as general principles of law were respected. Those concerns, as well as the special problems facing small economies in the area of competition law and the need for assistance and cooperation for countries faced with potential international regulation, would be reflected in a more fully refined report on the topic, to be submitted to the Committee for approval at its August 2003 session.

34. The fourth item under consideration was the enhancement of the administration of justice in the Americas, with particular reference to access to justice, a question that the OAS General Assembly had requested the Committee to continue studying in all its different aspects, while maintaining the necessary coordination and the highest possible degree of cooperation with other organs of the Organization working in that area, and especially with the Justice Studies Centre of the Americas, based in Santiago. That issue had received increasing attention at the Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, and various delegations had drawn attention to it during the presentation of the Annual Report of the Committee at the most recent General Assembly. Discussions in the Committee had included seeking analysis of specialized means of justice designed to facilitate access to justice and studying the underlying causes of the problem of access to justice in general, and for disadvantaged people in particular, and also the problems of funding.

35. The fifth item under consideration concerned the Fifth Joint Meeting with Legal Advisers of the Foreign Ministries of OAS Member States and the International Criminal Court. The OAS General Assembly had request-

ed the Committee to ensure that the agenda for the next meeting included a discussion of mechanisms to address and prevent serious violations of international humanitarian law and international human rights law, as well as the role of the International Criminal Court in that process. Accordingly, the Committee had prepared a basic document to be submitted at the next Joint Meeting, contributing to the analysis of a number of issues connected with the entry into force of the Rome Statute of the International Criminal Court and setting out the problems that might arise from the way in which the Statute had been adopted, as well as possible solutions. The Committee had requested the OAS General Assembly to submit to it a report on the status of signatures, ratifications and accessions to the Rome Statute, pertinent references to the instruments adopted by the Preparatory Commission for the International Criminal Court and any other information that might be relevant to that meeting. Necessary measures, including financing measures, were being taken to secure the participation of legal advisers of the foreign ministries at that important meeting.

36. Among the items in section B of the agenda concerning follow-up, the Committee would first deal with hemispheric security, an item that had already been studied in several reports. The second item was the implementation of the Inter-American Democratic Charter. A document on that subject had been submitted and would be analysed by the Committee at its next regular session. The third item related to preparations for the commemoration of the centennial of the Inter-American Juridical Committee, which would fall in 2006. As part of the programme of activities for that occasion, a draft declaration on the role of the Committee in the development of inter-American law might be prepared, for consideration in due course by the General Assembly. Furthermore, the 2006 session of the international law course held in August each year in Rio de Janeiro, Brazil, would focus on the topic of the contribution of the Committee to the development of inter-American law. The Committee had created a working group to coordinate and implement activities related to the celebration. A book celebrating the centennial was to be published shortly.

37. The last item in section B of the agenda was the preparation of a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, which the Committee had decided to include once again in its agenda in view of the importance assigned to it during the meeting of the Committee on Juridical and Political Affairs of the Permanent Council of OAS in March 2003. In conclusion, he thanked the members of the Commission who had honoured the Committee with their presence and expressed the hope that the relationship between the two bodies would continue to grow.

38. Mr. OPERTTI BADAN said that, on the current agenda of the Inter-American Juridical Committee, two items were particularly topical. The first was the competent jurisdiction in respect of extracontractual civil liability (*lex loci delicti*). The legal regime of contracts in the region was governed by norms, and the Inter-American Convention on the Law Applicable to International Contracts determined the applicable law, but that normative framework needed to be supplemented, in respect of extracontractual liability, by a regional codification exer-

cise that would define a number of general principles in that regard. The formulation of such principles did not involve the prior presentation of specific solutions for each category, but rather a pre-codification exercise that would allow progress to be made in developing the law of extracontractual liability, taking into account the work done by the Hague Conference on Private International Law, which, like the European Union, had not moved ahead as effectively in that area as in that of contractual liability. The second item concerned the absence of any regional law on competition. That item was important for MERCOSUR because of the problem of dumping. There had been attempts at codification in that area, but so far it had not been possible to arrive at a genuinely binding agreement. Dumping and trade were issues on which future work could be done within MERCOSUR, where the trend was towards adopting regional solutions.

39. Among the new items, the meeting with legal advisers of foreign ministries on the role of the International Criminal Court and on cooperation in that area was not just a question of organization. For the countries which had ratified the Rome Statute of the International Criminal Court, there were still some outstanding problems—for instance, article 98 of the Statute, on waiver of immunity, which might be an obstacle to the proper functioning of the Court. That problem should continue to receive attention, and that was why the Meeting with Legal Advisers and the inclusion of an item on the Court on the Committee's agenda were so important. Another major new development was the Inter-American Democratic Charter adopted in 2001. That document, which was very important from the standpoint of general principles of international law, regulated to some extent the principle of non-intervention and provided, *inter alia*, that a State could be prevented from participating in the meetings of inter-American bodies if it did not respect democratic principles. The Charter reflected a very strong commitment to the rule of law and representative democracy. Giving that basic political concept legal form took the sociological concept of representative democracy a step further. In adopting the Charter, which should be disseminated outside the region, the countries of the Americas had been the first to accept a code for the defence of democracy, the European Union clause being simply a general clause and not an operational norm. Finally, in an era of globalization and at a time when multilateralism and the international system adopted at the end of the Second World War were in crisis, not only politically but also in terms of financing and assistance, juridical development at the regional and sub-regional levels could revitalize the political will of States to abide by predictable rules of law. The Committee's work on racism and racial discrimination was very topical from that standpoint, in that it covered both traditional forms of discrimination and more heterodox and complex forms. The Committee's agenda demonstrated clearly the responsibility assumed by it at the regional level for the past almost 100 years, as well as its contribution to the progressive development of contemporary international law, both public and private.

40. Mr. MOMTAZ observed that many amnesty laws had been adopted in the Americas in recent decades and had been the subject of jurisprudence on the part of the Inter-American Court of Human Rights, which had judged them to be contrary to States' obligations under

the American Convention on Human Rights: "Pact of San José, Costa Rica". The United Nations Human Rights Committee had followed that jurisprudence. He wished to know whether, in its work, the Inter-American Juridical Committee had addressed the issue of amnesty laws as an obstacle to the implementation of the fundamental rights of the human person.

41. Mr. MELESCANU welcomed the continuing interest of the Inter-American Juridical Committee in the Commission's work. One of the new items taken up by the Commission was the fragmentation of international law. The view prevailing in the working group on that question was that one of the main reasons for such fragmentation was the development of regional legal systems which were autonomous on some issues and, in some cases, different from general rules. Meetings with regional legal bodies were therefore very important for ensuring that international law was diversified without being fragmented. The Committee should continue to keep the Commission abreast of its work, particularly on the two key issues of the regional application of the Rome Statute of the International Criminal Court and general principles in respect of extracontractual liability. The latter could be very important for the Commission's work on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities.

42. Mr. RODRÍGUEZ CEDEÑO said he agreed that the Inter-American Democratic Charter was a fundamental political and legal instrument for strengthening democracy in the region. The Meeting with Legal Advisers on the International Criminal Court was also important both for the universality of the Rome Statute of the International Criminal Court and for the internal legislation of countries of the region. Venezuela, for instance, had amended its Criminal Code, its Code of Criminal Procedure and its Code of Military Justice to facilitate cooperation with the Court. An effort must therefore be made to increase awareness of the Court's role as an international tribunal, which meant studying it in all its aspects, both procedural and legal, including its relationship with the legislative reforms under way in the region.

43. Mr. CHEE asked how many States of the region had acceded to or ratified the Rome Statute of the International Criminal Court and to what extent the work of the Inter-American Juridical Committee had influenced the policy of the States of the region. He wondered, in fact, whether the regional solidarity which was the basis for inter-American law and whose outcomes ranged from the Calvo clause<sup>4</sup> to the Inter-American Democratic Charter still prevailed. Finally, he would like to know whether the Committee's activities were disseminated globally, through journals, yearbooks and other publications.

44. Mr. BAENA SOARES said that the importance of the work of the Inter-American Juridical Committee could be explained by its tradition and authority and by the objectivity of its decisions, resolutions and reports. The items it took up were always topical and highly relevant. The Inter-American Democratic Charter reiterated and consolidated the resolutions and decisions of OAS and showed how much importance the region attached to

<sup>4</sup> See 2757th meeting, footnote 5.

the strengthening of democracy. The Meeting with Legal Advisers and hemispheric security were also important items. At a more practical level, since the Committee and the Commission both held annual seminars, the programmes of those seminars should perhaps be harmonized and a dialogue encouraged between them, through their secretariats as well as reciprocal visits, possibly involving members of the two bodies.

45. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) expressed satisfaction at the Commission's interest in the Committee's work and in strengthening the ties between the two bodies. With regard to the relationship between amnesty laws and access to justice, thus far, the Committee had focused on access to justice for the thousands of people who were too poor to afford a lawyer. It had considered the question of amnesty laws, but not in any depth. The issue might regain prominence. Of the 35 countries in the region, 34 belonged to the inter-American legal system, but only 16 were parties to the Rome Statute of the International Criminal Court, a number which did not include some of the region's major countries. The International Criminal Court already had two judges from the region. Inter-American law was perhaps one of the oldest examples of a regional legal system. The Inter-American Juridical Committee predated the United Nations system, as well as OAS. Currently, inter-American regional law was a reality which expressed itself in various forms, including the Inter-American Democratic Charter, attesting to the development of an objective regional legal system, not just the production of soft law. How to disseminate the experience gained in that context was one of the problems with which the Committee was dealing. A wealth of information on the subject was available on the OAS website. There was also the question of feedback on the experience that was disseminated. All the Commission's comments would be relayed to the plenary Committee at its August 2003 session in Rio de Janeiro. In any event, he hoped that cooperation between the Committee and the Commission would continue to grow.

46. The CHAIR asked the Observer for the Inter-American Juridical Committee to convey to the plenary Committee the importance that the Commission attached to the relationship between the two bodies.

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

[Agenda item 2]

47. Mr. KATEKA (Chair of the Drafting Committee) announced that the Drafting Committee on the topic of the responsibility of international organizations would comprise the following members: Mr. Gaja (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Kolodkin, Mr. Koskeniemi, Mr. Sreenivasa Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada and Mr. Mansfield (*ex officio*).

*The meeting rose at 1.05 p.m.*

\* Resumed from the 2758th meeting.

## 2765th MEETING

*Friday, 30 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

### International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. KOSKENIEMI thanked the Special Rapporteur for a useful overview of existing regimes of liability and thought-provoking suggestions. Perhaps it was impossible to trace a direct route from existing regimes to new ones, but there was an unaddressed gap between the Special Rapporteur's overview and the suggestions at the end of his report (A/CN.4/531). That gap continued to raise criticisms about the codifiability of the whole topic. In particular, five criticisms continued to be voiced. It was thus necessary to deal with them so as to demonstrate that useful work could be done.

2. One criticism, voiced by Mr. Brownlie and a number of academic commentators, was that a conceptual error had been made and the topic of liability should have been treated as part of the State responsibility project. There was some truth to that. On the other hand, responsibility and liability were both doctrinal constructions—languages, he would even call them—whose coverage could extend to the problem of uncompensated victims. Whether it should do so or not was a question of policy, not of doctrinal pigeon-holing. The criticism failed to take account of the real concern that, even after private liability regimes had been put into motion, cases might arise in which innocent victims were left without compensation. Surely the Commission should do something about that, whatever doctrinal difficulties that might create.

3. A second criticism was that the activities involved were too varied to regulate: oil pollution, nuclear pollution and hazardous waste were all very different, and

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



that was precisely the reason for the existence of a variety of regimes geared to their particularities. Issues such as the operator's liability in relation to that of the insurer or whether compensation funds should be established were matters that could not be dealt with in general terms. The criticism was partly correct: one could not lay down detailed rules about compensation and liability. But that was not what the Special Rapporteur was suggesting. The rules were to be residual, of a general nature, the purpose being not so much to regulate an activity as to provide a background against which States could be encouraged to find better ways of dealing with the problem of innocent victims.

4. A third criticism, voiced by Mr. Pellet in particular, was that members of the Commission, as public international lawyers, should not be concerned with civil liability. If anything was to be done in that field, it should be through harmonization of private law and the establishment of treaty-based regimes of liability and compensation. Yet public international law contained a great deal of material that regulated activity conducted by private actors. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, for instance, was a treaty that fell under public international law but regulated activity based on private contracts, and the same was true of much of international environmental law.

5. A fourth criticism was that the Commission should not deal with the matter because its members were legal experts, not negotiators or government representatives who could reconcile the various interests involved. True, important economic interests were at stake in the work on liability, and at some point the stakeholders would have to be involved in the work. Yet there was a long tradition of fruitful interaction between legal experts and negotiators, the first preparing the way for the second by, for example, producing substantive proposals or legal documents as the basis for negotiation. In any case, it had been negotiators at the Sixth Committee who had requested the Commission to complete its work. So there should be no worry about the Commission stepping beyond its mandate.

6. The fifth criticism, already addressed exhaustively by Mr. Mansfield, was that the topic did not fall within the Commission's mandate. The Commission itself had decided otherwise, however, in setting the liability issue aside from that of State responsibility for further development—a decision that had been endorsed by the Sixth Committee. Though the five criticisms were not absurd, it seemed to him that they should not paralyse the Commission.

7. The overview of the sectoral regimes on liability set out in paragraphs 47 to 113 of the report was an excellent and up-to-date description of the kinds of regimes in existence and the differences between them, pointing to the near-impossibility of regulating activities in a detailed fashion. By and large, he agreed with the conclusions, termed "policy considerations", contained in paragraphs 43 and 44. The expression "innocent victims", while perhaps not analytically correct, was useful in that it pointed to the overriding policy goal. The Commission should be concentrating not on a technical fine-tuning of liability regimes but on what might be seen as a human rights issue:

when major industrial or technological activities broke down, innocent people bore the burden, and that was unacceptable. The victim's standpoint, not the technical concerns behind setting up a workable compensation regime, should be the focus of the Commission's attention.

8. Ms. Escameia had pointed out that in paragraph 43 the Special Rapporteur spoke of "encouraging" States to conclude international agreements, and he agreed with her that stronger language was desirable. On the other hand, the Commission was not in a position to create binding, detailed rules. The new title of the topic, "Legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities", was somewhat misleading, tending to point to the work of an expert technical or environmental body rather than a legal body. The report referred to "models", possibly a euphemism for "draft convention". All of those instances of linguistic uncertainty, which perhaps reflected the Commission's uncertainty about the nature of the final result, added up to one conclusion: the Commission should draft a declaration of principles which, through mandatory language, would focus the attention of States on their duty to protect the human rights of innocent victims. The document would, by definition, not be a detailed set of articles regulating the various activities, but it would certainly be more than a protocol. Existing protocols on the environment, for example, the Montreal Protocol on Substances That Deplete the Ozone Layer, were full of technical detail, but that was not really the Commission's objective, which should be to draw the international community's attention to the dangers faced by individuals who lived in proximity to industrial and technological activities entailing a significant amount of risk.

9. In short, the criticisms of the topic should be taken seriously but not viewed as vitiating it, and there was an achievable objective that could be conceived as the drafting of a declaration of principles.

10. Mr. FOMBA said the report was a scholarly work, but conceptual and epistemological difficulties continued to plague the topic. The very feasibility of the exercise was open to question because of the thorny problem of how to clearly delineate State responsibility and liability. It was too late to turn back, however, since the Commission had been engaged in the exercise since 1978 and its very credibility might be at stake.

11. Mr. Pellet had argued that the exercise did not consist of codification and progressive development but rather of negotiation, while Ms. Escameia had rightly recalled the favourable reaction to the topic in the Sixth Committee. The Commission must try to do useful work by finding the common denominator between the *lex specialis* which reigned virtually unchallenged in that area and the *lex generalis* that seemed so hard, if not impossible, to find. A way must be found of squaring the circle.

12. Therein lay the merit of the Special Rapporteur's work. After outlining the Commission's previous efforts, reviewing the sectoral and regional approaches to the central issue of allocation of loss and addressing the difficult subject of civil liability, the Special Rapporteur made a summation and offered submissions for consideration. His attempt to reconcile what should be done from the

policy and legal standpoint with what the Commission could do from a technical standpoint should be supported, and he should be encouraged to go forward as far as possible without prejudging the final form the draft would take. Accordingly, for his own part, he accepted the spirit of the Special Rapporteur's recommendations.

13. Ms. XUE said that the first report on the topic was an impressive work containing a thorough review of existing liability regimes as a basis for further deliberation. In her view, it was difficult to codify and develop rules of international liability for transboundary damage caused by hazardous activity based on the existing regimes as examined by the Special Rapporteur. Allocation of loss caused by ultra-hazardous activities, both internally and externally, was not simply a matter of compensation of the injured: it involved various economic, political and social factors. Whether to allow an activity such as nuclear energy production often required important political decisions based on economic analysis, financial arrangements and the balancing of various social interests. The problem of how to handle possible mishaps was simply part of the package.

14. An examination of existing regimes revealed that neither the limits of liability nor the amount of financial guarantee given by the Government had remained unchanged, and they had sometimes been increased, indicating a gradual leaning towards public safety and environmental protection as opposed to industrial promotion in terms of policy concerns. Over the years, industrial countries had managed to develop a set of generally applied mechanisms for engaging in ultra-hazardous activities: technical standards, safety criteria, insurance-reinsurance schemes and harmonized procedural rules for compensation. At the international level, the extent of cooperation among States was determined not only by the nature of the activity itself but also by practical needs, particularly geopolitical considerations and economic conditions. A typical example was the differing practices adopted by the Western European countries under the Convention on Third-Party Liability in the Field of Nuclear Energy and by the United States under its national legislation on the same subject.

15. Even for activities characterized as ultra-hazardous, liability regimes differed, although they shared some common elements. The extent of State participation depended to a great extent on an activity's possible adverse effects internationally. A case in point was maritime oil shipping. The imposition of a loss allocation scheme would mean higher operating costs for the industry, higher prices for consumers, a more sophisticated insurance market and a heavier financial burden on the State. A balance thus had to be sought between economic development and the interests of the public in safety and environmental protection.

16. Could one conclude that the Commission should not proceed with the topic and leave liability to be covered by special regimes? She thought not, for a number of reasons.

17. The "polluter pays" principle had been incorporated into national legislation and reflected in international legal instruments. Specific rules on liability under which

the polluter was required to bear responsibility for damage caused to other countries were being negotiated in a number of areas. That was important for controlling the large-scale, high-risk-bearing industries that could inflict catastrophic damage on vulnerable developing countries which had limited means of coping with such damage. International law should look into the question and offer general principles for the conduct of such activities.

18. Transboundary damage did not affect the interests of one country alone. Conflict of interest between the author State and the injured State often began when an activity was still in the planning stage and did not end even after preventive measures were taken. General principles on damage recovery would help States to make appropriate arrangements to be applied to specific cases. Existing regimes on international liability had a strong regional and sectoral character. When ultra-hazardous activities were moved from one region to others owing to environmental concerns, general principles regarding allocation of loss became especially pertinent.

19. In short, despite the difficulties involved, States rightly expected the Commission to go ahead with the topic and come up with useful legal guidance. All the doubts about the topic had not yet been cleared up, however. The tough questions recently raised by Mr. Brownlie needed to be considered and answered. Were most cases of international liability that arose in fact cases of State responsibility, and if so, was there any need for rules on international liability? Such questions had often been raised when the rules on State responsibility were being drafted, and Mr. Brownlie had once described the whole topic as being misconceived. Now that the rules on State responsibility had been adopted, the subject could be re-examined.

20. In order for State responsibility to be invoked, there must be a breach of an international obligation through a wrongful act, and the act must be attributed to a State. In the case of transboundary damage caused by hazardous activity, it was questionable whether there was always a wrongful act on the part of a State. The principle enunciated by the tribunal in the *Trail Smelter* arbitration, namely that no State should allow activities in its territory to cause serious damage to another State, was often cited as an international rule prohibiting transboundary damage. If applied to its full extent, however, it would mean that international law should look into each and every case of transboundary damage. In reality, the law did not go that far.

21. Besides, under such a rule, a State would be held responsible for every act within its territory and any act carried out by its subjects. More importantly, when technology could not provide absolute safety, the injured State might insist on termination of the activity concerned, which indeed often happened in real life. Rules on State responsibility might be used by the injured State but might also provide a legal argument for the author State to walk away from the injurious consequences of its act, because no wrongful act in itself had been committed. When primary rules of conduct were not well-developed, it would be difficult to apply secondary rules based on breach of obligation. From that standpoint, she endorsed the Commission's approach of first working out preventive rules, and she appreciated why the Special Rapporteur had

changed the topic to allocation of loss. She agreed with the conclusions contained in paragraphs 150 to 152 and the recommendation that the model proposed should be general and residual in character.

22. With regard to the Special Rapporteur's submissions, she experienced no difficulty with those set out in paragraph 153, subparagraphs (a), (b) and (c), and agreed with subparagraph (d) in principle, but thought that the operator of an activity should first be held liable, since the word "operator" was understood to mean the person who carried out the activity and who was in practice responsible each step of the way. Otherwise, the person who was actually in control of the operation should be held liable. Without that premise, the words "in control" and "in command and control" in subparagraph (e) might give rise to differing interpretations as to who controlled the activities (the ship owner or the ship operator, for instance).

23. As to paragraph 153, subparagraph (e), the test for causal connection should be proximity. With regard to the exceptional cases referred to in the report, the first one might concern joint or several liability—to use the term for convenience—if the harm was caused by more than one source. The second might relate to situations where the operator should be exonerated from liability, for example, *force majeure* or fault of the injured or third party.

24. The phrase "in accordance with their national law and practice", in paragraph 153, subparagraph (f), should be deleted so as to give States more leeway for settlement through negotiations, arbitration or other options.

25. The assumption behind paragraph 153, subparagraph (g), was that limited liability was clearly inadequate for compensation. She wondered whether that was always true with every existing regime on liability. That kind of arrangement depended on the type of activity and the targeted economies.

26. She endorsed paragraph 153, subparagraphs (h) and (i), and, referring to subparagraphs (j) and (k), said that compensation for damage to persons and property was the norm. Damage to environment and natural resources was a more complicated issue. In principle, the distinction drawn between environment under national jurisdiction and control and environment *per se* was also acceptable. It should be noted that in some cases prevention, response measures and restoration measures could be quite different. The restrictions suggested in the report were very useful.

27. Mr. ECONOMIDES, commending the Special Rapporteur for a remarkable report, said that, like Mr. Pellet and Mr. Pambou-Tchivounda, he was somewhat reticent about the use of the word "loss" in the title of the topic and proposed that it be replaced by "compensation", which was employed several times throughout the report, in particular in paragraph 38, where the Special Rapporteur spoke of "a more equitable and expeditious scheme of compensation to the victims of transboundary harm".

28. The assertion in the footnote to paragraph 32 of the report to the effect that "States do have the sovereign right to pursue activities in their own territory even where they cause unavoidable harm to other States ... provided

they pay equitable compensation for the harm done"<sup>2</sup> was not in keeping with international law. On the contrary, States were under an obligation to respect the sovereignty and territory of other States. Paragraph 43 of the report mentioned that the Working Group created at the Commission's forty-eighth session, in 1996, had noted in that connection that the articles must ensure to "each State as much freedom of choice within its territory as is compatible with the rights and interests of other States".<sup>3</sup>

29. The question of liability posed many difficult problems, including that of its legal basis. Yet there was virtual consensus that liability was applicable to hazardous activities and that for such activities, the most suitable regime was that of strict or absolute liability. The relevant regime did not require the commission of a wrongful act or a prior violation of an international obligation, but only harm arising from hazardous activities. The harm alone gave rise to liability and opened the way to compensation. Finally, there was virtual consensus that no customary rules had ever existed imposing the regime of strict liability in international law. Such a regime had been instituted exclusively through international conventions for each particular hazardous activity.

30. A number of conventions and other texts had already adopted strict liability and had been discussed by the Special Rapporteur. Another example was the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, signed by 22 States, including Greece, at the Fifth Ministerial Conference "Environment for Europe" held in Kiev from 21 to 23 May 2003. The Protocol, prepared in Geneva by UNECE, filled a gap, because such damage was not covered by any existing instrument, with the exception of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, whose entry into force was very doubtful. The Protocol sought to avoid the Convention's tactical errors, such as the vague definition of "damage to the environment", its very general scope, which even included non-transboundary damage, and the clause in favour of European law that made the Protocol inapplicable to the major part of the territory of Europe and thus considerably reduced its normative scope.

31. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters fit in well with the international instruments cited by the Special Rapporteur which focused on the civil liability of the author of the damage. It contained mechanisms for the application of strict liability which enabled victims to have access to the courts without losing themselves in the complexities of private international law, and it introduced compulsory insurance arrangements which protected the victims against the insolvency of the author of the damage. The Protocol had a number of innovative elements,

<sup>2</sup> A. Boyle, "Codification of international environmental law and the International Law Commission: injurious consequences revisited", in A. Boyle and D. Freestone, eds., *International Law and Sustainable Development* (Oxford University Press, 1999), p. 78.

<sup>3</sup> *Yearbook ... 1988*, vol. II (Part Two), para. 82; text reproduced in the report of the Working Group of 1996 [*Yearbook ... 1996*, vol. II (Part Two), annex I, p. 112 (para. (4) of the commentary to art. 5)].



which he would refer to in commenting on the Special Rapporteur's submissions.

32. It would be premature to take a position on paragraph 153, subparagraph (a), of the report, but it would be noted that the Protocol allowed the victim of the damage to choose the applicable law: either the domestic law of the party on whose territory the industrial accident took place, or the provisions of the Protocol itself. The possibility open to the victim of "law shopping", an innovation in the area of civil liability in connection with damage caused to the environment, was motivated by the desire to give a maximum of options to the weaker party. As for the second part of the subparagraph, it would be easier and safer to rely from the outset on existing solutions in regard to strict liability, which was more suitable for hazardous activities. If due account was taken of existing precedents, the Commission would complete its mandate properly.

33. Again, it was too soon to express a view on paragraph 153, subparagraph (b), but on subparagraph (c) he agreed that the Commission should restrict the scope of the topic to the one adopted for the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>4</sup> It would be difficult to do otherwise. The threshold for compensation must be such that harm which was more than negligible or minimal had to be taken into account (paras. 31, 39 and 114 of the report).

34. While he endorsed paragraph 153, subparagraphs (d) and (e), it would be preferable in regard to subparagraph (f) to provide for the principle of equitable apportionment in a general form, leaving application of the principle to States or third parties.

35. Paragraph 153, subparagraph (g), was acceptable. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters required the operator's strict liability to be covered up to a given amount by a financial security, which would usually take the form of insurance, a bond or a declaration of self-insurance with regard to State-owned operators.

36. He supported the submissions contained in paragraph 153, subparagraphs (h) and (i). As to compensable damage (subpara. (j)), it should indeed take account of damage to the environment as broadly as possible, something the Protocol already did, since it allowed for measures to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred or, where that was not possible, to introduce the equivalent of those components into the transboundary waters (that being an innovative development), as well as response measures following an industrial accident to prevent, minimize or mitigate the damage.

37. Concerning paragraph 153, subparagraph (k), he noted that the Protocol contained a provision on loss of income. To cut short claims which causally were very remote from transboundary damage, it used another approach, that of legally protected interest. Only persons

with a legally protected interest in any use of the transboundary waters could claim loss of income, which was a reasonable approach.

38. The draft should take the form of an international convention. A binding instrument would render the best service to States and to international law and would be the best addition to the draft articles already prepared on transboundary harm arising out of hazardous activities.

39. The draft should also contain dispute settlement provisions, which would contribute to the development of international law and even facilitate the friendly settlement of disputes by the parties themselves. The Protocol made provision for arbitration before the Permanent Court of Arbitration in accordance with the Court's recently adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.<sup>5</sup> The Rules, mentioned for the first time in a convention, opened the courts to private individuals. But the Protocol also paved the way to the settlement of disputes between States. States parties thus had excellent opportunities to exercise diplomatic protection in cases in which the courts of other States parties improperly applied the provisions of the Protocol to their nationals.

40. Finally, the Commission should include in its future long-term programme of work the subject of protection of the environment of the global commons, which was of great interest to the entire international community.

41. Mr. GALICKI noted that the Special Rapporteur's informative and comprehensive report had highlighted the important work of his predecessors, Mr. Quentin-Baxter and Mr. Barboza, on the basis of which the Commission had rightly concluded that questions concerning the responsibility of States for internationally wrongful acts needed to be dealt with separately from the topic of international liability for injurious consequences arising out of acts not prohibited under international law. Their experience had shown that a comprehensive approach to the topic might not be the best one and that partial, sectoral solutions might be more effective.

42. The report included an interesting presentation of recent models of allocation of loss negotiated and agreed upon in respect of specific regions of the world or a specific sector of harm. However, those models did not really provide sufficient grounds for codification or even progressive development; more analytical work would be needed.

43. The Special Rapporteur identified a number of common features from the models, including the rule that State liability was an exception and that, as was stated in paragraph 153, subparagraph (d), of the report, liability and obligation to compensate should be first placed at the doorstep of the person most in control of the activity at the time the accident or incident occurred. Although States should have some secondary obligations, the picture became so vague that considerable efforts would be required before codification was possible.

44. It was unfortunate that the only clear system of State liability, which was accepted in the case of space activi-

<sup>4</sup> See 2762nd meeting, footnote 7.

<sup>5</sup> The Rules are available at [www.pca-cpa.org](http://www.pca-cpa.org).

ties, was of an exceptional nature and must be treated instead as an example of a “self-contained regime”. The Special Rapporteur examined the background of that regime solely on the basis of the 1972 Convention on International Liability for Damage Caused by Space Objects. Yet the principle of State liability for such damage had already been established in article VII of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and, even earlier, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.<sup>6</sup> The Principles Relevant to the Use of Nuclear Power Sources in Outer Space might also be cited in that context.<sup>7</sup> Those three texts had also introduced a distinction between the international responsibility of States for national activities in outer space and their international liability for damage caused by space objects launched from their territories or facilities. It might be useful to analyse whether and to what extent that approach could affect other models of international liability or whether the space model could be modified in the future under the influence of other sectoral liability models, especially with reference to the possibility of introducing liable subjects other than States.

45. The Special Rapporteur rightly argued that the scope of the topic should be limited to the same activities as those covered by the 2001 draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. Such continuity and consistency would make for greater flexibility in deciding whether to have a separate document or an addition to the existing articles on prevention.

46. While it was too early to decide definitively on whether the topic was ready for codification or progressive development, it would still be useful to draft a recommendation or a set of guidelines to assist States in their practice. The Commission should continue its work on producing its own model of allocation of loss, which should be both general and residual in character, leaving States sufficient flexibility to develop schemes of liability to suit their particular needs.

47. The submissions in paragraph 153 were largely acceptable, although some required further clarification. For example, with regard to subparagraph (e), it was not clear what criteria should be used for the proposed “test of reasonableness” in the case of liability of the person in command and control of the hazardous activity, given the variety of activities to which such a rule might apply.

48. He agreed on the need to follow, as far as possible, the approach used in the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. The same threshold of significant harm should be applied as in the case of prevention and certain kinds of harm; for instance, harm to the global commons should be excluded.

49. He was convinced that the Commission should be able to develop the Special Rapporteur’s proposals into

basic general rules. An appropriate first step would be to reconvene the working group on the topic.

50. Mr. YAMADA commended the Special Rapporteur for an excellent report which provided a sound foundation for future work.

51. At an earlier meeting, Ms. Escameia had asked why the Commission had taken so long to address the issue and failed to produce tangible results. It had always been his view that the topic of international liability was relevant and met the current needs of Governments. But until 1996, the discussions in the Commission had run around in circles, despite the efforts of its members. It had been very difficult to conceptualize the topic, which was very broad. The breakthrough had come when the Commission decided to proceed step by step, an approach Mr. Tomuschat had been instrumental in devising.

52. Two categories of activity had been identified: those having a risk of causing significant transboundary harm, and those which in fact caused transboundary harm if accumulated. It had been decided to deal first with activities having a risk of causing significant transboundary harm, namely, hazardous activities. It had also been decided that the aspects of prevention and liability were distinct, though related, and that the prevention aspect should be tackled first. Within the short five-year period of the last quinquennium, the Commission had been able to complete the two readings of the draft articles on prevention of such activities, under the able guidance of the present Special Rapporteur, and had reported on them to the General Assembly. The approach adopted had proved to be correct.

53. The Commission was now in the second stage of its step-by-step approach. What it should do was to build upon the first stage. As the Special Rapporteur rightly pointed out, the scope of the activities must be exactly the same as that for prevention. To change the scope by altering the level of the threshold, by expanding it to include activities of creeping pollution or to include global commons would bring the Commission back to square one, and to the situation in which it had found itself before 1996.

54. The case it was now dealing with was the one in which, in spite of fulfilment of the duties of prevention to minimize the risk, significant transboundary harm had been caused by hazardous activities. In most cases such activities were conducted by non-governmental operators. That gave rise to the questions of liability of operators on the one hand, and the liability of the States that had authorized such hazardous activities on the other. The majority of operators would be limited liability corporations. Thus, the questions of compulsory insurance schemes and the establishment of compensation funds would arise. As those activities were not unlawful and were in many cases essential for the advancement of the welfare of the international community, the other parties, including those who suffered direct injury, must also bear some of the burden. Accordingly, the Special Rapporteur’s decision to focus on the allocation of loss was the most appropriate approach.

55. Any failure to abide by the duties of prevention—primary rules formulated in the draft articles on preven-

<sup>6</sup> General Assembly resolution 1962 (XVIII) of 13 December 1963.

<sup>7</sup> General Assembly resolution 47/68 of 14 December 1992.

tion—entailed the responsibility of the State. In that context, he was rather disappointed that the General Assembly had not indicated its position on the draft articles on prevention. A firm position on prevention was essential if the Commission was to complete its work on the liability topic.

56. Some comments were called for on the Special Rapporteur's extremely useful analysis of the various sectoral and regional regimes. First, the Commission might also need to study the classical case of civil aviation, which also entailed hazardous activities. Since the Convention for the Unification of Certain Rules relating to International Carriage by Air, a series of treaty arrangements had been put in place. Second, as the Special Rapporteur had noted, the outer space regime was an exceptional case. At the time of its negotiation, it had been assumed that space activities were generally conducted by State agencies for public service purposes. Accordingly, State liability, strict liability and unlimited liability had been adopted. Now that private corporations also participated in space activities for commercial purposes, the outer space regime might need to be reconsidered.

57. All those regimes were set up as a result of new legislation, through negotiations by governments. Each regime had its own characteristics, and most of them were self-contained—a typical case of the fragmentation of international law. While consideration was given to alleviating the burden on the victims by establishing strict liability or transferring the burden of proof to operators, Governments tended to try to limit their liability, as Mr. Brownlie had pointed out. One such example was nuclear damage and liability under the Convention on Third-Party Liability in the Field of Nuclear Energy and the Convention on Supplementary Compensation for Nuclear Damage. Japan had not acceded to those conventions because Japanese domestic law provided much more comprehensive relief to the injured parties. In that connection, he strongly endorsed the Special Rapporteur's submission in paragraph 153, subparagraph (a), of his report that any regime that might be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. He had no problem with the Special Rapporteur's other submissions in paragraph 153, and he also endorsed the Special Rapporteur's approach based on the recommendations of the Working Group established at the Commission's fifty-fourth session, in 2002.<sup>8</sup>

58. The Commission's task was thus to examine whether it would be possible to extract generally applicable rules from those special regimes. Aware as he was of the extraordinary difficulty of that task, he nonetheless looked forward to receiving draft articles from the Special Rapporteur at the Commission's next session.

59. Mr. BROWNIE said that, doubtless through inadvertence, Mr. Koskeniemi had totally misrepresented his position, which was not a negative one. As a member of the Commission of seven years' standing, he had participated in the work of the 1997 Working Group and in the execution of the step-by-step approach, and had played a cautious but constructive role in the development of the

work. It was not his position that there was no subject. His main concern, whether as an academic or as a practitioner, was that the Commission should not inadvertently construct a set of rules that would then be widely misunderstood by the outside world—by people in the Sixth Committee and people in government. The result would be a set of principles that were not understood in relation to other existing important areas of international law. State responsibility was not simply a chapter in a book: it was the very cement binding together international law. And it would be particularly ironic if the Commission were to damage that bond, as it had only recently completed a vast enterprise devoted to the codification and clarification of the principles of State responsibility. It was crucially important to isolate the actual topic to be dealt with, and having listened to other members' contributions, he was, with all due respect, not at all assured that that had yet been achieved.

60. There were two major policy problems. The first was to identify the nature of the subject, which, in his present view, was precisely to deal with those situations in which there was no responsibility according to existing general principles of State responsibility but in which there had been catastrophic damage to innocent parties. It was a form of social engineering that was very difficult—but not impossible—to perform in a codification mode. The Special Rapporteur had already pioneered the step-by-step approach, so he was not particularly dismayed by the task ahead. But that task must be undertaken with care; and one problem was that, when there had been no determination of responsibility, quantification was difficult.

61. The second policy problem was the social cost, to which Ms. Xue and Mr. Koskeniemi had referred. The problem was that social cost was differentiated from sector to sector. The issues of social cost, the process of trading off the cost of an adequate compensation regime against the reduction of a certain type of activity within the State concerned, tended, quite rightly, to be solved on a sectoral basis. The Commission's enterprise, on the other hand, was to produce general principles. That seemed to him to present quite a considerable problem.

62. Mr. Sreenivasa RAO (Special Rapporteur) thanked those members who had contributed to the debate thus far. Many ideas had been touched upon and some clarifications requested. On the issue of the scope and legal basis of the topic, some old bones of contention had again resurfaced. While he could see the case for revisiting those arguments, he was not enthusiastic about the prospect of the Commission going over them yet again if there was no realistic prospect of any final solution. It seemed to him that, after so many years of debate, no more time should be spent on mere procedural issues, or on reopening issues which might conceivably admit of some solution.

63. In that connection, he reminded members of the suggestion, endorsed by the Working Group in 2002, to focus on a model of allocation of loss keeping in mind the interests of the innocent victim who suffered damage even after all obligations of prevention had been met. On the definition of "innocent victim", he wished to make it clear that it was not to be expanded to include the environment, as some had suggested. It referred essentially to

<sup>8</sup> See 2763rd meeting, footnote 2.



those persons who were not directly involved in the conduct of hazardous activities.

64. The suggested focus on allocation of loss would obviate the need to go back to the debate on the relevant basis for compensation. State responsibility as a legal basis was, however, not to be prejudiced. Attribution of private acts to a State was acknowledged to be a truly difficult legal exercise and one that could not assure the innocent victims compensation in all circumstances. It was therefore useful to avoid designating the topic in terms of “reparation”, which might suggest a return to the topic of State responsibility. Equally, reference to the concept of compensation was to be avoided, so as not to link the topic too closely to the topic of civil liability, which was better addressed in the domestic legal context. Further, it would be hard to attempt to establish a comprehensive legal regime reconciling different elements of a civil liability regime, since that would involve many national jurisdictions and different legal systems. Moreover, it might also be helpful to leave the innocent victim some scope for forum shopping. However, it was also important to prevent claims for compensation for the same injury from being pursued simultaneously in different forums.

65. Members would recall that the Commission had in the past discussed extending the scope of the topic to the global commons, but that it had proved impossible to reach agreement on the inclusion of that issue because it was difficult, first, to identify the geographical scope, and second, to determine the quantum of damages in the absence of any impact on persons or property.

66. There were also other issues, such as *locus standi*. But to the extent that environment within a national jurisdiction could not be separated from environment outside that jurisdiction, the problem that remained uncovered was that much less significant. In any case, the issue could be revisited once the Commission had finalized the model of allocation of loss covering the same scope of activities as had been covered by the draft articles on prevention. Allocation of loss had the advantage of not involving liability or State responsibility, making it possible for the Commission to mix different elements, drawing on the outcomes of various international negotiations until a universally acceptable solution was found.

67. Some members had questioned whether the Commission was suited to engaging in a task that was best left to States to negotiate. Rejecting that line of argument, he noted that it had not prevented the Commission from working on draft articles on the law of the sea and the law of treaties which had later become the subject of negotiations among States. Indeed, the Commission had a duty to complete a mandate given to it by the representatives of States. He was concerned, however, to ensure that the exercise undertaken by the Commission did not drag on interminably. While he offered his assistance, as Special Rapporteur, to the Commission in discharging its mandate, it was up to members themselves to decide when it would succeed in discharging that mandate.

68. The CHAIR said that the Commission had received a mandate from the Sixth Committee, which had certain expectations of it. He trusted that it would not take another 20 years to complete the topic. It seemed to him that

the approach taken in 2002 and 2003 was more realistic than in the past and that the Commission was considerably closer to a final draft that would fulfil the Sixth Committee’s expectations. The Commission must achieve its objective by specifying certain principles that could be deduced from its past work and from new developments. Countries drew up agreements on the basis of principles of general international law, and there was a lot of substance on which the Commission could work constructively and realistically to clarify the topic. Admittedly the task was a difficult one, but the Commission could not give up when it had been entrusted with the progressive development of international law. The Special Rapporteur’s comments were therefore very timely.

69. Mr. KATEKA said that he sympathized with the Special Rapporteur and appreciated his worthwhile efforts. The Special Rapporteur should bear in mind that members of the Commission had also demolished his predecessors’ reports. The Commission had to make sure its proposals were up to standard. The topic posed a number of terminological problems, such as the definition of “innocent victim”, whether to replace “allocation of loss” by “liability and compensation” or how to define the “global commons”. He believed that a global commons did exist and hoped that, once the Commission had defined the necessary legal principles, a residual regime would be applied to it. The Special Rapporteur should not consider abandoning his important task, no matter how thankless.

70. Mr. PAMBOU-TCHIVOUNDA noted that when Luc Ferry, France’s embattled Minister for Education, had said recently that he would gladly resign his post, President Jacques Chirac had had to express his personal support for Mr. Ferry. The Commission must do the same for the Special Rapporteur. Even the pessimists among its members eagerly awaited his next report, which they trusted would contain proposals guided by the suggestions they had made at the present session. No one had ever doubted the Special Rapporteur’s abilities.

71. He wished to suggest two further avenues that the Special Rapporteur might explore. First, he could draw on the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>9</sup> to determine how to approach the question of compensation and what form it should take. The concept of “significant harm” could also be developed. With regard to modalities, compensation would have to be compartmentalized. The Special Rapporteur could help the Commission draw conclusions on those questions. A second avenue would be transboundary harm as it related to the global commons. The latter evoked the idea of cooperation, since more than one State would have to respond to the harm. The Commission might also draw on the idea of cooperation in discussing the modalities of compensation. Thus far, it had adopted a somewhat individualistic interpretation of who should pay for transboundary harm. It might be preferable to adopt a more open interpretation and advocate a shared, community approach to liability for harm.

<sup>9</sup> See 2751st meeting, footnote 3.

72. Again, the Commission might approach UNEP for help in integrating the idea of shared responsibility and compensation in its future work. He wished to reiterate his encouragement to the Special Rapporteur and trusted that his next report would contain some new ideas for the Commission to consider.

73. Mr. MANSFIELD said that the Commission could and must deal with the topic within five years. The Working Group's excellent work in 2002 had provided a solid basis for the Special Rapporteur's first report. It was precisely because of its earlier decisions on State responsibility that the Commission was having to deal with the topic at all. At present, in a situation where lawful activities caused catastrophic losses even though the State had fulfilled its duty of prevention, the relevant countries were under no obligation to do anything. The Sixth Committee and Governments were aware that that situation reflected a widening gap in international law. The Commission did not need to complicate matters so much. It might have to develop general principles based on existing regimes, or its task might be far easier than that. All it had to do was stipulate that loss could not fall entirely on the innocent victim and that countries must at least get together to work out an effective remedy and allocate loss. Failure to do so would entail responsibility. He was confident that, with the Special Rapporteur's guidance, the Commission could complete its work on the topic within five years.

74. Mr. ROSENSTOCK recalled that the United Nations Conference on the Human Environment had adopted a principle that was expected to provide a basis for legal responsibility in such matters.<sup>10</sup> The principle had never been put into effect, however. The same would doubtless happen with the three instruments adopted at the Fifth Ministerial Conference "Environment for Europe".<sup>11</sup> The Commission was in danger of drafting yet another instrument that might be supported by a handful of States but was unlikely to obtain universal acceptance.

75. Mr. Sreenivasa RAO (Special Rapporteur) expressed appreciation for members' words of encouragement and pledged to continue his task, although its success was in the Commission's hands. With all due deference to Mr. Rosenstock's vast experience, he felt that if the Commission did only what it felt Member States would fully accept, it would end up doing nothing. It could not be faulted if countries failed to implement and recognize the articles it drafted. As long as it did its work as mandated by the Sixth Committee, it was up to States whether or not they applied the resulting instruments. Even so, many courts used the various instruments developed by the Commission as a basis for their judgements. The Commission

should not compromise, therefore, simply because States were reluctant to apply what it had developed.

*The meeting rose at 1.05 p.m.*

## 2766th MEETING

*Tuesday, 3 June 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### **International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. RODRÍGUEZ CEDEÑO, commenting on the concerns to which the topic had given rise in the Commission and in the Sixth Committee, said that, despite the doubts expressed and the problems involved, the topic could be the subject of codification and progressive development, and the Commission should deal with it as such. The rules relating to liability arising out of activities resulting from technological advances were not clearly established in international law, although international instruments of a sectoral nature did embody rules on international liability, prevention, civil liability, reparation and compensation, and important principles had been established on strict liability, the allocation of loss, the limited liability of the owner or the operator and damage, not to mention the rules stated in the very recent Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Despite the gaps in international law and the national law of States with regard to the allo-

<sup>10</sup> See the Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

<sup>11</sup> The Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context; the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters; and the Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

cation of loss and the prompt, full and adequate compensation of innocent victims, doctrine, practice and jurisprudence contained enough elements for the codification and progressive development of general principles governing allocation of loss and compensation. As had been stated in the Sixth Committee, that was also justified by the fact that the consideration of the topic was the logical extension of the Commission's work on prevention and State responsibility.

2. The possibility of formulating relevant rules of international law applicable directly or indirectly to natural and legal persons had been considered on other occasions. In his view, the purpose of the Commission's work must be not only to encourage States to adopt national law rules allowing to some extent for the proper allocation of loss and the protection of innocent victims, but also to establish general principles on the basis of which to formulate rules applicable to States and operators. Even though an overly "human rightist" approach should not be adopted, the main question was the protection of innocent victims from transboundary harm arising out of a hazardous activity. On the basis of a minimum standard of equity, victims not benefiting from the activity must be excluded from the allocation of loss. Although, as the Special Rapporteur indicated in paragraphs 13 and 14 of his report (A/CN.4/531), the Commission had already adopted "the principle that the victim of harm should not be left to bear the entire loss", which meant that compensation did not necessarily have to be full and complete, everything must be done to ensure that the innocent victim was compensated promptly and fully, subject to conditions and exceptions related, *inter alia*, to the measures he might have taken to mitigate loss.

3. The obligation to provide compensation for transboundary harm arising out of a hazardous activity might give rise to liability on the part of the State when the latter had not adopted the necessary measures to prevent such harm. The liability might be shared, but in all cases it must lead to the prompt and full compensation of the innocent victim. The regime for allocation of loss and compensation might provide that the company engaging in the activity in question had to compensate the victim and repair the environmental damage, even when no wrongful act had been committed. The liability of the State would be residual and would come into play when the victim had not been promptly, fully and completely compensated by the operator or the operator's insurance.

4. There could be practically no question of an obligation to compensate for harm arising out of lawful but hazardous activities carried out by a State which had fulfilled its obligations of prevention as a principle of customary international law, even if that principle could be derived from some of the instruments referred to in the report of the Special Rapporteur.

5. In order to formulate rules that would be acceptable to all, limits must be set, on the one hand, on scope, which must be hazardous activities or even ultrahazardous activities exclusively, and, on the other, on the level of harm in question, whence the concept of "significant harm". This concept was defined by the Special Rapporteur in paragraphs 31, 33, 34 and 39 of his report, reflected the

practice of States and was used in various international treaties.

6. Another question warranting careful consideration was that of rules which were different from the rules of private international law and which guaranteed victims access to national courts. Victims must be able to apply indiscriminately, at their convenience, to the courts of the State where the activity had been carried out or to those of the State in whose territory the damage had occurred in order to obtain compensation. That was how the ruling of the European Court of Justice in the *Mines de Potasse d'Alsace* case had interpreted article 5, paragraph 3, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

7. The establishment of appropriate rules relating to allocation of loss and compensation had a preventive effect because it encouraged companies to adopt more effective safety measures to prevent damage but did not hamper the activities they carried out with a view to the development of new technologies.

8. He generally agreed with the conclusions and proposals the Special Rapporteur submitted in paragraphs 150 to 153 of the report. Paragraph 153, subparagraph (c), stressed the need for harmony between the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, in 2001,<sup>2</sup> and the draft articles on allocation of loss and compensation. That was logical and therefore acceptable. The same was true of the statement in paragraph 153, subparagraph (d), concerning the liability of the State and that of the person in command and control of the activity, as well as the analysis of joint and several liability. In paragraph 153, subparagraph (g), emphasis had rightly been placed on additional funding mechanisms, which must come primarily from the operators concerned, as provided in the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, referred to in paragraphs 66 and 67 of the report. Paragraph 153, subparagraph (i), stressed that each State should ensure that domestic remedies were available in order to guarantee victims equitable and expeditious compensation. Damage to the environment and to public areas in general, even if only to areas within the jurisdiction of a State, should also be taken into account. Consideration should be given to the possibility of the rehabilitation of the environment and of natural resources that had been damaged or other similar formulations. The case of damage to the global commons must nevertheless not be ruled out completely, even though that question was not dealt with in the draft articles on prevention—something that had, incidentally, given rise to criticism by the Sixth Committee and by several Governments. In any event, it was still too early to adopt a final position on the outcome of the Commission's work.

9. Mr. CHEE said that the allocation of loss amounted to the allocation of damage to persons, property and the environment. As to the scope of the work to be undertaken by the Special Rapporteur, he endorsed the position the Special Rapporteur had adopted on the three criteria relating to the definition of "transboundary damages" and

<sup>2</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97.



the four recommendations made in paragraphs 37 and 38 of the report. The definition of damage and compensation was a particularly important and difficult question involving both economic loss and moral damage. As far as moral damage was concerned, reference might be made to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>3</sup>

10. In chapter III of the report (Summation and submissions for consideration), the Special Rapporteur concluded that the models for liability and compensation schemes he had surveyed made it clear that “States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss”, but he was in favour of the idea expressed by the Special Rapporteur in paragraph 153 of the report that the model of allocation of loss should be both “general and residuary in character”. He agreed with the argument put forward in paragraph 153, subparagraph (a), that the innocent victim should be given the possibility of obtaining compensation through civil liability and that the “polluter pays” principle available in the national law of many States should be applicable. He also agreed with the suggestions made in subparagraphs (b), (c), (d) and (e). Subparagraph (f) referred to joint and several liability. In such a case, could liability be equitably apportioned? That principle would be difficult to apply in practice. He therefore supported the proposal in the last sentence that the option of equitable apportionment could be left to States to decide in accordance with their national law and practice.

11. The idea stated in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms was commendable, but difficult to realize: Would a State be willing to make an additional contribution? However, he was entirely in favour of the idea stated in subparagraph (h) that a State should assume responsibility for designing suitable schemes to solve problems of transboundary harm. In that connection, he referred to principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>4</sup> which provided that “States have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. Although the Stockholm Declaration was not legally binding, it was as much a source of law as the Universal Declaration of Human Rights. The idea was reaffirmed in principle 13 of the Rio Declaration on Environment and Development (Rio Declaration),<sup>5</sup> which had in turn been confirmed by the World Summit on Sustainable Development held in Johannesburg, South Africa, from 26 August to 4 September 2002. The principle that States had an obligation to ensure that transboundary air pollution did not cause any

harm to other States had also been affirmed in the *Trail Smelter* case and in the advisory opinion handed down by ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case. Those international instruments and decisions thus imposed an obligation on States to ensure that they did not cause any environmental harm to other States. That obligation could be characterized as being *de lege lata*. He therefore agreed with the Special Rapporteur that States must take measures to prevent transboundary harm caused by atmospheric pollution.

12. With regard to paragraph 153, subparagraph (i), he pointed out that, if a State had an obligation under international law to prevent harm to persons, property and the environment, it would be logical that a State should also have a duty to introduce means of redress for injuries sustained as a result of an internationally wrongful act of a State or the failure of a State to fulfil its international obligations. In that connection, it should be noted that a denial of the right of an injured person to access to the courts to obtain redress for environmental harm arising out of transboundary air pollution would be contrary to article 8 of the Universal Declaration of Human Rights, which provided that every person had a right to an effective remedy by the competent national tribunals, and to article 3, which guaranteed everyone the right to life, liberty and security of person. The right of access to the national courts of the wrong-doing State should therefore be guaranteed to individuals seeking compensation for damage caused by transboundary atmospheric pollution. He asked what was meant by the term “evolving international standards”, as used in subparagraph (i). He also endorsed subparagraphs (j) and (k), which reflected current State practice.

13. As to the outcome of the Commission’s work on liability, he agreed with the Special Rapporteur that it should take the form of a protocol to the instrument on prevention. In concluding, he recalled that the current work had been undertaken in accordance with a General Assembly resolution and the provisions of the Rio Declaration.

14. Mr. KOLODKIN said that the problem was complex because it affected the interests of persons, corporations and States, and those interests were certainly not always the same. Points of view on the question of liability for harm arising out of activities not prohibited by international law continued to differ. In 1985 Akehurst stated that there were few actual cases of liability for the consequences of activities not prohibited by international law, and those cases were not related to the environment.<sup>6</sup> More recently, in 2001, in the monograph *Liability and Environment*,<sup>7</sup> Bergkamp expressed doubt about the applicability of the concept of environmental liability.

15. States, groups of States and regions with different levels of development and hence different priorities could not view the concept of development in the same way, and that explained why the positions of States on that question differed. A great deal of rule-making activity was going on, particularly in Europe.

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> See 2765th meeting, footnote 10.

<sup>5</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex I.

<sup>6</sup> See M. B. Akehurst, “International liability for injurious consequences arising out of acts not prohibited by international law”, *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3–16.

<sup>7</sup> See L. Bergkamp, *Liability and Environment* (The Hague, Kluwer, 2001).

16. But national legislation was not uniform. Within States, approaches could differ according to the types of activities in question. For example, in the Russian Federation, the 1999 Air Protection Act provided for liability in the event of wrong-doing, whereas the 2001 Use of Nuclear Power Act provided for the no-fault liability of the operator in the event of loss or damage caused by radiation.

17. The report also contained an analysis of many sectoral agreements establishing different systems of liability and compensation. Because there were so many different regimes, a regime of liability or at least civil liability for hazardous activities could not be formulated at the present time. There was the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which not only had not yet entered into force, but was not all-embracing in nature. In particular, it did not apply to harm caused by nuclear substances or the transport of dangerous goods.

18. It was necessary to point out that treaties concluded in the 1990s on issues of responsibility were mostly not ratified by States.

19. The diversity of the approaches adopted by States was illustrated by the comments received from Spain and the United Kingdom. Spain was very much in favour of the work being carried out and even considered the draft to be too restrictive, stating that it would be possible to develop a more ambitious treaty regime that would encompass liability for harm to the environment, as well as to areas beyond the territory of a State, whereas the United Kingdom had reservations about the success of the Commission's work in that regard and the possibility of harmonizing the positions of States. The truth probably lay somewhere between the two.

20. Despite their fragmentary nature, treaty regimes reflected certain trends and contained some common elements, as the Special Rapporteur pointed out in his report. For example, they attached great importance to the "polluter pays" principle, which emphasized the liability of the operator.

21. In his own view, the framework of prevention that had been defined continued to be valid, and the Commission should restrict the scope of the topic to the consideration of the types of activities to which the articles on prevention applied and, for example, limit the threshold for the implementation of the articles on compensation. In other words, the harm in question must be significant, since it was caused by an activity not prohibited by international law. He also agreed with the comment that the regime the Commission was proposing should not relate to activities under special regimes, which were governed by *lex specialis* and should be of a general nature.

22. He was of the opinion that, at the current stage, the Commission's work should not relate to harm originating beyond the limits of the territorial jurisdiction of States. There was a great deal of vagueness in that regard. Who, for example, could be regarded as an innocent victim if reference was being made to the idea of the common heritage of mankind? Who would determine the extent

of damage? Who would be the subject of the request for compensation?

23. With regard to allocation of loss, the Commission should focus on a single model. One could argue about the relationship between absolute and objective liability or cases genuinely involving liability for injurious consequences arising out of activities not prohibited by international law, as opposed to responsibility for acts contrary to international law. There was nevertheless a consensus on certain fundamental principles, which were stated in paragraphs 43 to 45 of the report and which might serve as a basis for the Commission's work.

24. The Special Rapporteur's approach, which was to avoid the question of the form of liability and to deal directly with a regime of allocation of loss, was not very clear. If such a regime was based directly on the "polluter pays" principle and the purpose was to provide compensation for loss from harm arising out of activities not prohibited by international law, what was the legitimate basis for the residual liability of the State that was intended to compensate for loss not assumed by the polluter, namely the operator? If the State was not the polluter and had not broken any rule, why should it pay? The State's obligation to earmark funds for that purpose, as provided for in paragraph 153, subparagraph (h), of the report, would be an acceptable solution, as long as the basis for that obligation was known. If the State had to assume that residual liability, it must also be asked whether it must do so in every case or only in certain specific situations.

25. Since the Special Rapporteur proposed, in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms, should it be assumed that the liability of the State must always be limited? If so, on the basis of which criteria? He himself believed that liability was limited in the case of objective liability, and that was reasonable because the purpose was to compensate for harm arising out of an activity that was not unlawful.

26. In the case of liability of the guilty party, a reasonable question was whether the harm must be compensated in full. For example, the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters did not make the limitation of compensation provided for in the event of objective liability applicable to the case of liability for the operator's fault. It must then be asked whether the residual liability of the State was justified in the event of the operator's liability. All in all, his view was that the system of allocation of loss caused by activities not prohibited by international law was closely linked to the forms of liability.

27. He shared the Special Rapporteur's view that liability must be attributed not to the operator but to the person who was most in command and control of the activity at the time when the harm had occurred, but it was possible to define the operator as the person who had exercised such control, thereby solving the problem. He also supported the Special Rapporteur's proposal that the Commission should encourage States to conclude international agreements and provide in their national legal systems for intervention and compensation. It was to be expected that

the part of the thesis relating to encouragement of states to make agreements would be further developed. In this respect the provisions of articles 21 and 22 of the draft articles prepared by the Working Group of the Commission at its forty-eighth session, in 1996, and the commentaries thereto were of great importance.<sup>8</sup>

28. He also considered that damage to the environment as such could not give rise to compensation, as indicated in the first sentence of paragraph 153, subparagraph (k), but the idea the Special Rapporteur had put forward in the second sentence, namely, that “loss of profits and tourism on account of environmental damage are not likely to get compensated”, should be given more thought because it did not relate directly to the question of damage to the environment *per se* and because it had not been backed up by any argument in the report.

29. The Commission must continue its work on the topic, but it was too early to decide what form the final product of its work should take.

30. Mr. MELESCANU said that the topic was a difficult one because the practice of States in respect of liability was nearly nonexistent and the conventions adopted related to very specific types of activities, and because the different theoretical and doctrinal approaches to the question went from the outright denial that the topic existed to recognition of the existence of objective liability based on risk. He personally considered that the Commission should formulate rules, without which the regime of international liability would be incomplete. That was all the more important because in the future there would probably be more transboundary harm arising out of activities not prohibited by international law than harm arising out of activities that could be characterized as conventional.

31. The question dealt with in the report was linked to the work the Commission had already done on the prevention of transboundary harm. There was a relationship between prevention and the allocation of loss from hazardous activities. The Commission must therefore carefully consider that relationship, which was the basis for compensation, because it might otherwise end up in a grey area that involved social welfare, not law. The problem was that of the liability of the State in a situation where harm, and particularly transboundary harm, occurred despite its diligence and the adoption of measures of prevention in accordance with its international obligations. The Commission must thus consider the question whether the objective liability of the State for risk actually existed in public international law. If so, such liability would be exceptional because it would be based not on a wrongful act but on a principle of solidarity or of the protection of innocent persons, however controversial such a concept might be.

32. The approach which the Commission had adopted and which was pragmatic in the sense that it was intended to dissociate the question of objective liability from that of the allocation of loss would have to be provisional because of the problem of drafting a regime that was generally acceptable to all members.

33. The second question that the Commission had to consider related to the link between national regimes and treaty provisions on liability for risk and international law. A comparative study of national legislation showed that in civil-law countries the existence of objective liability was recognized, as in the case of the liability of building owners for damage caused by their property. In most of those countries, such provisions of the civil code, which came from Roman law, were regarded as the basis for objective liability for damage caused by the operators of nuclear power stations or by polluters, and in many of those countries no-fault liability had even been made applicable to administrative law. A study of international conventions on transboundary harm showed that they covered a variety of fields, such as damage resulting from oil pollution or the transport of dangerous substances, the disposal of hazardous wastes and the exploitation and exploration of outer space. In view of that diversity, the Commission's task was not so much to find a common denominator in such practice in order to codify it, but to establish general principles which could be applied and would serve as a model that States could follow, since in many cases national legislation was not enough to cover transboundary harm. In that connection, he believed that allocation of loss should be based not on a particular idea of the protection of human rights, as Mr. Koskeniemi had suggested, but on the idea of liability for risk, which was recognized in many civil-law countries. Those principles, which must be of a general and residual nature, as the Special Rapporteur had stressed, were already outlined in paragraph 153, subparagraphs (b) to (h) and (k), of the report. As to the idea referred to in paragraph 153, subparagraph (g), of supplementing limited liability by additional funding mechanisms, he was of the opinion that liability must be limited to a certain amount, because otherwise the burden to be borne by operators and States might be undefined and might hamper economic activities that were very important for the countries concerned.

34. To these principles which he approved of, he proposed to add others. First, the relevant regulations should take into account the double imperative of protecting innocent victims while not creating overly heavy burdens for operators. One should also establish the principle, mentioned by the Special Rapporteur in paragraph 44 of his report, according to which full restitution might not be possible in every case. This idea, which might be covered by a special rule, could also be combined with that of a minimum threshold, namely that of significant damage, and a maximum threshold such as was provided for in insurance contracts and in the complementary compensation regimes of States.

35. The Commission could also explicitly recommend that operators take out insurance to cover the risks. In reality, such insurance should be obligatory for risky activities that might cause transboundary damage. Otherwise it would in practice be difficult to ask operators to be responsible for such accidents. The establishment of a regime covering damages was absolutely necessary in order to enable insurance companies to set a ceiling for damages, for, if responsibility was not capped, one could not require operators to enter into insurance contracts, since the damages caused by accidents such as that in Chernobyl were not really insurable.

<sup>8</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 143–146.



36. With regard to the scope of the topic, he agreed with the Special Rapporteur that the principles and rules to be established should be linked to the draft articles on prevention, since the two questions were related. He was also in favour of the idea of establishing a drafting group to start formulating general and residual rules on allocation of loss in case of transboundary harm arising out of hazardous activities, based on the recommendations contained in paragraph 153 of the report.

37. Mr. KOSKENNIEMI said that he was concerned about the approach to the topic. At earlier meetings, he had taken the side of the victims of harm and suggested that rules or principles should be drafted from the viewpoint of those victims. Mr. Melescanu had probably been right to say that such an approach was not balanced, since the Commission had to find a happy medium between protecting the interests of victims and carrying out activities for the benefit of society as a whole, but it was specifically that idea of balance that should be called into question, because it could lead only to a dead end in terms of codification, since a balance between differing interests could not be struck without taking account of circumstances. Since circumstances could not be known in advance, such an approach amounted to remaining silent. A rule that only referred to “balancing of interests” in fact transferred decision-making powers to those interests that were well represented in the institutions whose task such “balancing” was. In fact, the victim’s standpoint was rarely represented in the relevant public or private institutions. A “balancing” rule would, in fact, work in favour of powerful commercial or industrial interests. Here the Commission was called upon to take a stand, and he suggested that such a stand should openly favour the interests of victims.

38. Mr. MOMTAZ said that he sympathized with the Special Rapporteur, who had, in a way, been a victim of his own intellectual honesty because he had openly recognized—for example, in paragraphs 2 and 3 of his report—that global and comprehensive liability regimes had failed to attract States, that the attempt to gain compensation for damage through the instrumentality of civil wrongs or the tort law of liability had its limitations, that State liability and strict liability were not widely supported at the international level, that case law on the subject was scant and that the role of customary international law in this respect was equally modest. Those statements, which explained why the Commission had not made any further progress, must not in any way serve as arguments for abandoning the topic. At most, it could be concluded that the task entrusted to the Special Rapporteur was very difficult and sensitive and that a great deal of ingenuity would be required. The excellent survey in the report of what were, of course, sectoral and regional treaties prepared thus far by States clearly showed that the international community was concerned about the need not to abandon the innocent victims of transboundary harm arising out of hazardous activities to their fate.

39. It had rightly been maintained that such harm was often the result of the fact that the State on whose territory the incident had occurred had not fulfilled its obligation of prevention. In such a case, harm would be compensated on the basis of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission

at its fifty-third session. It was now well established that the implementation of the best methods of prevention did not rule out the risk of accidents, and that harm could be caused even in the absence of breaches of international obligations. It would be interesting to consider the extent to which that could apply to the ecological disasters that had taken place in different parts of the world in recent years.

40. In any event, there was no doubt about the relevance and feasibility of the topic and the Special Rapporteur’s competence. The study was based on the assumption that the State in whose territory the harm had occurred had fulfilled its obligation of prevention. In such a case, the operator must be primarily liable and the State might have residual liability, but in both cases such liability could only be limited. Most of the treaty regimes that had been drafted to date were based on the civil liability of the operator and the “polluter pays” principle, which could be regarded as a general principle of international law. It was obvious that, where several operators were involved, joint and several liability could always be claimed.

41. When the operator could not be identified or was not solvent, the basis for the residual liability of the State concerned might be the principle that States were responsible for the activities carried out in their territory. States would then be entitled to require multinationals which carried out hazardous activities in their territory to inform them of the risks that such activities might involve. States whose national enterprises carried out such activities abroad should, in turn, ensure that such operations were carried out in accordance with international safety standards. That approach was entirely in keeping with the principle of the equitable allocation of loss among subjects of law which, in one way or another, benefited from the activities in question. The result would probably be that such activities would be more closely supervised and the risks would be reduced accordingly. A solution based on solidarity, which would draw inspiration from the approach of the law of cooperation, not that of coexistence, might lead more easily to a result. The question would thus be one of establishing a kind of collective insurance for innocent victims, something which the Special Rapporteur described as “joint and several liability”.

42. In any event, such liability could not be absolute, and harm would have to reach a given threshold in order to bring it into play. In that connection, the threshold of “significant harm” proposed by the Special Rapporteur was entirely acceptable and would cover environmental damage in the case where tourist activities were the key sector of a country’s economy and the damage seriously disrupted a tourist season.

43. There should be a savings clause which would rule out harm resulting from armed conflict and natural disasters.

44. It would be better to wait and see how the work on the topic progressed before taking a decision on the form the study should take.

45. Mr. DAOUDI, thanking the Special Rapporteur and congratulating him on his first report, which was clear and complete, said that it was too late to question whether the topic under consideration could be codified, since the

proposal the Commission had made in 2002<sup>9</sup> had been endorsed by the Sixth Committee and by the General Assembly.<sup>10</sup>

46. He agreed with the criticism levelled by some members concerning the restrictive criteria which had been used by the preceding Special Rapporteurs to define transboundary harm, and which ruled out harm to the global commons. He did, however, support the recommendation the Special Rapporteur had made in paragraph 39 of his report for the endorsement of the Commission's decision to designate "significant harm" as the threshold for the obligation of compensation to come into play. But he pointed out that, as was recalled in paragraph 31 of the report, the way that term had been defined by the Working Group in 1996<sup>11</sup> might cause disputes among States and give the courts broad powers of interpretation. The terms used to translate that idea, particularly in Arabic, must be given careful attention.

47. In paragraph 46 of his report, the Special Rapporteur noted that States had attempted to settle the issue of allocation of loss in most recently concluded treaties by relying on civil liability. In part II of his report, he gave a detailed description of the regime which had been established by various international conventions and which varied according to the type of activities in question. Depending on whether such activities were stationary or mobile, the person responsible could be the operator or the owner or the generator, the importer or the disposer. In some cases, the "polluter pays" principle was applied, while, in others, it was not. Some conventions provided for the establishment of an additional compensation fund, while others did not. Of all the conventions referred to by the Special Rapporteur, only the Convention on International Liability for Damage Caused by Space Objects referred to State liability and civil liability. In paragraphs 114 to 121 of his report, the Special Rapporteur nevertheless tried to describe the common features of civil liability. The problem was how to turn those features into rules of international law, and it was not at all certain that codification was the right method; the progressive development of international law in that field was essential.

48. He was very impressed by Mr. Melescanu's proposal that a body of principles should be drawn up to serve as guidelines for the practice of States. He nevertheless wondered whether such principles, apart from the "polluter pays" principle, were in fact general principles of international law recognized by civilized nations, in accordance with Article 38 of the Statute of the International Court of Justice. That was the crux of the problem, but the Special Rapporteur would undoubtedly be able to deal with it.

49. He endorsed the arguments the Special Rapporteur put forward in paragraph 153 of his report concerning the formulation of a model of the allocation of loss. He pointed out that environmental damage, as mentioned in paragraph 153, subparagraph (j), was extremely difficult to quantify, and he suggested that reference should be made to the work being done by the United Nations Compensation Commission (Iraq-Kuwait).

50. Mr. KABATSI said that the topic had been under discussion by the Commission for a quarter of a century and had already been the subject of 21 reports prepared by three different special rapporteurs, as well as several reports by working groups. Its original title had been internally contradictory and had been bound to give rise to problems because its purpose had been to promote the construction of regulatory regimes without resort to prohibition activities regarded as entailing actual or potential dangers of a substantial nature and having transnational effects. The topic was less easy to codify or progressively develop than that of harm arising out of wrongful acts under international law or internal law. The topic had nevertheless continued to attract interest in the Commission and among the majority of States in the General Assembly because, as was only fair and logical, the innocent victims of activities from which some persons nearly always benefited must not be left without compensation. That was why the topic could not be abandoned and progress had been made in studying it. In 2001, the Commission had thus completed a set of draft articles on the prevention of transboundary harm arising out of hazardous activities.<sup>12</sup> That progressive step had to be pursued by navigating through narrow straits between the provisions on State responsibility and those on special treaty regimes, at the international level, and between civil liability and various local arrangements at the internal level. Those narrow straits could be only the general and residual rules advocated by the Special Rapporteur, who had also rightly advocated that the threshold of seriousness of harm should be the same as that adopted in respect of prevention—in other words, the regime to be drafted must be limited to significant harm. With regard to the continuation of the Commission's work on the topic, the proposals made by the Special Rapporteur in paragraphs 152 and 153 of his report were a step in the right direction, and it would therefore be appropriate to establish a working group which would, under the chairship of the Special Rapporteur, continue to discuss and refine the general and residual rules in question, bearing in mind that whatever regime might be established should be without prejudice to claims under international law and, in particular, the law of State responsibility.

51. Mr. AL-BAHARNA, reviewing the history of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission had decided at its twenty-second session, in 1970, to confine the study of international responsibility to the consequences of wrongful acts of States.<sup>13</sup> That decision had led the General Assembly to declare in 1973 that it was also desirable to consider the injurious consequences of activities which were not regarded as unlawful.<sup>14</sup> The Commission had then decided in 1997 to divide the topic into two parts, one on prevention and the other on liability.<sup>15</sup> The Commission had thus established a working group in that year and had requested the present Special Rapporteur to begin the study of the first part of

<sup>9</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 517.

<sup>10</sup> See 2763rd meeting, footnote 3.

<sup>11</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 119 (paras. 4 and 5 of the commentary to art. 2).

<sup>12</sup> See footnote 2 above.

<sup>13</sup> *Yearbook ... 1970*, vol. II, document A/8010/Rev.1, p. 331, para. 66.

<sup>14</sup> General Assembly resolution 3071 (XXVIII) of 30 November 1973, para. 3 (c).

<sup>15</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

the topic.<sup>16</sup> In 2001, the Commission had adopted the final text of the 19 draft articles on prevention proposed by the Special Rapporteur. In 2002, a new working group had begun studying the second part of the topic on liability and had submitted a report in which it had recommended that the scope of liability should continue to be restricted to the activities dealt with in the part on prevention. The Working Group had reaffirmed the importance of the role of the State and its obligation to ensure that there were regimes of international and national liability to guarantee equitable loss allocation.<sup>17</sup> In his first report on the legal regime of allocation of loss in case of transboundary harm arising out of hazardous activities, the Special Rapporteur adopted many of the Working Group's recommendations, such as those relating to the duties of the State and the need to ensure that the legal regime to be recommended was without prejudice to the law of State responsibility.

52. In part II of his report, the Special Rapporteur referred to a set of international instruments and sectoral and regional arrangements constituting models of allocation of loss. States had concluded a number of conventions and other international instruments which covered a wide range of environmental aspects and dealt generally with international liability arising out of transboundary harm caused by various types of activities, including nuclear and space activities, activities in Antarctica, and the transport of hydrocarbons and noxious and hazardous substances. He also referred to principle 13 of the Rio Declaration calling on States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and to cooperate to develop further international law regarding liability and compensation.<sup>18</sup> He himself did not dispute the judgement by the Special Rapporteur in paragraph 114 of his report, but the list of instruments was not exhaustive. The Commission should give those instruments further consideration, preferably on the basis of a separate list which would serve as a reference, in order to come up with some common principles and factors that could constitute a legal regime on allocation of loss.

53. The summations and submissions contained in part III of the report showed that the purpose of the study of the topic should be to draft rules governing the allocation of loss that transboundary harm might have caused despite prevention efforts or when prevention had not been possible. Such loss should be allocated between the operator and those who authorized, managed or benefited from the activity, in accordance with the "polluter pays" principle. Those rules should be designed to ensure that innocent victims, whether natural or legal persons or States, were not left to bear the loss caused by transboundary harm. The principle that the innocent victim should be protected was no doubt generally acceptable, but, as the Special Rapporteur pointed out in paragraph 44 of his report, full compensation might not be possible in all cases. The regime to be established should therefore be designed to encourage all parties concerned to take preventive and protective measures in order to avoid damage. There were, of course, States which were unwilling to accept any form

of liability not arising out of the breach of an obligation under internal law or international law. However, the treatment of the subject from the viewpoint of the allocation of loss between the different players, including the State, might be a generally accepted solution to the problem of liability not involving a wrongful act.

54. With regard to the respective roles of the State and the operator, it was the operator, whether private or public, which must assume primary liability, but, in order to facilitate the compensation of innocent victims, loss should be shared by the different players responsible for the transboundary harm through the establishment of special compensation or insurance schemes. If harm in any way gave rise to the liability of the State, such liability could only be secondary or residual in relation to that of the operator, unless the State itself was the main operator of the activity. The residual liability of the State could, for example, be the result of its function of monitoring the activity or of the fact that the private operator concerned could not fully compensate the victims. In such a case, the State could assume that liability by contributing to a compensation fund or an insurance scheme.

55. The criterion of significant harm adopted in the draft articles on prevention should be used as the threshold of harm as of which the regime of allocation of loss would apply. "Ultrahazardous" activities, such as nuclear activities and the transport of oil, might require a more restrictive criterion, but for the time being there did not have to be a separate regime for those activities, which were in any event covered by their own sectoral regimes.

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

[Agenda item 2]

56. Mr. KATEKA (Chair of the Drafting Committee) announced that Mr. Economides would replace Mr. Baena Soares on the Drafting Committee for the topic of the responsibility of international organizations.

*The meeting rose at 1 p.m.*

## 2767th MEETING

*Wednesday, 4 June 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi,

<sup>16</sup> *Ibid.*, paras. 162 and 168 (a).

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 455.

<sup>18</sup> See footnote 5 above.

\* Resumed from the 2764th meeting.



Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. AL-BAHARNA, continuing his statement from the previous meeting, noted that some members of the Commission, as well as several delegations in the Sixth Committee, clearly supported the proposal to extend the topic to areas beyond national jurisdiction. It seemed to be acknowledged that the issue should be discussed further.

2. The global commons was a different matter. It did not fall within the scope of the present topic and, moreover, had not been dealt with in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>2</sup> However, it could be taken up as a separate topic at a later stage if the Commission thought necessary.

3. In formulating the concept of a legal regime for allocation of loss, a fair balance should be struck between the rights and obligations of the operator, the beneficiary and the victim, as well as any other actors who might be involved.

4. The recommendations made by the Working Group established at the Commission's fifty-fourth session, in 2002,<sup>3</sup> had focused on models for allocation of loss, to which the Special Rapporteur referred in paragraph 37 of his report (A/CN.4/531). They had gained general approval in the Commission and were largely reflected in chapter III. With regard to the submission in paragraph 153, subparagraph (d), he was not sure that State liability was an exception and was accepted only in the case of outer space activities. The Commission had yet to explore other models for allocation of loss based on various treaties and international instruments and it should not close the door too soon on such a possibility. As for subparagraph (e), the test of reasonableness should be accepted in preference to that of strict proof. With reference to subparagraph (f), he agreed that liability could either be joint and several or could be equitably apportioned. He also believed that the principles in subparagraphs (g) and (h) would further strengthen the legal regime of liability

and that the principle in subparagraph (i) should be acceptable. In line with that principle, States should seek to harmonize their laws of compensation, for, as the Special Rapporteur noted in paragraph 45 of his report, harmonization could be a means of avoiding conflicts of law and contributed to creating certain shared expectations on a regional basis.<sup>4</sup> The submission in subparagraph (j) about compensation for damage to persons and property and damage to the environment and natural resources seemed fair and should be acceptable, whereas the limitations in subparagraph (k) required further consideration.

5. The liability regime should take the form of guidelines to States for negotiating allocation of loss, but he remained open to the suggestion that the draft articles should take the form of a convention similar to the one adopted for the draft articles on prevention. Once the articles were complete, they would need to be cemented by an international dispute settlement mechanism that provided for conciliation and arbitration procedures, perhaps similar to those for the prevention regime.

6. Finally, he supported the Special Rapporteur's intention to speed up the conclusion of work on the topic. The Commission should not spend any more time arguing about the viability of the topic for the purposes of codification or progressive development. The General Assembly had approved the topic at its fifty-sixth session, in 2001,<sup>5</sup> and the time for such arguments was past. As was indicated in paragraph 36 of the report, the Assembly had urged the Commission in 2001 to proceed promptly to the study on liability.<sup>6</sup> The debate in the Sixth Committee in 2002 had been constructive and supportive. He therefore endorsed the proposal to establish a working group.

**Statement by the Legal Counsel**

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

8. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) congratulated the newly elected members of the Commission and also the Commission on having added three new topics to its agenda. He looked forward to the results of its work and recalled that the General Assembly, in paragraphs 4 and 5 of its resolution 57/21, had reiterated its invitation to Governments to provide information on State practice for two topics on the Commission's agenda. Such inputs were certainly valuable and he wished to emphasize that without them the Commission did not receive the requisite guidance.

9. In paragraph 8 of the same resolution, the General Assembly noted the Commission's position on cost-saving measures and encouraged it to continue taking such measures. He trusted the Commission would bear that in mind not only when considering the duration of its

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2762nd meeting, footnote 7.

<sup>3</sup> See 2763rd meeting, footnote 2.

<sup>4</sup> P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002), p. 279.

<sup>5</sup> General Assembly resolution 56/82 of 12 December 2001, para. 3.

<sup>6</sup> *Ibid.*

next session and whether it should be a single or split session but also when planning its weekly programmes and conducting its meetings. It was a matter of some concern to him that the Commission's use of conference services had dropped to 80 per cent of available time in 2002, a matter that he would be discussing with the Committee for Programme and Coordination and the Advisory Committee on Administrative and Budgetary Questions on his return to New York.

10. In paragraph 57 of his report entitled "Improving the performance of the Department of General Assembly Affairs and Conference Services",<sup>7</sup> the Secretary-General had introduced a policy of "enforcing page limits", under which the 20-page limit would henceforth serve as a guideline for all reports not originating in the Secretariat. Despite his objections as the Legal Counsel, the Department had been determined to apply those guidelines very strictly. Consequently, he had had to request specific waivers, which had been granted, for all the reports of special rapporteurs. It was meaningless if the Commission could not develop its thinking in the space needed when its work generated the major documents adopted by the Sixth Committee.

11. The Rome Statute of the International Criminal Court had entered into force on 1 July 2002, and the first session of the Assembly of States Parties had taken place from 3 to 10 September 2002. The first session had resumed in February 2003 for the election of judges. Eighteen had been elected in accordance with an innovative procedure, involving complex maximum and minimum voting requirements, which had successfully ensured an adequate regional and gender distribution in the Court's composition. The judges had been inaugurated at a solemn ceremony held in The Hague on 11 March, and Judge Philippe Kirsch of Canada had been elected President of the Court. At its resumed session on 21 April, the Assembly of States Parties had by consensus elected Mr. Luis Moreno Ocampo of Argentina as Prosecutor. At the same meeting, 10 of the 12 members of the Committee on Budget and Finance had been elected. The remaining two members, from the Group of Eastern European States, would be elected in September. Nominations had been invited for members of the Board of Directors of the Trust Fund for victims and their families. The judges were expected to appoint the Registrar of the Court soon, thereby filling the last remaining principal position on the Court.

12. The Assembly of States Parties would be holding its second session at United Nations Headquarters from 8 to 12 September 2003, at which time it would also hold the first meeting of the special working group on the crime of aggression which was to continue work on the definition of that crime.

13. The purpose of the Special Court for Sierra Leone set up on 16 January 2002 pursuant to Security Council resolution 1315 (2000) of 14 August 2000 was to prosecute persons who bore the greatest responsibility for committing crimes against humanity, war crimes and other serious violations of international humanitarian law, as well

as certain crimes under the relevant laws of Sierra Leone. Unusually, the Court had been set up by an agreement between the United Nations and the Government of Sierra Leone, and its expenses were covered by voluntary contributions from the international community. The Prosecutor, Mr. David Crane, acted independently as a separate organ of the Court. The Government of Sierra Leone had appointed Mr. Desmond da Silva as Deputy Prosecutor, while the Secretary-General had appointed the Registrar, Mr. Robin Vincent. The Secretary-General had also appointed two Trial Chamber and three Appeals Chamber judges, while the Government had appointed one Trial Chamber and two Appeals Chamber judges. The judges had elected Mr. Geoffrey Robertson of Australia as their President. Again unusually, a management committee composed of representatives of the Government, the United Nations and the major contributors had been overseeing the Court's non-judicial functions since January 2002. On 10 March 2003, the Prosecutor had announced that he had indicted seven individuals, five of whom were currently in Court custody; one had reportedly been murdered in Liberia, and active efforts were being made to secure the arrest of the seventh. The trials might begin in 2003.

14. The Commission would recall that negotiations had begun in 1999 between the Secretary-General and the Government of Cambodia on United Nations assistance in drafting a national law for a special national court to try Khmer Rouge leaders and for the participation of foreign judges and prosecutors in the proceedings. The Secretary-General had reluctantly discontinued the negotiations in February 2002. In paragraph 1 of its resolution 57/228 A of 18 December 2002, the General Assembly had requested the Secretary-General to resume them, and exploratory meetings had been held in New York in January 2003, following which he, as the Legal Counsel, had travelled to Cambodia in March to conduct detailed negotiations with the Government. The result had been the draft 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, which the General Assembly had approved in its resolution 57/228 B of 13 May 2003. He would be signing the agreement in Phnom Penh on 6 June, after which it would have to be ratified by the relevant constitutional authorities of Cambodia and would enter into force once the necessary legal requirements had been met on both sides. In the meantime, much work remained to be done, especially to prepare for the practical implementation of the agreement and to raise the necessary funding. The General Assembly had decided that the assistance to be provided to the Government by the United Nations should be funded from voluntary contributions, although it could be argued that, as a matter of constitutional principle, courts should be financed by assessed contributions.

15. The Commission would recall that the General Assembly, in paragraph 2 of its resolution 57/16 of 19 November 2002, had decided to reconvene the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property to make a final attempt at consolidating areas of agreement and resolving outstanding issues with a view to drafting a generally acceptable instrument based on the

<sup>7</sup> A/57/289. The Department of General Assembly Affairs and Conference Services was renamed the Department of General Affairs and Conference Management as of 16 January 2003.

draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session<sup>8</sup> and on the discussions of the open-ended working group of the Sixth Committee and the Ad Hoc Committee. Outstanding issues had included the criteria for determining the commercial character of a contract or transaction under article 2, paragraph 2; the concept of a State enterprise or other entity in relation to commercial transactions under article 10, paragraph 3; contracts of employment under article 11; pending issues relating to articles 13 and 14; pending issues relating to the effect of an arbitration agreement under article 17; and issues concerning measures of constraint against State property under article 18. There had also been issues concerning criminal proceedings in the context of the draft articles, as well as the relationship of the draft articles with other agreements.

16. Informal consultations on article 2, paragraph 2, had been coordinated by Mr. Yamada; those on article 10, paragraph 3, and article 11, criminal proceedings and the relationship with other agreements had been coordinated by Mr. Bliss, Legal Adviser to the Permanent Mission of Australia to the United Nations; and those on articles 13, 14 and 17 and on measures of constraint under article 18 had been coordinated by Mr. Hafner of Austria, Chair of the Ad Hoc Committee.

17. Under Mr. Hafner's able chairship, the Ad Hoc Committee had successfully completed its work. The full text of the draft articles and understandings was contained in the Ad Hoc Committee's report to the General Assembly.<sup>9</sup> The Ad Hoc Committee had referred back to the Assembly the matter of the final form of the draft articles.

18. In its resolution 57/27 of 19 November 2002, the General Assembly had renewed the mandate of the Ad Hoc Committee on International Terrorism, which had been established under Assembly resolution 51/210 of 17 December 1996, and which, under Assembly resolution 54/110 of 9 December 1999, was to consider the drafting of a comprehensive convention on international terrorism. The substantial progress achieved in negotiations launched in late 2000 was reflected in the reports of the Ad Hoc Committee.<sup>10</sup> Despite that progress, serious difficulties remained on the key elements of the future convention, namely the definition of terrorism; the relationship of the draft convention to existing and future instruments on international terrorism; and differentiation between terrorism and the right of peoples to self-determination and to combat foreign occupation.

19. Work on the convention had been very nearly finished by October 2001, but events in the Middle East had poisoned the climate for negotiation, and, until the political atmosphere improved, little progress was likely to be made. The Ad Hoc Committee had met from 31 March to 2 April 2003 and continued its work on the convention, in spite of the divergent viewpoints. The Sixth Committee

would carry on with that work at the fifty-eighth session of the General Assembly. The Ad Hoc Committee also had on its agenda the draft international convention for the suppression of acts of nuclear terrorism, an initiative of the Russian Federation, but the project was so closely linked to the work on the comprehensive convention that he thought it unlikely that one endeavour would move ahead without the other.

20. Since February 2000, the Ad Hoc Committee had also been concerned with the convening of a high-level conference on terrorism. Some delegations had expressed support for such a conference, which could, *inter alia*, focus on concrete measures to strengthen the existing framework of international cooperation; look into preventive measures such as promotion of cooperation among national law enforcement authorities; and develop a definition of terrorism. Other delegations, however, had doubts about the practical benefits of such a conference and considered that the outcome of work on the comprehensive convention should be awaited before convening a conference.

21. The United Nations Secretariat had made strong efforts to draw attention to existing anti-terrorism conventions. Special treaty events had been held at Headquarters in November 2001 and November 2002, with particular emphasis on the main anti-terrorism instruments. Another such event was to be held in late 2003. In 2001, the Office of Legal Affairs had published a collection of international instruments related to the prevention and suppression of international terrorism,<sup>11</sup> and in 2002, it had issued a compendium of national laws in that field.<sup>12</sup> It maintained close cooperation with the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime in Vienna.

22. The Security Council had been active in the anti-terrorism effort. On 20 January 2003, it had held a special ministerial meeting whose main objective had been to give new impetus to the struggle against terrorism. As a result of that high-level meeting, the Security Council had adopted resolution 1456 (2003), annexed to which was a declaration on combating terrorism. In the declaration, the Security Council encouraged Member States of the United Nations to cooperate in resolving all outstanding issues with a view to the adoption, by consensus, of the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism.

23. On 6 March 2003, the Counter-Terrorism Committee established in accordance with Security Council resolution 1373 (2001) of 28 September 2001, had held a meeting with representatives of 60 international, regional and subregional organizations to exchange views on adopting a coordinated approach to combating international terrorism. In his opening address, the Secretary-General had stressed the need to develop an international programme of action to fight terrorism and uphold the rule of law and

<sup>8</sup> *Yearbook ... 1991*, vol. II (Part Two), document A/46/10, p. 13, para. 28.

<sup>9</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22 (A/57/22)*, annex.

<sup>10</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 37 (A/56/37)*; *ibid.*, *Fifty-seventh Session, Supplement No. 37 (A/57/37)*; *ibid.*, *Fifty-eighth Session, Supplement No. 37 (A/58/37)*.

<sup>11</sup> *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

<sup>12</sup> *National Laws and Regulations on the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E/F.02.V.7).



the importance of fighting poverty and injustice so as to address the conditions used as justifications by terrorists. Many references had been made to promoting the ratification and appropriate implementation of the 12 anti-terrorism conventions.<sup>13</sup> A communiqué issued at the end of the meeting had emphasized exchange of information, complementarity and giving priority to counter-terrorism initiatives. A follow-up meeting to be hosted by OAS would be held later in the year in Washington, D.C.

24. Another matter of great concern was the protection of United Nations personnel. The cable traffic at Headquarters brought news every day of the difficult and exposed situation of staff in the field, and, sadly, many staff members lost their lives every year. The Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had met for a week in March 2003 to continue its discussion of measures to enhance the existing protective legal regime for United Nations and associated personnel. The Committee had focused on the Secretary-General's recommendation that the scope of the Convention be extended to all United Nations operations and to associated personnel from non-governmental organizations. It was a cause of serious concern that United Nations staff members were now being deliberately targeted by participants in armed conflict.

25. The United Nations Convention on the Law of the Sea, which had had its genesis in the Commission's work in the 1950s, now had 142 Parties, including the European Communities. A report prepared for the forthcoming fifty-eighth session of the General Assembly and available on the website of the Office of Legal Affairs covered all the latest developments in relation to the law of the sea. The website of the Office's Division for Ocean Affairs and the Law of the Sea had recently been updated and offered most official documents in all the official languages.

26. The twentieth anniversary of the opening of the Convention for signature had been commemorated from 9 to 10 December 2002, and the thirteenth meeting of the States Parties would be held from 9 to 13 June 2003. The Commission on the Limits of the Continental Shelf had received its first submission and would be holding its twelfth and thirteenth sessions from 28 April to 2 May 2003 and from 25 to 29 August 2003, respectively. The second round of informal consultations on the conservation and management of straddling fish stocks and highly migratory fish stocks was to be held from 21 to 25 July 2003 at United Nations Headquarters. While the latest po-

litical events and international crises tended to attract attention, the materials and meetings he had just mentioned conveyed a gloomy message about the state of the world's oceans, and it was to be hoped that awareness of the problem would be heightened.

27. The thirty-sixth session of UNCITRAL was to be held in Vienna from 30 June to 11 July 2003. The membership of UNCITRAL had been increased from 36 to 60 under General Assembly resolution 57/20, of 19 November 2002. The session would address the adoption of the draft model legislative provisions on privately financed infrastructure projects, arbitration, electronic commerce and the draft legislative guide on insolvency law.

28. Information on publications, including the question of responsibility for maintaining the *Repertory of Practice of United Nations Organs*, technical support, websites, and other activities that might be of interest to the Commission would be provided to members in writing. Finally, he wished to raise an issue about which the legal advisers of the United Nations system, whose annual meeting he chaired, had recently expressed concern. They had observed that the Internet was basically operating without any international legal regime, although in the past, when communication systems that had international consequences had been developed, States had got together to regulate the new phenomenon. While regulation of the Internet was primarily a policy issue, the legal advisers wished nevertheless to convey three of their concerns to the Commission. First, the Internet was of fundamental importance as an instrument of communication, commerce, political and cultural expression, education and scientific cooperation. Second, national laws and court systems were not able to provide a sufficient legal framework for much of the activity on the Internet. Third, it was urgent to develop a legal architecture and international institutions that favoured the further development of Internet activities within an environment of legal certainty, respect for the rule of law and respect for their international character. Website hijacking—for example, when persons seeking information on women's issues found themselves in a highly objectionable environment—was one of the many problems that had to be dealt with.

29. The CHAIR thanked the Legal Counsel for his valuable report on the activities of the Office of Legal Affairs. Of particular interest had been the information on the work of the International Criminal Court and other international tribunals, jurisdictional immunities of States, the law of the sea, terrorism, protection of United Nations personnel and the new phenomenon of Internet activity.

30. Mr. BROWNIE asked for further information on the problems with the world's oceans.

31. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the report prepared for the fifty-eighth session of the General Assembly dealt with a variety of aspects of the overall problem, and he would merely mention a few. Depletion of the ocean's resources was an unexplained and disturbing phenomenon. Coral reefs, which served as nurseries to many varieties of fish, had suddenly and inexplicably become bleached. Both land-based and sea-based pollution had to be tackled. In the aftermath of the recent *Prestige* disaster, thought

<sup>13</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism.

needed to be given to flag State jurisdiction, namely, how to deal with a situation in which States had no proper authority over ships flying their flags. Were global warming and depletion of the glaciers, with the corresponding potential rise in the ocean's level, part of natural cycles or were they the result of human interventions?

32. Mr. DUGARD said that special rapporteurs of the International Law Commission fulfilled very different functions from special rapporteurs of other bodies. For the Commission on Human Rights, for example, special rapporteurs wrote reports that facilitated political debate, whereas the studies done by special rapporteurs of the International Law Commission formed the very basis for that body's work. The submission of very brief reports would be difficult to contemplate, since that would only restrict the Commission's debates and thus the progress of its work. He appealed to the Legal Counsel to use his influence to try to persuade members of the Fifth Committee of the special nature of the Commission's work.

33. There was no need to recall that members of the Commission were unhappy that their honoraria had been withdrawn as from 2002, but he wished to place on record his personal view that the withdrawal of the honoraria of the special rapporteurs was exploitative and unfair. It meant that they had to work for several months each year, in addition to during the Commission's sessions, for no remuneration whatsoever, and in many instances that they were denied the possibility of employing research assistants.

34. As to the anti-terrorism measures described by the Legal Counsel, a dangerous phenomenon had followed the adoption of Security Council resolution 1373 (2001) invoking Chapter VII of the Charter of the United Nations to direct States to take action to suppress terrorism. Many States had gone overboard in the adoption of domestic legislation. One State, for example, had simply defined terrorism as an illegal act, while others had defined it as an unlawful act involving violence designed to influence government policy, which in effect meant that any anti-governmental activity fell within the ambit of terrorism. Yet human rights standards had to be balanced with measures to suppress international terrorism. Accordingly, when working on the definition of international terrorism, the international community should also work to prevent States from taking advantage of the opportunity to settle domestic disputes by taking firm action against the opposition.

35. Ms. ESCARAMEIA asked the Legal Counsel to provide details on any steps being taken to follow up the proposal in paragraph 62 of the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services"<sup>14</sup> for a study of the practical and cost implications of replacing summary records with digital recordings. It would be very bad for the Commission if the summary records were replaced. She would also appreciate an explanation of what was meant in paragraph 54 by the reference to a "new system of improved advance upstream planning".<sup>15</sup> Did it entail the page limit on reports of special rapporteurs

and the replacement of summary records? What could be done to avoid such developments? The Commission would probably address those issues in its report, and the Sixth Committee might also take them up in its resolution relating to the Commission. The very practice of requesting a waiver of the 20-page limit was a repetitive task requiring considerable work in the Codification Division and in other bodies. In her view, the page limit should be waived once and for all. Would the Legal Counsel be meeting with senior officials in the Department to discuss changing that practice? It was disturbing that the waiver practice might remain unchanged despite the Commission's expression of concern.

36. With regard to the reference to the need for a legal regime for the Internet, had the Legal Counsel discussed the issue with other bodies within and outside the United Nations system, requested studies from them or consulted any Internet experts? How far had the plan matured?

37. Mr. MELESCANU, noting that the legal advisers had decided they should convey their legal concerns about the Internet *inter alia* to the Commission, asked whether they had done so to other bodies in the United Nations system or to Internet experts. Was the Commission expected merely to take note of the legal concerns expressed, or was more concrete action wanted, and if so, in what form?

38. Mr. Sreenivasa RAO said it was quite surprising to learn that a 20-page limit had been placed on the length of reports of special rapporteurs and that a waiver was required for any report that exceeded that limit. In the case of his own report, he could have shortened it from the current 52 pages to 20, but then it would have taken three sessions, and thus three years, for him to present it in its entirety. Surely that would not be in the interest of efficiency. If members were to grasp the topic quickly, they needed to have all the material at once, something that would be impossible if the report was restricted to a certain number of pages. Nor would a special rapporteur be able to obtain the reaction of the other members to the subject matter as a whole. The discussion would lose itself in constant requests for clarifications, which were unnecessary when all the material was available. With the 20-page limit, the topic would require a time frame that was inefficient and, as such, unacceptable.

39. Another issue was the assistance special rapporteurs needed and were normally entitled to. Honoraria were only a modest contribution to meeting their needs. If they were not forthcoming, that too would have an adverse impact on the efficiency of the Commission's work and, indeed, on its very purpose. The honoraria must be seen in the broader context, and not merely as a cost-cutting question. Apparently, the United Nations had begun to undervalue the aspects of its work on legal issues. This was a dangerous development.

40. Mr. MANSFIELD said that the need to coordinate issues relating to the oceans and the law of the sea involved the responsibilities and mandates of a wide range of United Nations bodies that were separate legal entities answerable to their members, and that even the Secretary-General had no authority to order such coordination. Another problem was that Member States gave different levels of instructions. He hoped the Legal Counsel could

<sup>14</sup> See footnote 7 above.

<sup>15</sup> *Ibid.*

provide some positive news on how the legal and structural issue could be addressed. If the Commission were to take up the question of the Internet, it would raise the same kind of problem, namely, some mechanism would be needed to deal with the separate legal existence of the various United Nations specialized agencies and find a way to adopt a coordinated approach.

41. Mr. PELLET thanked the Legal Counsel for engaging in what he personally had always regarded as a very useful exchange of views. The suggestion to discontinue the work on the *Repertory of Practice of United Nations Organs* and to ask an academic institution to maintain it was completely absurd, the product of bureaucratic inventiveness gone mad. Academic institutions could not take on such a task. On the contrary, it was up to the Secretariat to provide the Commission with data on the *Repertory of Practice*. It was inconceivable for such work to be done otherwise than from within.

42. His other concern was the very serious threat hanging over the secretariat of the Commission. As he understood it, it was planned—in another fit of bureaucratic delirium—to have the secretariat of the Commission serviced by some sort of bureaucratic monster, a secretariat in charge of all United Nations conferences. That, too, sounded like a completely insane idea. It was inconceivable that those who serviced and assisted the Commission should have no idea about international law. The Commission's staff had very extensive legal training that was invaluable and indispensable. If the proposed idea was really taken further, the Commission must issue a very strong formal protest.

43. He associated himself fully with the comments by Mr. Dugard and Mr. Sreenivasa Rao regarding the obstacles to the work of special rapporteurs. Everything seemed to suggest that the Commission was being subjected to the whims of people who had no idea of what the Commission did; even assuming that they had a slight idea of what its purpose was, the way the Commission was treated did not testify to any high esteem for its work. The current developments, far from being encouraging, were worrisome and, indeed, alarming.

44. Mr. MOMTAZ, referring to the Convention on the Safety of United Nations and Associated Personnel, said that the threats hanging over such personnel were very worrying. He gathered that negotiations were under way to extend the scope of the Convention. The Legal Counsel had spoken of the need to extend the scope of the Convention to include not only all United Nations activities but also all field staff of non-governmental organizations. He could not imagine what the obstacles were to such a step, or why negotiations had not been successful to date.

45. Mr. KOSKENNIEMI said he was concerned about the emphasis the Office of Legal Affairs placed on the issue of terrorism and the suggestion that regulation of the Internet might be of great importance in the future. Those two subjects came from a very narrow sector of the international community and reflected the concerns of the developed world. International terrorism quickly faded to insignificance when compared to other problems. Given the enormous disparities in wealth between the developed and the developing countries, and in view of the—preventable—death every year of millions of children due to

malnutrition, the priorities of the international community or, for that matter, of the Office of Legal Affairs should not be terrorism or the Internet. Clearly, it was not easy for the Office of Legal Affairs to address development issues, but he could cite two examples it might find instructive. One was in the field of law and development. He was personally associated with the Asian Development Bank, whose legal office had embarked upon a very successful, wide-ranging programme on law and development in East Asia, where legal cultures were not well rooted in the traditional economic and social systems. The other example had to do with the Global Compact, the Secretary-General's initiative of several years earlier, in which the Secretary-General himself had undertaken to work with transnational corporations on standards and good governance practices in their activities in the developing world. One of the attractions of the Global Compact was that it did not aim to create legally binding standards, although there was in fact an undercurrent in the debate that binding standards on good governance and transparency might be envisaged at some point. Thus, such avenues did exist, and he suggested that, in order to get their priorities right, the United Nations and the Office of Legal Affairs might do some useful work there.

46. Mr. GALICKI said it was gratifying that the tradition of the Legal Counsel meeting with the Commission every year had been continued at the present session.

47. He endorsed Mr. Pellet's remarks. It was inconceivable for the Commission to be serviced by a general unit of the Department of General Assembly Affairs and Conference Management. It was worth noting that, at the meeting on the subject in the Sixth Committee, all the representatives of States had spoken out against such a measure. The Commission had long had excellent experience working with the secretariat of the Codification Division and was aware of the burden of servicing the session, preparing reports, and so on. He asked the Legal Counsel to provide additional information on recent developments and to inform all those concerned that the members of the Commission were strongly opposed to such a change, which would be very detrimental to its work. He entirely agreed with Mr. Pellet about the need for a strong protest, which should be included in the Commission's report.

48. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel), replying to Mr. Dugard, who had raised the issue of the length of reports, said the decision to enforce page limits had been taken by the Department of General Assembly Affairs and Conference Management, in response to requests by Member States that the work of the General Assembly should be made more relevant, more coordinated and less bureaucratic. At the coordination meetings convened by the Under-Secretary-General for General Assembly Affairs and Conference Management, he consistently emphasized that simply reducing the length of reports served no purpose, as a meaningful discussion of the contents would thereby be precluded. While it was regrettable that such an obvious point needed making, it had to be said that his requests for waivers had never yet been turned down.

49. On the question of terrorism, the Secretary-General himself had on a number of occasions highlighted the issue of protection of human rights. Human rights stand-



ards must be borne firmly in mind when the Commission started to address the question of terrorism; failure to do so would result in the creation of precisely the kind of society that the terrorists would like to see, and the whole purpose of the exercise would be defeated. In his own—perhaps simplistic—view, terrorist acts were acts already criminalized in the penal code of every Member State. The real issue was the different context in which crimes of terrorism were committed, since the victims were innocent people unconnected with the purposes of the perpetrators. Nevertheless, irrespective of whether the crime was an act of terrorism or an “ordinary” crime, the same human rights standards must be observed—a point that had been stressed by the United Nations High Commissioner for Human Rights.

50. He was not apprised of the details of the measures proposed in paragraph 62 of the Secretary-General’s report, to which Ms. Escameia had referred. The proposals represented one possible means of making the work of the General Assembly more efficient. The effects of those across-the-board measures on the various bodies would need to be evaluated. As he had already stated, his intention was to bring the views expressed at the present meeting, as reflected in the summary record, to the attention of the Under-Secretary-General for General Assembly Affairs and Conference Management.

51. The Internet was a remarkable tool that could be put to the service of all humankind, but also one that could be abused. It was thus important that all those who had a mandate in any particular field should be aware that they might be under an obligation to take up the matter. The issue, which was basically one of policy, had been discussed for several years by the legal advisers to the entire United Nations system, including its specialized agencies. On the copyright aspects, for example, the Legal Adviser of WIPO was taking measures to bring the various concerns to the attention of the relevant bodies, and he himself had addressed a WIPO body on behalf of his fellow legal advisers. The other legal advisers would also raise the issue in their respective organizations. However, it was not for him, as Legal Counsel, to take steps that were basically political: it was for Member States to take those steps. The most he could do was to raise the question in the bodies with which he interacted, and that was why he had raised it in the Commission, which might or might not wish to discuss it. The legal advisers had agreed, not on steps to be taken, but on talking points. The talking points on the Internet issue had been circulated to members of the Commission.

52. On the question of honoraria, in cases where they had already been earned before the General Assembly had taken its decision, he had taken the very firm position that the Organization must honour its commitment. However, the question of the legality of the decision of the General Assembly was a different matter and had proved to be less straightforward than it might at first appear. Nonetheless, the issue had given rise to such extensive debate that he was confident the General Assembly, and the Fifth Committee in particular, would return to it.

53. As to the coordination of ocean affairs, the legal advisers had very efficient means of communicating important developments via the Internet. The idea put forward at

the previous session of the General Assembly had been to seek better coordination of ocean issues at the Secretariat level. The intention was not to bring everything together under a single umbrella: agencies such as FAO, UNESCO and IMO should be allowed to continue to work with their own special expertise within the area of the law of the sea. Nonetheless, there were some areas, such as refugee issues, oil transportation and flag State jurisdiction, where a gap between mandates needed to be bridged. After the new mandate had functioned for a year or so, it might perhaps become clearer how the new ideas put forward had been addressed by Member States. He had requested the Division for Ocean Affairs and the Law of the Sea to come up with further ideas, to enable terms of reference to be drafted with a view to enhancing the various mandates and providing a further basis for interaction.

54. There had indeed been a proposal to discontinue publication of the *Repertory of Practice of United Nations Organs* in its present form. One idea had been to consult with academia, and in that context he had had the benefit of Mr. Pellet’s advice in the latter’s professorial capacity. The emerging message seemed to be that the activity was not one that could be easily undertaken by any academic institution. That view would be brought to the attention of the legislative bodies when the matter was discussed in the Fifth and Sixth Committees at the next session of the General Assembly, as would the views concerning bureaucracy and the secretariat of the Sixth Committee. The problem was one of scarce financial resources.

55. Mr. Momtaz had asked for information about the negotiations in connection with the Convention on the Safety of United Nations and Associated Personnel. The Director and the Deputy Director of the Codification Division might be better qualified than himself to give a precise answer to that question, and the Chair might thus wish to give one or the other the floor to respond.

56. The socio-economic issues raised by Mr. Koskenniemi were certainly on the agenda, and the Secretary-General never failed to draw attention to them in major international forums. However, while he fully agreed with Mr. Koskenniemi’s comments regarding development issues, it had to be asked to what extent the Office of Legal Affairs was mandated to deal with those matters. The Office had only 160 staff members and, in his view, it should not undertake services of general assistance in law and development, which were already provided by other units within the Organization. Its task was to offer guidance in locating such assistance: legal advisers requested by foreign ministers to identify possibilities for technical assistance were able to access such information instantaneously via the Office’s website. However, it was in UNDP and the World Bank, bodies with the mandate and the means, rather than the Office of Legal Affairs, that the expertise needed to formulate programmes was to be found. Similarly, ILO and OHCHR were the bodies best placed to help States enhance their human rights legislation. While in Kosovo and East Timor—to cite just two examples—the Office of Legal Affairs had reviewed every regulation from a constitutional perspective, to ascertain whether it was in accordance with the Charter of the United Nations, the relevant resolution and human rights standards, it had not tried to second-guess the technical solutions in, for instance, banking legislation. In short, he had tried to take a

strategic view, singling out knowledge, language, money and need as the key elements which, if combined, could lead to the creation of projects.

57. Mr. Galicki had asked about the current status of the proposal regarding the Commission secretariat. The Advisory Committee on Administrative and Budgetary Questions had examined the proposal, and it had been forwarded to the Fifth Committee. To what extent the Fifth Committee would consult the Sixth Committee remained to be seen. In any case, a decision on the matter would be taken at the next General Assembly.

*The meeting rose at noon.*

## 2768th MEETING

*Thursday, 5 June 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of diplomatic protection (A/CN.4/L.631), said that the Committee had held five meetings from 8 to 14 May and on 28 May 2003. The Committee had begun its work on the topic at the Commission's fifty-fourth session and had adopted, on first reading, articles 1 to 7 covering Parts One and Two of the draft articles. At the current session, the Committee had turned its attention primarily to the draft articles on the rule on the exhaustion of local remedies. It had also discussed several draft articles on the diplomatic protection of legal persons, but, owing to the

lack of time, had been able to work only on one such provision. It had therefore decided to postpone the referral of the provision to the plenary until the next session so that all the provisions on legal persons could be submitted in a single package.

2. With regard to the structure of the draft articles, he recalled that draft articles 1 to 7, which had been adopted at the preceding session, dealt with general provisions (Part One) and natural persons (Part Two). At the current session, the Committee had decided to include the articles on the exhaustion of local remedies in a separate part so that they would apply both to the part on natural persons and to the future part on legal persons. The structure of the draft articles would thus include Part Three on legal persons, followed by Part Four on the exhaustion of local remedies rule. When the Committee had considered the three draft articles on that rule, it had not yet had before it the draft articles constituting the future Part Three, and it had therefore renumbered the draft articles it had considered to follow on those already adopted on first reading (1 to 7). The three draft articles previously proposed by the Special Rapporteur as articles 10, 11 and 14 thus became articles 8, 9 and 10, respectively. A footnote to the Committee's report nevertheless explained that those three provisions would again be renumbered when Part Three of the draft articles had been completed. As to the title of Part Four, the Committee had decided on "Local remedies" rather than "Exhaustion of local remedies" so that that part and article 8 [10] would not have the same title.

3. The titles and texts of the draft articles adopted by the Drafting Committee read as follows:

#### DIPLOMATIC PROTECTION

##### *Article 8 [10]. Exhaustion of local remedies*

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]\* before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

##### *Article 9 [11]. Classification of claims*

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].\*

##### *Article 10 [14]. Exceptions to the local remedies rule*

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible, or the circumstances

\* Resumed from the 2764th meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.\*\*

\* The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

\*\* Subparagraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver".

4. Article 8 [10] was intended to codify the customary rule that local remedies had to be exhausted as a prerequisite for the presentation of an international claim. It had been clear from the Commission's discussions that that was an accepted rule of customary international law. With regard to paragraph 1, the Committee had retained the basic thrust of the Special Rapporteur's proposal, but had streamlined its formulation. It should be noted that, in the articles adopted at the preceding session, reference was made to the "presentation" of the claim, but the Committee had considered that, in the context of article 8 [10], the word "bring" more accurately reflected the process involved, since the word "present" suggested a formal act to which consequences were attached and could best be used to identify the moment when the claim was formally presented. As to the term "bring an international claim", alternative formulations had been considered, such as "exercise diplomatic protection in respect of an injury". The Committee had nevertheless taken the view that such wording would cover a much longer time frame, including the time of the initial presentation of the claim, while, in the context of the provision under consideration, the relevant moment was that when the requirement of the exhaustion of local remedies was provided for. The Committee had therefore been of the opinion that, while earlier articles referred only to a "claim" and not to an "international claim", it was clear in those cases that reference was being made to the exercise of diplomatic protection. However, in the context of the local remedies rule, there were various possible types of claims, and a more specific reference to "international claims" was therefore necessary. The Committee had also decided to bring the text more into line with draft article 1, as adopted at the preceding session, by replacing the words "international claim arising out of an injury" by the words "international claim in respect of an injury".

5. The Committee had also decided to amend that provision in the light of exceptions to the nationality rule introduced by article 7 [8] on stateless persons and refugees by adding the words "or other person referred to in article 7 [8]". As was indicated in the corresponding footnote, the Committee had left the door open to the possibility of amending that provision in the light of any further exceptions to the nationality rule that the Commission might see fit to include in the draft articles. The Committee had decided to delete the words "whether a natural or legal person", contained in the text proposed by the Special Rapporteur as being unnecessary, since the draft articles as a whole dealt with both natural and legal persons. The text of paragraph 1 had been further aligned on the texts adopted at the preceding session by replacing the words "injured national" by the words "injured person".

6. With regard to the words "all local remedies", the Committee had first discussed whether the original ver-

sion, namely, "all available remedies", did not set too high a standard for an injured national. However, the prevailing view had been that the provision should be read in the light of draft article 10 [14], so that the injured national was required only to exhaust all available local remedies which provided a reasonable possibility of an effective remedy. The original version as proposed by the Special Rapporteur referred to "legal" remedies in order to encompass both judicial and administrative remedies, but not to remedies as of grace or favour. The Committee had also streamlined the text by reducing the number of words modifying the word "remedies". It had taken note of suggestions made in the Commission and in the Sixth Committee that article 8 [10] should contain a reference to local remedies' being adequate and effective. It had observed, however, that the principle of effectiveness was dealt with in draft article 10 [14], and it had therefore preferred not to deal with it in draft article 8 [10], mainly because the onus of proof was on the respondent State to show that there were available remedies within the meaning of article 8 [10], whereas the onus of showing that there were no adequate and effective remedies within the meaning of article 10 [14] was on the applicant State. The Committee had therefore preferred to provide for the principle of effectiveness in a separate article.

7. Paragraph 2 defined the scope of the words "local remedies" used in paragraph 1. It reflected the principle embodied in various judicial decisions that remedies should be judicial or administrative in nature or before authorities which recognized a right that might lead to a remedy. It did not matter whether the courts or authorities were ordinary or special. The emphasis was on the fact that the remedies must be open to the injured persons as of right and not as of favour or grace. The original version referred to "legal" remedies. The Committee had considered the possibility that limiting the text to "legal" remedies might exclude other types of remedies, such as access to an ombudsman as a form of administrative remedy. It had also been realized that ombudsmen had different powers in different jurisdictions, thereby making it difficult to draft an appropriate provision. In some jurisdictions, there were "authorities", such as ombudsmen, which had only recommendatory powers. It was unnecessary for such remedies to be exhausted in order to satisfy the exhaustion of local remedies requirement in paragraph 1. That conclusion also arose out of the application of article 10 [14], in that such non-binding remedies would not provide a reasonable possibility of effective redress. The commentary would make it clear that, when local remedies could not result in a binding decision, they should not be considered to be local remedies that had to be exhausted. Instead, what was being referred to was the normal legal system—in other words, remedies that had binding consequences. The Committee had decided to replace the term "authorities" by the term "bodies" because "authorities" could have a discretionary connotation, while "bodies" implied some sort of structure. Following the deletion of the reference to "legal" remedies in paragraph 1, the same deletion had been made in paragraph 2, but, as had already been mentioned, largely for stylistic reasons, in order to limit the number of adjectives modifying the term "remedies" and without prejudice to what he had just stated about the type of local remedies that had to be exhausted. In other words, what he had said also applied to the term "local



remedies". The other amendments related to the words "natural or legal" persons, which had been replaced by the words "the injured person", and the addition at the end of paragraph 2 of the words "of the State alleged to be responsible for the injury", which added further precision to the concept of "local remedies". The Committee had also decided that article 8 [10] should be entitled "Exhaustion of local remedies".

8. Article 9 [11] was concerned with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It was the "Mavrommatis principle", according to which an injury to a national was an injury to a State. The draft articles dealt with such "indirect" injury to the State, and the exhaustion of local remedies rule therefore applied in such circumstances. It did not apply when a direct injury was caused to the State, whence the need for a provision indicating when an injury to the State was "indirect" for the purpose of determining whether the local remedies rule was applicable and, indeed, whether the act in question was governed by the draft articles at all. With regard to wording, it should be noted that the terms "direct" and "indirect" did not appear in article 9 [11], largely to take account of the concerns expressed by some members of the Commission about the use of those terms in languages other than English. The problem at hand was to draft a provision that required the exhaustion of local remedies only in the context of indirect injury. However, in some cases it was not clear from the facts whether the injury was to the State directly or to the State through the individual. The Committee had considered two possible tests for determining whether an injury was direct or indirect: first, the preponderance test, approved in both the *ELSI* and the *Interhandel* cases, whereby the injured individual was obliged to exhaust local remedies where the claim was preponderantly the one that related to the injured individual, as opposed to the State. The second test was the *sine qua non* test—in other words, whether the claim would have been brought if there had been no injury to the national.

9. The Committee had proceeded on the basis of the Special Rapporteur's proposal, which used the two tests to emphasize that the injury to the national must be the dominant factor in the bringing of the claim if local remedies were to be exhausted. However, the Committee had observed that, in the *Interhandel* case, ICJ had resorted only to the first of the two tests and that, in the *ELSI* case, it had noted the existence of both tests but had not required that they should be exhausted in combination. It had been proposed that the two tests should be used as alternatives, but the prevailing view had been that the preponderance test had received the most attention in judicial decisions. It had thus been agreed that only the preponderance test should be retained in the article and that the other test should be dealt with in the commentary. It had also been maintained that the "but for" test raised difficult issues of the onus of proof. The Special Rapporteur's original proposal contained an exposition in square brackets of the various factors that could be taken into account in determining whether the claim was preponderantly weighted in favour of an injury to a national or whether the claim would have been brought if such injury had not occurred. The Committee had nevertheless taken account of the prevailing view in the Commission that it was not desirable

to legislate by example and had therefore decided that examples should be discussed only in the commentary to the article.

10. As in the case of article 8 [10], the Committee had decided to align the provision on the draft articles adopted at the preceding session by recognizing the exceptions to the nationality rule introduced by article 7 [8] and including the words "or other person referred to in article 7 [8]". In this connection, the Committee had considered the possibility of including a separate provision, in an earlier part of the draft articles, that would provide that the term "national" included, *mutatis mutandis*, the persons referred to in article 7 [8], but that proposal had not been adopted. The Committee had considered two options for the title of article 9 [11], namely, "Claims of a mixed character" and "Classification of claims", and had settled for the latter.

11. Article 10 [14] on exceptions to the local remedies rule was the one on which the Drafting Committee had spent the most time, because of its length and the complexity of some of the issues it raised, particularly that of the "voluntary link". It was structured in the form of a chapeau followed by a list of four situations regarded as exceptions to the basic rule. There had been some discussion in the Drafting Committee on whether the last exception in subparagraph (d) relating to waiver was really an exception or not. The Committee had based itself on the Special Rapporteur's fundamental proposal (contained in what had then been article 14), but had reduced the number of exceptions from five (the sixth proposed by the Special Rapporteur had not been referred to the Committee) to four, primarily on the basis of the Commission's discussions at its preceding session. The exceptions had been reordered to group the provisions relating to the effectiveness and nature of local remedies together, with the provision dealing with the unique situation of waiver coming last.

12. Subparagraph (a) dealt with the situation where, even though local remedies existed, they did not provide any reasonable possibility of effective redress. The text proposed by the Special Rapporteur contained three options: local remedies were obviously futile; they offered no reasonable prospect of success; or they provided no reasonable possibility of an effective remedy. Acting on the strong support expressed in the plenary debate, the Drafting Committee had decided to adopt the third option, which was based on the wording of the separate opinion of Judge Lauterpacht in the *Norwegian Loans* case. In so doing, the Committee had noted that the first option of obvious futility had been considered as being too high a threshold and that, conversely, the second option of no reasonable possibility of success was too low a threshold. In order to avoid the awkward situation of saying, in the English text of the new subparagraph (a), that the remedies provided a remedy, the Committee had decided to replace the words "of an effective remedy" by the words "of effective redress". As to the scope of the provision, the Committee had considered whether it would cover the situation where a remedy might be technically available, but at a prohibitive cost beyond the means of the injured national. It had noted, however, that there was no authority supporting such an interpretation of subparagraph (a). It had also noted that that issue might arise in the context of subparagraph (c), in connection with situations where it

might be unreasonable to want to exhaust local remedies. It had therefore considered that situations of that kind, which were not only of a financial nature, would best be covered by subparagraph (c).

13. The exception provided for in subparagraph (b), the former subparagraph (e), on undue delay had been considered uncontroversial. The Committee had noted that authority for the exception existed in case law, but it had limited itself to expounding the basic principle without going into what constituted undue delay, which the court would be in a better position to evaluate. It had also been noted that the plenary had supported the inclusion of such an exception, by way of codification. The original version proposed by the Special Rapporteur stated that the delay was “in providing a local remedy”, but that was inaccurate because the remedy already existed, and what was delayed was its implementation. The Committee had next considered an alternative formulation whereby the State was responsible for undue delay in providing redress. However, the reference to “redress” was itself considered inaccurate because it assumed that the process would end with the injured individual obtaining redress. The Committee had then considered leaving the wording simply as “is responsible for undue delay”. However, it had subsequently decided to bring the text into line with article 8 [10] by replacing the reference to “respondent State” by “State alleged to be responsible”, but the provision would then contain the word “responsible” twice. After having considered various possible formulations, the Committee had decided that a clear-cut link must be established between the delay and the remedies, and that it should also be clearly indicated that the undue delay was attributable to the State alleged to be responsible. It had therefore finally settled for “There is undue delay in the remedial process which is attributable to the State alleged to be responsible”. The Committee had found the words “remedial process” to be preferable because they were broader than just the end product of “local remedies” and included the various processes through which local remedies would be channelled.

14. With regard to subparagraph (c), which provided that the local remedies did not have to be exhausted where “there is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable”, the Special Rapporteur had initially included two separate exceptions in subparagraphs (c) and (d) of what had then been article 14 dealing with the so-called voluntary link and the absence of a territorial connection, respectively. Those issues had taken up a substantial proportion of the debate in plenary, and the Drafting Committee had also spent most of its time on them. At the beginning, the issue had been whether a provision on the voluntary link should be included in article 10 [14]. At the conclusion of the plenary debate at the previous session, the Special Rapporteur had also proposed that a provision on the voluntary link might not be necessary, and that it could be considered instead in the context of the commentary to article 8 [10], where it could be pointed out that frequently the voluntary link was a rationale for the local remedies rule and a precondition for the exercise of diplomatic protection in many cases; and that another possibility was to refer to it in the commentary to arti-

cle 9 [11], given that in most cases there would be a direct injury, and the need to exhaust local remedies would therefore not arise. In addition, the issue could be considered in the commentary to article 11 [14], subparagraph (a), explaining that there might not be the possibility of effective redress. The Commission had been strongly divided on the subject, and support had been expressed for all the options he had mentioned, as well as for the option of reformulating the provision as a general provision dealing with unreasonableness.

15. At the end of the plenary debate at the previous session, the Special Rapporteur had submitted a further proposal, according to which local remedies would not be required to be exhausted where “any requirement to exhaust local remedies would cause great hardship to the injured alien [be grossly unreasonable]”.<sup>3</sup> The proposed text would have covered the situations initially envisaged in subparagraphs (c) and (d) of the earlier text, although it would set a higher threshold. It would also have covered the situation where the costs involved would be exorbitant, as well as the situation, in what was then article 14, subparagraph (f), of denial of access to institutions which could provide remedies. That proposal by the Special Rapporteur had laid the foundation for the Drafting Committee’s approach. The Committee had had three options: to do nothing and have the Special Rapporteur deal with the issue in the commentary; to draft a provision referring to the voluntary and territorial link, thereby merging former subparagraphs (c) and (d); or to include a general provision on unreasonableness.

16. The Committee had first concluded that a provision was necessary in the text, since the issue was too substantive to be left to the commentary. It had also felt that the kind of examples being considered would not be aptly covered by the concept of “effectiveness” in subparagraph (a). In addition, the Committee had been of the view that the concept of “voluntariness” did not adequately solve the problem in the cases of hardship being dealt with. What was decisive was the degree of reciprocity and reciprocal expectations of the individual when the link was being established. The questions were therefore how substantive the link between the injured person and the State was and how much the individual gained from that link. The Committee had considered various options. The first option was to include the words “or substantial commercial relations” in the version proposed by the Special Rapporteur, although the Committee had considered that option too narrow, since injury could occur in other contexts. The second option was to delete the former subparagraph (c) on the voluntary link and to prepare a text based on the territorial link connection in subparagraph (d). The third option was to qualify the words “voluntary link” in order to elucidate the concept by focusing on its rationale, which was the acceptance of the risk that the injured person should exhaust local remedies first. Accordingly, the Committee had considered a proposal that would contain the following definition of the voluntary link: “The voluntary link must amount to a form of conduct which constitutes acceptance of local remedies in the event of injury caused by the respondent State.” However, it was considered preferable to draft a more objective pro-

<sup>3</sup> *Yearbook ... 2002*, vol. I, 2729th meeting, p. 124, para. 2.

vision and to avoid any possible suggestion that the validity of the rule was based on its acceptance by the persons concerned. It was also considered that the interpretation of conduct as constituting acceptance might be too difficult to prove. The fourth option was to reformulate the provision to provide for a more objective test by stating that “local remedies need not be exhausted where there is no material connection between the individual and the respondent State.” However, the Committee had considered the “material” connection test to be too inaccurate. The fifth option was to reformulate the text as a general provision relating to situations where it would be unreasonable to exhaust local remedies; it might read: “where in the circumstances it would be unduly harsh or unreasonable to require the exhaustion of local remedies”. That proposal had been considered to have the virtue of more fully encompassing all the possible situations that might arise. At the same time, such a formulation could be regarded as vague. The Committee had therefore questioned whether such general wording should be more rigorous, and it had been proposed that reference should be made to “the relationship between the injured person and the respondent State”. A further proposal had involved combining the material connection test and the formulation dealing with the situation where it would be unduly harsh/onerous or unreasonable to require the exhaustion of local remedies. The Committee had then moved in the direction of abandoning the reference to the “voluntary” link in favour of a more general provision. It had nevertheless been agreed that the commentary would explain that the provision would deal with the voluntary link, the assumption of risk and extraterritoriality.

17. The Committee had focused on several formulations combining the concept of a material connection between the injured person and the respondent State, together with the more general concept of “unreasonableness”. It had concluded that it would be better to place the burden of proof on the injured individual, despite the problems that would create for that person, since placing the burden on the respondent State could have the effect of eliminating the local remedies rule entirely. In considering the various options before it, the Committee had borne in mind the possible impact such an exception might have on the rule itself, since the objective was not to weaken the rule but to provide an adequate exception to cover hardship cases. The Committee had therefore preferred wording that would place the onus of proof on the applicant State in order to show that the situation warranted an exception to the general rule of the exhaustion of local remedies. Conversely, the respondent State would have an interest in showing that the individual in question had such a relationship with the host State and had accepted its internal legal system and therefore had to exhaust any remedies offered by that system. Such an approach implied a certain balance between the rights of the individual and the interests of the respondent State.

18. The Committee had reached the conclusion that a provision to that effect should be included in the article; that the provision should refer to the fact that, in some circumstances, it would be unreasonable or unduly harsh to expect the individual to exhaust local remedies; and that wording capturing the concept of the “voluntary link” should be included, without using the phrase itself.

It had narrowed its options to two formulations, namely: “[t]here is no relevant/substantial connection between the injured individual and the responsible State or the circumstances of the case make the exhaustion of local remedies [grossly] unreasonable” or “[i]t would be unreasonable to require the exhaustion of local remedies because there is no material connection between the injured individual and the responsible State or the circumstances of the case so indicate”. Eventually, the Committee had settled for the first option, without the reference to “gross” unreasonableness, which had been considered unnecessary. It had considered that that wording was broader and covered more aspects of unreasonableness, such as acts by third persons (including threats by criminal conspiracies).

19. In reaching that conclusion, the Committee had considered the difference between the terms “relevant” and “substantial” and had discussed using both those terms or the term “material”. The term “relevant” referred to the connection between the injured individual and the responsible State in relation to the injury suffered, on the understanding that the term would be explained in the commentary. As to the word “substantial”, the Committee had considered that the lack of a “substantial” connection might unnecessarily modify the local remedies rule, in the sense that the provision could be read as requiring a substantial presence or time period for the local remedies rule to apply. The test was, however, not one of quantity but one of quality. By including the word “relevant” instead, the Committee had attempted to include some elements of the concept of assumption of risk within a more general provision.

20. The Committee had considered other formulations in order to add more precision to the provision, but, except for adding the word “otherwise” in the second half of the sentence, had been unable to agree on one such formulation and had decided that only the reference to the “relevant” connection would be included in the commentary.

21. With regard to other drafting changes, the Committee had decided to ensure consistency with formulations adopted in the past by replacing all references to “respondent State” by “responsible State” or “State alleged to be responsible” and had settled for the latter formulation, in line with the wording of article 8 [10], paragraph 2.

22. The Committee had first considered article 10 [14], subparagraph (d), on the basis of the Special Rapporteur’s original proposal, namely, draft article 14, subparagraph (b), as contained in his third report and discussed in 2002. It had been agreed early on that the words “expressly or implicitly” should be deleted as superfluous. During the plenary debate, the bulk of the discussion had focused on implied waiver. In the light of the position adopted by ICJ in the *ELSI* case, namely, that the waiver of the local remedies rule was not to be readily implied, the Commission had considered that waiver should be clear and unambiguous. It had agreed that there might be circumstances where waiver might be implied and that such a possibility should be acknowledged, but the question was whether it was advisable to introduce that element into the provision or not. The Committee had also noted that the provision set out the application of a principle of general international law, which would apply even if there were no provision along



those lines. As to estoppel, the Committee had noted that, according to some sources, estoppel might give rise to the finding that the respondent State had waived the local remedies rule. Some members of the Commission had argued in plenary that estoppel might be read into the concept of implied waiver. However, the Committee had decided that it was not necessary to include a reference to estoppel in the provision, since it could give rise to problems as to what estoppel was meant to cover. It had been decided that the Special Rapporteur would deal with the issue in the commentaries.

23. In order to bring the wording into line with that of article 8 [10], the words “respondent State” had been replaced by the words “State alleged to be responsible”.

24. The Committee had decided to place the provision on waiver at the end of article 10 [14]. However, the Committee had considered the possibility of placing the paragraph on waiver in its own provision, since it was different from the other exceptions provided for in article 10 [14]. Some of the problems the Committee had faced related to the title of the provision, namely, “Exceptions to the local remedies rule”. The Committee had questioned whether the provision on waiver could really be seen as an exception to the local remedies rule in the normal sense or as a “condition” for the application of the rule. According to one of the viewpoints expressed, waiver was not an “exception”, but arose by virtue of the application of a principle of international law. Nevertheless, placing the provision on waiver, as now drafted, in its own article would have resulted in repetition and in the question why provisions dealing with situations where the local remedies rule was not applicable were not included in one text. The Committee had even briefly considered the possibility of reformulating the paragraph on waiver entirely so as to place it in its own provision, but, in the end, had decided against doing so. As was indicated in footnote 3, the Committee had left open the possibility of reconsidering the issue later on, perhaps on second reading, and drafting a separate provision, which might be entitled “Waiver”.

25. Several amendments had been made to the text of article 10 [14] in order to bring it into line with texts previously adopted. For example, the words “the injured individual” had been replaced by the words “the injured person”. On behalf of the Drafting Committee, he recommended that the Commission should adopt the articles submitted.

26. Mr. MELESCANU said that he did not understand the use of the words “declaratory judgment” in article 9 [11]. He pointed out that the Statute of the International Court of Justice referred to “advisory opinions”, not “declaratory judgments”. Article 9 [11] seemed to be based on the practical consideration that a party could apply to an international court not in order to request a decision resulting in an action or compensation, but simply in order to request it to take note of a factual situation or a rule of law. In the event of success, the party might then submit an application for redress. In any case, he thought that the commentary to article 9 [11] should explain in greater detail what that term meant, and that practical examples should be provided.

27. Mr. ECONOMIDES said that the title and contents of article 9 [11] (“Classification of claims”) were not clear. Moreover, if the Commission was to deal with classical diplomatic protection, the claim must be based exclusively, not “preponderantly”, on an injury, as was stated in the article. In the *Mavrommatis* case, PCIJ had created a fiction when it had stated that an injury to an individual must be regarded as an injury to the State. In his own opinion, however, the question with which the Commission should deal related not to the injury a State might inflict on another State, but only to classical diplomatic protection. Moreover, the thrust of the provision was already contained in the definition of diplomatic protection and in article 8 [10], paragraph 1.

28. The term “effective redress” in article 10 [14], subparagraph (a), should not be used because it was not clear what it covered. Reference was made to fair, adequate, equitable or reasonable compensation or compensation commensurate with the injury, but not to “effective redress”. On a less important point, the term “There is ... delay” in subparagraph (b) was not appropriate. In his view, however, subparagraph (c) involved a substantive problem. Since exceptions to the exhaustion of local remedies rule were blatant restrictions on State sovereignty, each one must be very carefully weighed. That paragraph was also very vague and ambiguous because it referred to two separate cases, not to one, as was shown by the use of the term “or”. If it was to be retained, the word “or” should be replaced by the word “and”.

29. The CHAIR reminded the members of the Commission that they could no longer discuss the substance of the articles, which had already been considered at the previous session. The comments by Mr. Melescanu and Mr. Economides would be reflected in the summary record of the current meeting.

30. Mr. KATEKA (Chair of the Drafting Committee), referring to the term “declaratory judgment” in article 9 [11], recalled that the *ELSI* decision stated: “The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment” [para. 51]. That excerpt showed that ICJ had used that term.

31. With regard to Mr. Economides’ comment on the word “preponderantly”, he pointed out that ICJ had referred to the preponderance criterion in the *ELSI* and *Interhandel* cases.

32. Mr. DUGARD (Special Rapporteur) said that article 10 had created a number of problems when the Commission had considered it at the previous session and had discussed it in depth. He regretted that Mr. Melescanu and Mr. Economides had not been present at that time.

33. Not only was “declaratory judgment” a recognized expression, as Mr. Kateka had indicated, but it should also be dealt with in article 9 because otherwise a State might simply request a declaratory judgment and would then not be bound to exhaust local remedies, thereby defeating the purpose of the rule. He had dwelt at length on that question in his third report but was prepared to give further explanations in the commentary.

34. With regard to the title of article 9 [11], he agreed that the words “direct or indirect claims” could have been used, but at the previous session Mr. Pellet had pointed out that they were not suitable in French and they had therefore been ruled out. Since the cases covered by article 9 [11] involved both direct and indirect claims, the scope of the provision, which related only to indirect claims, as Mr. Economides had rightly pointed out, must be restricted.

35. Referring to article 10 [14], he recalled that the Drafting Committee had used the words “effective redress” in subparagraph (a) because it had not wanted to repeat the term “remedy”. The term “redress” was broader than the term “remedy” because it included elements of compensation and was therefore more accurate. Subparagraph (b) had given rise to a lengthy debate in the Commission at the previous session, as had subparagraph (c), in which the Committee had decided that the two concepts should be included. It had therefore chosen the term “or” rather than the term “and”.

36. In any event, he assured the Commission that all the comments made on those questions would be included in the commentary.

37. Mr. MELESCANU said that, in the *ELSI* case, the United States had wanted to show that it was unnecessary to exhaust local remedies in order to bring a claim in an international court. In his opinion, paragraph 51 of the judgment by ICJ referred to that very specific aspect of the question, namely, that the United States had requested the Court to find that there had been a breach of a treaty obligation and that, consequently, the company which had enjoyed the diplomatic protection of the United States had not been required to exhaust local remedies. The purpose of article 9 was, however, entirely different, since it provided that local remedies must be exhausted. There was thus a contradiction between article 9 and paragraph 51 of the Court’s judgment, and it would be well to explain what “declaratory judgement” meant.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the Drafting Committee’s report on diplomatic protection (A/CN.4/631), as well as draft articles 8 [10], 9 [11] and 10 [14].

*It was so decided.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>4</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

39. Mr. OPERTTI BADAN welcomed the quality of the Special Rapporteur’s report (A/CN.4/531), which

contained a number of issues on which it was difficult to reach a consensus at the present time. He endorsed the Special Rapporteur’s method, which was to use concepts, such as that of significant harm, that the Commission had already discussed during its consideration of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>5</sup>

40. One such concept was that of the liability of the State as an active or passive subject of rights and obligations. At present, private agents were involved in international trade and were investing more and more in services, port infrastructures and telecommunications—essential areas that had previously been under State control. The situation had changed enormously during the second half of the twentieth century and it was now much more widely accepted that some major activities were not controlled by the State. The challenge the Commission faced was thus to formulate guidelines that would reconcile the two elements of a sharp decline in State-controlled activities and the continuing existence of State liability in those areas.

41. With regard to the problem of classical civil liability, which lay at the very heart of contract law, the Special Rapporteur had rightly acknowledged that the existence of a causal link between the harm and the activity had to be proved. That was one of the key points of the Commission’s work.

42. Other international agencies were also dealing with the topic under consideration, and the Commission should try to ensure better coordination between its work and theirs. The Special Rapporteur himself referred in his report to Bernasconi’s work, which was very useful because it stated a number of rules *de lege ferenda* on the question.<sup>6</sup> It should also be noted that, in his statement in the Commission, the Observer of the Inter-American Juridical Committee had indicated that one of the topics on which the Committee was now working was that of extracontractual liability (see 2764th meeting, para. 31), a basic question which was not only part of classical private law (conflicts of laws) but also part of the much broader subject of efforts to formulate criteria and material rules to serve as guidelines for solving the problem of compensation for loss or injury. The Commission must therefore take account of the fact that other international bodies were dealing with the topic. Accordingly, its first task should be to define the exact limits of its own work in order to avoid any conflict with other bodies.

43. The question of extracontractual liability had been discussed at the Sixth Conference on Private International Law held in Washington, D.C., from 4 to 8 February 2002. The Conference had defined a number of criteria from which the Commission might draw inspiration and which might include access by applicants to the courts, the possibility of benefiting from a favourable legal system and the right not to be tried by courts or under laws which did not have a reasonable link with the purpose of the ap-

<sup>5</sup> See 2762nd meeting, footnote 7.

<sup>6</sup> See C. Bernasconi, “Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?” Hague Conference on Private International Law, Preliminary Document No. 8 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference.

<sup>4</sup> See footnote 2 above.

plication or with the parties. As far as compensation was concerned, those criteria applied not only to relations between private individuals but also, for example, when a State formulated a claim as a result of harm attributable to a subject of private law.

44. The Special Rapporteur raised the question of the applicable law and the court to be applied to in order to obtain compensation, and in reply he proposed classical criteria, namely, the place where the harm had occurred and the place where the harm had been suffered. Following the *Mines de Potasse d'Alsace* case, court decisions had confirmed those criteria, thereby providing for dual jurisdiction. In other words, the liability of the State also gave rise to the problem of a conflict of jurisdiction, since there was not necessarily only one international court which had jurisdiction. The criterion adopted in the above-mentioned decision had thus been in the victim's favour.

45. The Special Rapporteur recognized that the topic did not easily lend itself to codification, that States should be allowed the necessary freedom to establish systems of liability suited to their particular needs and that a general and residual model of allocation of loss should be adopted. In his own view, the Commission's codification work, however limited, should be carried out in a coordinated manner, and the Special Rapporteur should define the framework more clearly in his next report, using as a basis, for example, the work of other bodies on the topic. For example, there were many bilateral agreements between Latin American countries on the question of liability that the Commission could use to give its work a regional dimension.

46. Mr. BROWNLIE said that he agreed with the idea of setting up a working group because he had the feeling that, until now, he and the other members of the Commission, except perhaps for Mr. Momtaz, had given the Special Rapporteur only limited assistance. Having been entrusted with an extraordinarily difficult task, the Special Rapporteur had done what was necessary and had provided a panorama of options. He proposed some formulations in paragraph 153 of his report, but they were of a very general nature, like the study itself. Before advancing much further, however, the Commission had to face up to some specific legal issues, including structural relations. The first issue was the overlap with State responsibility. Several delegations in the Sixth Committee had taken the view that there really was not much overlap. The point had been made that it was indeed far from clear whether the duty to compensate for harm arising from lawful harmful activities by the State which had in fact performed its duty of prevention existed in positive law. It had also been asserted that, while the principle of strict liability was accepted for certain specific regimes, such as damage caused by space objects, there was no evidence that the principle was part of customary international law.

47. The general approach of courts was to rely on the principle of objective responsibility, which was very close to that of strict liability, and to link obligations under State responsibility to fault only in exceptional cases. When it came to compensating for loss or injury, the regime of State responsibility was much more relevant than some delegations in the Sixth Committee thought. In his own view, such overlap was not necessarily antagonistic, and

he urged the members of the Commission to make sure that there was no antagonistic or colliding relationship. In the case of State responsibility, the Commission had merely codified something that had already existed in customary international law. In contrast, there were no existing principles of general international law on State liability. It was therefore up to the Commission to prevent overlap. In paragraph 153 (b) of his report, the Special Rapporteur recalled the recommendation by the Working Group established by the Commission at its fifty-fourth session that a regime of liability should be without prejudice to issues of State responsibility.<sup>7</sup> That general precaution would not be sufficient in practice, for a number of reasons. For example, it could be asked whether the local remedies rule would be applied or, in other words, whether the civil claims system in the municipal courts of States Parties which had acceded to the future instrument would replace that rule. A related question was whether remedies available under civil liability in municipal courts would qualify as another available means of settlement.

48. Liability must be absolute, not just strict. As the Special Rapporteur indicated in paragraph 153 (e) of his report, it should be dependent upon strict proof of the causal connection between the harm and the activity. In that connection, the standard of proof must be questioned. He was not convinced that the Special Rapporteur had settled that question by invoking the threshold of "significant harm". If the issue of social cost was taken into account, the whole structure would founder in the sense that the Sixth Committee might be satisfied with the work done, but States would not accede to the draft. For all those reasons, it was necessary to establish a working group which would refocus the topic.

49. Mr. KOSKENNIEMI said that he was still puzzled about how Mr. Brownlie's suggestions could help clarify the work still to be done. With regard to the overlap between State responsibility and liability that Mr. Brownlie was concerned about, he himself was not sure that it was easy to determine because the boundaries of State responsibility were not clearly demarcated. Consequently, the Commission had more leeway than some members thought.

50. He was completely in agreement with Mr. Brownlie's suggestion that some specific legal issues should be given further attention, but Mr. Brownlie had referred to four extremely difficult issues which were partly issues of internal civil law, partly issues of comparative law, but not so much issues of public international law. He himself was not sure whether the Commission was in a position to go into that level of detail. Perhaps it should stick with generalities and simply draw attention to potential problems while concentrating on its main objective, which was to ensure that the victims of harm obtained compensation.

51. Mr. PELLET said that on the whole he fully agreed with Mr. Brownlie's concerns and feared that the Special Rapporteur might become the "García Amador of liability". Mr. García Amador had not been able to complete his work on responsibility because he had tried to approach the subject from the most controversial angle. Now, the

<sup>7</sup> See the report of the Working Group in *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.



subject entrusted to the present Special Rapporteur was also a very “hot” topic and the focus of many basically political, economic, financial and technical controversies which could not be settled by legal experts, but required political negotiations. Without refusing to deal with the problems, the Commission must have the clear awareness of what it could and could not do. The topic of responsibility had been “saved” by Mr. Ago, one of whose strokes of genius had been to place himself in the area of general rules. It could be in the Commission’s interest to do the same for the topic under consideration, because it would then be staying within the realm of the law and would be in a position to make a contribution with every ounce of skill it possessed.

52. In the first place, the title of the topic was a problem because the Commission’s concern was primarily compensation for harm arising out of transboundary activities. According to the basic principle on which a consensus seemed to have been reached during the discussions by the members of the Commission, operators were liable and must provide compensation. Requesting States to encourage the establishment of insurance mechanisms and compensation funds was not within the Commission’s competence, and it would be better to deal with that question by drafting a model clause. The third key point of the study of the topic was that States were liable only on a conventional basis.

53. In any event, the Commission must not follow as dangerous a course as the one that had led to the “García Amador deadlock”.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that he had tried to indicate in his humble way which options were available to the Commission, without advocating any of them, because he had wanted to know the preferences of the members, who would all be able to choose what suited them best. Mr. Pellet’s proposal, which was, of course, welcome, might be discussed in the working group whose establishment had rightly been suggested by several members, including Mr. Brownlie.

55. The purpose of his study was to find ways of ensuring that an innocent victim could obtain compensation without running into legal problems unless he wanted to. With regard to ways of supplementing limited liability, he had suggested in paragraph 153 of his report that a State should have “an obligation to earmark national funds”, and that was very different from having to pay as a party to the damage under some kind of liability. Of course, the State would then only be helping to compensate the loss or injury caused to the victim, and that corresponded to the principle of social cost, as seen from another point of view. He wondered why the Commission could not deal with that question from the viewpoint of primary rules of law, without worrying about international law or politics.

*The meeting rose at 1 p.m.*

## 2769th MEETING

*Friday, 6 June 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### **Tributes to Mr. Robert Rosenstock, outgoing member of the Commission**

1. The CHAIR announced that, for personal reasons, Mr. Rosenstock, who had served the Commission for the past 12 years, was resigning with effect from the present meeting. Mr. Rosenstock had been the Special Rapporteur for the topic of the law of non-navigational uses of international watercourses, and his legal expertise, diplomatic skills and leadership had been instrumental in ensuring the final completion of the work on that topic<sup>1</sup> and its adoption as an international convention.<sup>2</sup> He had been a dedicated member of the Commission, participating in every drafting committee, working group and planning group on every subject. There was no aspect of the Commission’s work that he had not seriously studied and commented on.

2. Those members who had known Mr. Rosenstock from other international conferences and Sixth Committee meetings over the years had come to admire him as a man of impeccable dignity, with a wonderful sense of humour and a unique New York accent, one who liked a good fight, but always remained professional and looked for a solution to the problem at hand. On behalf of the Commission, he thanked Mr. Rosenstock, who would be remembered as a remarkable and productive colleague, and conveyed to him the Commission’s best wishes for his future endeavours.

3. Mr. PELLET said that, contrary to custom, he would address Mr. Rosenstock directly rather than through the Chair, and in the second person singular, for Mr. Rosenstock’s inimitable mastery of Shakespeare’s language did not preclude a thorough familiarity with the language of Molière. With characteristic dignity, courage and dis-

<sup>1</sup> At its forty-sixth session the Commission adopted the final text of 33 draft articles on the law of the non-navigational uses of international watercourses and a resolution on transboundary confined groundwater (*Yearbook ... 1994*, vol. II (Part Two), para. 222).

<sup>2</sup> Convention on the Law of the Non-navigational Uses of International Watercourses.

cretion, Mr. Rosenstock had decided to leave the Commission after 12 years' service. In the course of those 12 years he had soon made his highly influential presence felt: not because he hailed from the United States of America—even if, in that capacity, he had initially employed a royal plural that could occasionally be disconcerting—but because he had placed at the Commission's disposal his long experience of the United Nations; because he had accommodated himself to the collaborative approach that was one of the Commission's richest assets; and because, despite some memorable occasions when he had crossed swords with the late Doudou Thiam, or with Mr. Arangio Ruiz and himself, Mr. Rosenstock had been a moderating element, stating his often very firm point of view with moderation, winning his point or remonstrating without recourse to bullying and threats. He had been scrupulous in his attendance of plenary meetings, drafting committees and working groups; and, latterly, had even desisted from his celebrated habit of raising points of order.

4. When he had felt strongly about a point, Mr. Rosenstock had not hesitated to stick to his guns for as long as he felt the match was winnable, elegantly conceding defeat when he had seen that his cause was lost, seeking mutually acceptable compromises and always respecting his opponent. He had been a highly competent special rapporteur on the—ironically—somewhat arid topic of the non-navigational uses of international watercourses, which he had successfully shepherded to the General Assembly; and, despite recent ill health, an effective, dignified and courageous Chair of the Commission's previous session. He had been a noble brother-in-arms, bold but not rash, determined but not obstinate, learned but not pedantic, circumspect but not timid. He would be sorely missed.

5. Mr. Sreenivasa RAO congratulated Mr. Rosenstock on a productive and brilliant career in international law. Mr. Rosenstock was one of the best international law practitioners it had been his privilege to work with and a spirited advocate and defender of the interests he had chosen to represent with such distinction in the United Nations and the International Law Commission. He had contributed in no small measure to the codification and progressive development of international law as Special Rapporteur on the international watercourses topic and through his vigorous participation in other topics, particularly that of State responsibility. Honest, pungent, to the point, he went straight to the heart of the issues, but always worked to ensure agreeable outcomes. His fighting qualities and sense of accommodation were truly worthy of emulation. He wished Mr. Rosenstock a happy and healthy retirement.

6. Mr. MELESCANU said that it was always a sad moment when a member left the Commission. Yet it was also a source of satisfaction to members to have worked closely with a colleague from whom they had learned so much; one who had served as an exemplary Chair of the Commission; one with so great a fund of practical experience and common sense; and one who had so often brought his more speculative and theoretically inclined colleagues back down to earth and to reality—a reality in which international law was not what international lawyers might like it to be, but what States wanted it to be. Mr. Rosen-

stock's contributions were part of the history of the Commission, but would also remain as an inspiration for the Commission's future activities.

7. Mr. DUGARD, speaking for the African continent and on behalf of Mr. Kateka, who was unfortunately unable to be present, said that Mr. Rosenstock had been an exemplary colleague from whose wisdom the Commission had benefited tremendously. His interventions in plenary had been short, sharp, sometimes caustic, often good-humoured, his words carefully chosen, wise and amusing; and he had on many occasions brought those members who had tried to fly too high back down to earth. As a special rapporteur, he personally had particularly benefited from Mr. Rosenstock's invaluable contributions to the work of drafting committees, through his ability to effect a compromise. Mr. Rosenstock had been a great team player and a great team leader. He took the opportunity to say *au revoir* to a great international lawyer and a model member of the Commission and to wish him every happiness in his retirement.

8. Mr. OPERTTI BADAN said that he heartily endorsed the Chair's words and those of other members. His tribute to Mr. Rosenstock differed from others, in that his duties as President of the fifty-third session of the General Assembly had prevented him from devoting to the Commission the time and dedication it demanded of its members. Nonetheless, he had had the opportunity to recognize in Mr. Rosenstock a solid, straightforward and frank lawyer whose indispensable assistance to him during his term as President of the General Assembly he wished to acknowledge personally.

9. Mr. BROWNLIE offered Mr. Rosenstock his best wishes for the future. In his seven years as a member of the Commission, he had always had the benefit of Mr. Rosenstock's humour, patience and professional skills. It had been a great pleasure to work with him, and he would indeed be missed.

10. Mr. ROSENSTOCK recalled that, on the last occasion when he had spoken French in the Commission, a distinguished jurist representing France who had subsequently become a judge of ICJ had waved his handkerchief in the air in token of surrender. Since then he had never inflicted his French on anyone on a public occasion. Nonetheless, he had enjoyed working in the Commission and had enjoyed, too, the cooperative spirit that had almost invariably motivated it. Members were not representatives, but sat in the Commission in their expert capacity, to seek common goals. The very excessive praise being heaped upon him had the merit of showing that that spirit of cooperation still prevailed. That was enormously encouraging, enormously important, and a note on which he felt very comfortable to leave. He was truly grateful to colleagues for their overly gracious statements and for the pleasure he had derived from working with them in the Commission and other forums.

*The Commission gave Mr. Rosenstock a standing ovation.*

*Mr. Melescanu (Vice-Chair) took the Chair.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/529, sect. D, A/CN.4/531<sup>3</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)\*

11. Mr. Sreenivasa RAO (Special Rapporteur) said that he was grateful for the encouragement given him to continue with the difficult task at hand. He was also gratified that several members had focused specifically on the recommendations made in his report (A/CN.4/531), particularly in chapter III. He was especially grateful to Mr. Economides, who had reviewed those recommendations in the light of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, recently adopted in Kiev. There was a need to examine, *inter alia*, the standard of proof for establishing a causal link, and to clarify the eligibility of loss of profits and tourism on account of environmental damage. There was also the issue of referring to suitable forums for the resolution of claims and to forms of dispute settlement to address any dispute concerning the interpretation and application of the model to be proposed. The need to specify minimum international standards for regulating the resolution of claims also required more thought.

12. Given the strong support within the Commission for examining his recommendations further, he felt that it was important to establish a working group for that purpose. The Working Group set up in 2002 should therefore be reconstituted to continue its development of a suitable model for allocation of loss. No one disputed that the Commission should pursue the remaining part of its mandate on international liability, especially since the General Assembly had held up the adoption of the draft articles on prevention<sup>4</sup> to allow the mandate to be completed. That was a duty the Commission could not shirk, and continued delay would undermine its credibility.

13. The Commission should therefore continue the search for a model of allocation of loss which, as Mr. Kabatsi had rightly noted, did not conflict with the regime of State responsibility or duplicate concepts better addressed under civil liability. Most members seemed to support that approach, although some would have liked a clearer and more detailed reference to the totality of the regime applicable to the resolution of claims for damage. Once the Commission had succeeded in developing a model, it could explain the difficulties it had seen in the development of a regime on international liability and request the General Assembly to treat the submission of the model on allocation of loss as a full response to its original mandate. Various members had argued that the devel-

opment of such a model was perfectly possible. Moreover, given the difficulty of addressing the concerns of innocent victims through the regime of State responsibility, it might, as Ms. Xue had said, be essential.

14. Mr. Pellet had surprisingly argued that developing such a model would amount to negotiation—a task reserved for States. That raised interesting questions about the task of codification and progressive development. Not long ago, the Commission had been asked to submit a draft Statute for an International Criminal Court,<sup>5</sup> a mandate that it had successfully completed.<sup>6</sup> Moreover, its drafts always had been, and always would be, subjected to political scrutiny and negotiation by States before their eventual adoption. The Commission's mandate was not to confine itself strictly to restating the law, and progressive development had never been understood only as an extension of codification. Otherwise the Commission could not have made such progress on State responsibility. The Commission could not, in fact, alter the mandate he had reluctantly assumed.

15. It had been asked whether it would be proper to allow claims for compensation for damage arising from a single incident to be pursued through more than one source. In that connection, Mr. Gaja had suggested that it might be desirable to develop a comprehensive regime to respond to claims arising from transboundary harm. The important point of policy was that a claimant should not be allowed to seek compensation on the same legal basis in different forums. However, claims could be made in different forums on a different legal basis and decided on their merits. To reconcile different legal systems and divergent national jurisdictions was no easy task, however, and he agreed with Mr. Pellet that the Commission was not particularly suited for it.

16. A multi-tiered approach to compensation for innocent victims was now well established in all regimes which addressed damage resulting from accidents or incidents involving hazardous activities. While the Commission's mandate was restricted to compensation for transboundary harm, the future model was expected to appeal to States to provide similar relief for innocent victims within their own jurisdiction and boundaries. The working group could consider the best way of reflecting that aspect. The multi-tiered approach provided for the first share of the loss to be allocated to the operator and the second and subsequent shares to be allocated to States and to supplementary funding mechanisms. There had been considerable support in the General Assembly for such an approach. Several members of the Commission had likewise emphasized the need to provide suitable redress for innocent victims through a model that was not limited to the liability of the operator, and Mr. Al-Baharna had even questioned the assumption that State liability was an exception.

17. The sectoral regimes reviewed in the report generally endorsed the multi-tiered approach, placing primary liability at the door of the operator or person most in con-

\* Resumed from the 2767th meeting.

<sup>3</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>4</sup> General Assembly resolution 56/82, para. 2.

<sup>5</sup> General Assembly resolution 47/33 of 25 November 1992, para. 6.

<sup>6</sup> *Yearbook ... 1994*, vol. II (Part Two), para. 91.



trol at the time of the incident or accident. While most members had agreed with that approach, some—for instance, Mr. Kolodkin—had questioned the rationale for allocating some loss to the State in the absence of any wrongdoing on its part. However, the suggestion was not that the State should participate in the regime of allocation of loss on the same basis as the operator, but that it should, out of a sense of social obligation, help make good the loss suffered by innocent victims. After all, it was the State that initially authorized hazardous activities despite the risk of harm. Moreover, as the General Assembly and many members of the Commission had emphasized, such an approach might prompt States to take their duties of prevention more seriously and to be more vigilant in monitoring hazardous activities within their jurisdiction. The social justification and equitable dimension of the subsidiary tier in any regime of allocation of loss could not be overemphasized, particularly when the operator's liability was limited, or the liable operator could not be traced or identified.

18. Mr. Koskeniemi had drawn attention to a gap in the report, in that it analysed various sectoral regimes but did not refer to them in its summation. Mr. Brownlie had rightly noted the absence of any clear signposts. The gap was intentional. He had been directed, after reviewing existing models and without confusing the role of the State in such a scheme with State responsibility, to develop a model that was not linked to any particular legal basis. Accordingly, he had focused on the results of various sectoral arrangements, rather than on their negotiating process or on States' attitude to them. It was not his mandate to seek the views of States or draw conclusions with a view to codification, but only to propose a model by developing a primary obligation.

19. There had been unanimous agreement on the operator's liability, but the legal basis for that liability was not self-evident and presented difficulties for uniform application. While strict liability was recognized in most domestic legal systems and some special treaty regimes, it was not well accepted in the context of transboundary harm. In some systems, it was acceptable for some hazardous activities but not others. It should therefore be approached with caution.

20. The review of some essential elements of civil liability had also revealed considerable variations in the way in which such elements were treated in different national jurisdictions. That was why he had taken the view that the exercise of developing a model should be general and residual, a view that had received wide support.

21. Mr. Brownlie had raised questions about the relationship between claims invoking the operator's civil liability and possible claims against the State. However, if a share of the loss was to be allocated to the State only as a matter of social obligation, rather than one of liability, that issue would be better addressed in the context of apportioning the social cost of beneficial but hazardous activities.

22. Mr. Kateka and others had raised the issue of compensation for harm to the global commons. His reason for keeping that issue separate had been the need to keep the scope of the topic suitably narrow, but the Commission could return to the issue at a later stage if the General Assembly gave it a separate mandate to do so.

23. He apologized if he had not fully addressed all the points raised. That was not because they were not important, but because they required more time and reflection. The working group would have to address those and other issues with a view to submitting a more concrete set of principles or, as Mr. Yamada had suggested, even draft articles to the Commission in 2004. The Commission must respond by completing such principles or draft articles as soon as possible. That would also help the General Assembly to expedite the adoption of the draft articles on prevention.

24. The CHAIR asked whether the Commission wished to establish a working group on international liability.

25. Mr. PELLET said that, in principle, he was not opposed to establishing such a working group. However, since pursuing the topic was the Special Rapporteur's task, he wondered what precise mandate would be entrusted to the working group.

26. The CHAIR said that the working group's mandate, as defined by the Special Rapporteur, would be to refine the principles and proposals put forward in his first report.

27. Mr. OPERTTI BADAN said that, as he understood the Special Rapporteur's thinking, the working group would be requested to develop a model for allocation of loss which would be residual and subsidiary and not require the modification of domestic models. The emphasis would be not on trying to determine the applicable law but on identifying a number of guiding principles with a view to protecting the rights of victims. Those objectives would constitute a good mandate.

28. Mr. Sreenivasa RAO said the Working Group established in 2002 had looked into ways of proceeding by clearly demarcating specific areas, without reopening issues relating to State responsibility or liability. That did not mean that matters relating to civil liability had to be completely ignored or carefully avoided, however. The model could be designed to provide sufficient guidance on the settlement of claims and the forums for doing so. Those were all just ideas on which the working group could and should reflect, and they should not be deemed to constitute a rigid mandate.

29. Mr. ECONOMIDES said he agreed that, on the basis of the material contained in the report and the debate in the Commission, the working group must map out the route to be followed. The mandate was a very broad one: to develop an approach to the topic while addressing the specific issues involved.

30. Mr. MELESCANU said that the working group's task should be to draft provisions or principles to serve as a model for allocation of loss arising from transboundary damage. Such an undertaking would be pragmatic and useful. He agreed with the Special Rapporteur's preference for not delving into the type of responsibility or liability that was the basis for allocation of loss, but he thought it must also be understood that nothing prevented reference from being made to the principles underlying the model. The components of the model would, after all, be determined by its legal foundations, which, in the present case, were State practice in respect of strict, objective civil liability.

31. Mr. MANSFIELD said he supported the idea that the entire range of issues that needed to be discussed should be discussed. He expressed confidence that the Special Rapporteur would make sure that they were. The term "model" conveyed a rather narrow view of what was to be done, but the working group would undoubtedly make constructive efforts in the right direction.

32. Mr. BROWNLIE said that he agreed with those remarks and thought the working group could be relied on to work out its own mandate, which was essentially to sharpen the focus within the boundaries of the current title of the topic.

33. Mr. Sreenivasa RAO said that the Commission should consider choosing someone other than himself as chair of the working group.

34. Mr. PELLET said that it was precisely the Special Rapporteur who must be in charge of the proceedings in the working group, and there was no need for the Commission to determine the group's mandate.

35. Mr. BROWNLIE said that, if the chair of the working group was anyone other than the Special Rapporteur, that might create greater rather than fewer difficulties for the Special Rapporteur. There had to be a single captain of the ship.

36. Mr. Sreenivasa RAO said that, if the Commission so wished, he would carry out the additional responsibilities to the best of his ability.

37. Mr. AL-BAHARNA proposed that the working group should be established under the chairship of the Special Rapporteur.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to establish the Working Group on the Topic of International Liability.

*It was so decided.*

*Mr. Candioti resumed the Chair.*

**The fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/529, sect. F, A/CN.4/L.644)<sup>7</sup>**

[Agenda item 8]

39. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law) said that the open-ended Study Group had held a useful first meeting on 27 May 2003. It had discussed how to move forward during the second part of the Commission's fifty-fifth session and at its fifty-sixth session with a view to identifying priorities in and the methodology for its future work.

40. The Study Group had held an exchange of views based on the report of the Study Group contained in the Commission's report to the General Assembly on the work of its fifty-fourth session<sup>8</sup> and on the debate in the Sixth Committee during the fifty-seventh session of the General Assembly (A/CN.4/529, sect. F). It had determined that its perspective on the topic would be substantive as opposed to institutional. It would not focus on institutional questions of practical coordination, hierarchy and the jurisprudence of various actors, but would instead consider whether and how the law itself might have been fragmented into special regimes that lacked coherence or conflicted with one another. That substantive focus was consistent with the approach outlined by the Commission<sup>9</sup> and endorsed by the General Assembly, as was indicated in paragraphs 227 and 229 of the topical summary.

41. The Study Group had agreed on a tentative outline for its future work in 2003 and 2004 and would basically proceed on the basis of the recommendations contained in the Commission's report to the General Assembly on the work of its fifty-fourth session.<sup>10</sup> Concerning the programme for 2004, it had been agreed that the Chair would undertake a preliminary study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. The study would contain an analysis of the general conceptual framework in which the entire question of fragmentation had arisen. That was in line with paragraph 226 of the topical summary, which indicated a preference in the Sixth Committee for a comprehensive survey of the rules and mechanisms dealing with possible conflicts of norms. Shorter introductory papers would be prepared by individual members of the Commission on the topics mentioned in the report,<sup>11</sup> developing the issues, fleshing out the problems and highlighting what needed to be covered.

42. Expressions of interest in preparing certain papers had already been received from members of the Commission, and during the second part of the session the Study Group would finalize the allocation of topics. At that

<sup>7</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

<sup>8</sup> *Yearbook ... 2002*, vol. II (Part Two), pp. 97–99, paras. 495–513.

<sup>9</sup> *Ibid.*, p. 98, paras. 505 and 507.

<sup>10</sup> *Ibid.*, pp. 98–99, para. 512.

<sup>11</sup> *Ibid.*, subparas. (b)–(e).

time, the Study Group would also discuss the structure and contents of the papers with a view to ensuring compatibility. To facilitate the process, he himself had undertaken to prepare a discussion paper which might be either a general outline or the basis of a substantive study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. Those issues might also be discussed at a brainstorming session which would be arranged by the Study Group and to which Judge Bruno Simma, former Chair of the Study Group, might be invited.

43. He thanked all members of the Study Group for their participation and valuable contributions.

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

[Agenda item 2]

44. The CHAIR announced that the Commission had concluded the first part of its fifty-fifth session.

*The meeting rose at 11.20 a.m.*

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\* Resumed from the 2766th meeting.





## SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-FIFTH SESSION

*Held at Geneva from 7 July to 8 August 2003*

### 2770th MEETING

*Monday, 7 July 2003, at 3.05 p.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

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

[Agenda item 2]

1. The CHAIR welcomed the members of the Commission to the second part of the fifty-fifth session and announced that he would suspend the meeting to enable the Enlarged Bureau to consider a revised programme of work for the first two weeks of the second part of the session.

*The meeting was suspended at 3.10 p.m. and resumed at 3.40 p.m.*

2. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the revised programme of work.

*It was so decided.*

#### Filling of casual vacancies in the Commission (article 11 of the statute) (*concluded*)\* (A/CN.4/527 and Add.1–3)

[Agenda item 1]

3. The CHAIR announced that the Commission was required to fill a casual vacancy that had arisen following

the resignation of Mr. Robert Rosenstock. The curriculum vitae of the candidate for the vacancy was contained in document A/CN.4/527/Add.3. He would suspend the meeting to enable the members of the Commission to hold informal consultations.

*The meeting was suspended at 3.45 p.m. and resumed at 4.20 p.m.*

4. The CHAIR announced that the Commission had elected Mr. Michael J. Matheson to fill the casual vacancy. On behalf of the Commission, he would congratulate him on his election and invite him to join the Commission.

#### Unilateral acts of States (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

##### SIXTH REPORT OF THE SPECIAL RAPPORTEUR

5. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing the sixth report on unilateral acts of States (A/CN.4/534), said that it dealt in a very preliminary and general manner with one type of unilateral act, recognition, with special emphasis on recognition of States, as some members of the Commission and some representatives in the Sixth Committee had suggested in 2002. He had tried to reflect the very interesting comments made on that question, especially by the Working Group established to consider it. It had been decided at that time to take time out to request Governments to transmit information on their practice in that regard and to give more in-depth consideration to the way the Commission's work was to proceed.

6. The question was not only complex but also full of grey areas, since it could not be said that there was a theory of unilateral acts. To define the nature of a unilateral legal act, *stricto sensu*, and particularly the applicable rules, was not easy, but that in no way meant that the act did not exist as such and did not produce legal effects. There was no doubt that, as ICJ indicated in its decisions in the *Nuclear Tests* cases, declarations that took the form of unilateral acts could have the effect of creating legal obligations, which was the premise forming the basis of the Commission's work.

\* Resumed from the 2751st meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

7. The Commission had said at its forty-ninth session, in 1997, and had repeated in the conclusions adopted by the Working Group,<sup>2</sup> that it was possible to engage in codification and progressive development. The topic was ripe for that purpose, but, despite the extensive writings on it, which were nevertheless not homogeneous, and despite the very relevant but not abundant case law, it remained highly controversial. It might be possible to consider whether or not certain rules could be codified on the formulation of an act, concentrating solely on certain aspects of a general nature, but a more rigid codification effort would be more difficult. The codification of the law of treaties had proved comparatively easier because treaties had a much clearer foundation in practice, the doctrine was much more abundant and coherent, and there were many legal decisions and arbitral awards. The law of treaties was much more structured and comprehensive than any other institution, but that was certainly not true of unilateral acts, since their still undefined nature, foundation and legal effects made them more difficult to study. The Commission's work was sometimes easier when it was a matter of choosing one option among several equally valid ones. Such was the case, for example, with diplomatic protection, where there were much clearer rules than for unilateral acts, on which State practice had not yet been sufficiently analysed. However, while government opinions had not been numerous, they were fundamental to the consideration of the topic. The fact that practice had not been sufficiently analysed was one of the major obstacles he had encountered. Unilateral acts were formulated frequently, as could be seen every day, but there was no certainty as to their nature. Without knowing the views of States, it was not easy to determine what the nature of the act was, whether the State that had formulated it had the intention of acquiring legal obligations, and whether it considered that the act was binding on it or that it was simply a policy statement, the result of diplomatic practice.

8. It was difficult to tell what final form the Commission's work might take. In that connection, he recalled the very important statements made in the Sixth Committee. If it proved impossible to draft general or specific rules on unilateral acts, consideration might be given to the possibility of preparing guidelines based on general principles that would enable States to act and that would provide practice on the basis of which work of codification and progressive development could be carried out. Whatever the final product, he believed that rules applicable to unilateral acts in general could be established, based on the definition referred two years earlier to the Drafting Committee. That definition was intended to reproduce the principle that the State could bind itself through a unilateral expression of its will, it naturally being understood that, by such an act, the State could not impose obligations on other States or even on the other subjects of law that were the addressees of the act, something which was known to be a widely established principle of international law.

9. Certain principles of a general nature which were applicable to all unilateral acts, regardless of their content, could be stated. First, a unilateral act in general and an act of recognition in particular must be formulated by

persons authorized to do so—in other words, by persons authorized to act at the international level and to bind the State they represented. Such authority was determined by internal law. Moreover, the act must be freely expressed, and that made its validity subject to various conditions, such as an examination of the causes of invalidity, some of which were related to the expression of will, the lawfulness of the purpose of the act and its compatibility with the peremptory norms of international law. A unilateral act was legally binding if it met those conditions.

10. The binding nature of the act might be based on a specific rule, *acta sunt servanda*, taken from the *pacta sunt servanda* rule that governed the law of treaties. It might also be stated as a general principle that a unilateral act was binding on a State from the moment it was formulated or the moment specified in the statement by which the State expressed its will. The act would then be binding. Similarly, the act could not be modified, suspended or revoked unilaterally or arbitrarily by its author. While the act was unilateral at the moment of its formulation, it established a bilateral relationship between its author and the addressee, in which it created an expectation, thereby limiting the possibility of modifying, suspending or revoking the act in an equally unilateral way. The State accordingly did not have the arbitrary power to modify, suspend or revoke its unilateral act in the same way. Owing to the very nature of unilateral acts, their interpretation must be based on a restrictive criterion, and great caution must be exercised in respect of a unilateral statement with no specific addressee.

11. The aim of the sixth report was to bring the definition and examination of a specific material act—recognition—into line with the Commission's work on unilateral acts in general. The introduction dealt with the viability of the topic, possible forms for the final product of work on it and the structure of the report. Chapter I contained a definition of an act of recognition. It examined acts and conduct that should be excluded, reaching the conclusion that the unilateral act of recognition with which the Commission was concerned was expressly formulated, with a precise intention. A distinction was then drawn between the institution of recognition and a unilateral act of recognition. Chapter II dealt with the conditions for the validity of such an act, still in relation to unilateral acts in general. Chapter III examined the legal effects of recognition, which were expressed by their opposability, and re-examined its legal basis, namely, the introduction of a specific rule, *acta sunt servanda*. Finally, chapter IV dealt with the possibility of modifying, revoking or suspending the temporal and spatial application of acts of recognition. Some consideration was also given to causes external to an act which could bring about its termination—the disappearance of the object of the act or a change of circumstances.

12. Chapter I dealt with the various forms of recognition and ended with an outline definition that could be aligned with the draft definition of unilateral acts in general. He attempted to show that the draft definition considered by the Commission could encompass the category of specific acts constituted by recognition. Before consideration of certain forms of recognition other than the unilateral act *sensu stricto*, unilateral acts would need to be characterized, but that would not be easy. The recognition of a *de*

<sup>2</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 64, paras. 194 and 196.



*facto* or *de jure* situation or of a legal claim could, in its turn, involve waiver, or indeed promise, which made it difficult to characterize. What was most important was to determine whether it was a unilateral act in the sense understood by the Commission, regardless of its characterization, namely, a unilateral expression of will formulated with the intention of producing certain legal effects.

13. The institution of recognition did not always coincide with the unilateral act of recognition. A State could recognize a situation or a legal claim by means of a whole range of acts or conduct. No list of acts of recognition seemed to be in existence, but there were undoubtedly acts of recognition that could be identified as such, for instance, in relation to the recognition of States or Governments or of belligerency, neutrality, delimitation of borders or sovereignty. A State could recognize a *de facto* or *de jure* situation or a legal claim implicitly or explicitly, for example. The conclusion of an agreement with an entity that it had not recognized as a State constituted implicit recognition, something that would certainly have legal effects. The State formulating the act recognized the status of the entity or Government with which it had concluded the agreement, and that established a legal relationship between the author State and the addressee. The same applied to recognition of the territorial status or claim to sovereignty of a State by an explicit act which was distinct from an express act of recognition. In the Special Rapporteur's view, such acts, which should be considered to be recognition, could be excluded from the study of unilateral acts which the Commission was seeking to define.

14. A State might also recognize a situation or a claim through conduct such as silence. Such silence could take several different forms: approval, disagreement or simply indifference. International courts had several times had to rule on such conduct interpreted as recognition, for example, in the *Temple of Preah Vihear* or *Right of Passage over Indian Territory* cases. Silence signified an absence of protest, which could mean that a legal claim was recognized or accepted. Once again, a link between various unilateral acts and conduct—silence, protest or acquiescence—could be discerned. Even though it produced legal effects, however, recognition arising out of silence should be excluded from unilateral acts proper, as understood by the Commission.

15. Recognition could also be based on a treaty, and in that regard the Special Rapporteur referred the Commission to paragraph 29 of the report. In his view, such recognition should also be excluded from the unilateral acts to be considered by the Commission. As was briefly outlined in paragraphs 30 *et seq.*, acts of recognition expressed through a United Nations resolution should be excluded as well. It was worth emphasizing that, over the past years, the practice of a vote in favour of admission of a State to an international organization had developed into a form of recognition. That applied, for example, in the case of Spain with regard to the former Yugoslav Republic of Macedonia. Acts emanating from international organizations, although they could signify recognition and have political and legal force, should also be eliminated from the scope of the study. The matter was not discussed in the report, but recognition could also arise out of a statement made in the context of judicial proceedings, and in that regard the Special Rapporteur recalled the dissenting

opinion of Judge Wellington Koo in the *South West Africa* cases in 1966.

16. Chapter I also raised some questions that were crucial to the adoption of a draft definition of a unilateral act of recognition. The questions related to the criteria for the formulation of such an act and its discretionary nature, a feature that seemed quite specific to the act of recognition but could also characterize other acts, such as waiver, protest or promise. Its discretionary nature was clearly acceptable as an appropriate characteristic of the act of recognition of a State, given its more political nature.

17. There were no criteria governing the formulation of an act of recognition. The recognition of States, in particular, was not based on any consistent criteria, although the requirements of international law had to be met with regard to determining that recognition had occurred. Recognition of a state of belligerency, insurgency or neutrality also seemed not to be subject to specific criteria, and the same seemed to apply to situations of a territorial nature. Such an absence of criteria was linked with the discretionary nature of the act. Nothing obliged a State to recognize or not recognize a given situation or legal claim. Under international law, there was no general rule imposing obligations in that context, as most of the literature acknowledged. International practice in the matter was clear, as was shown by Opinion No. 10 of the Arbitration Commission of the Conference for Peace in Yugoslavia, paragraph 4 of which stated that recognition was a discretionary act that other States might perform when they chose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law.<sup>3</sup>

18. Any consideration of an act of recognition involved the consideration, even if only cursory, of non-recognition, which could also be an express act and could thus on occasion be confused with protest. The discretionary nature of non-recognition could be approached in a different way. A State could—as was recognized in various international texts, such as the Anti-War Treaty (Non-Aggression and Conciliation) (the so-called Saavedra Lamas treaty), the Charter of the Organization of American States and various General Assembly and Security Council resolutions—be prohibited from recognizing *de facto* or *de jure* situations, such as situations arising out of violations of international law, including territorial settlements obtained by non-peaceful means or by occupation. The State was thus not obliged to take action or to formulate non-recognition, but was simply not permitted to recognize such situations. The discretionary criterion that applied to the act of recognition seemed, however, to apply equally to the act of non-recognition. The latter could thus be a unilateral and fully intentional expression of will, which made it similar to the act of recognition and, to a certain extent, protest. The declaration by the Minister of State of Cyprus on 3 October 2002 on the non-recognition of the Turkish Republic of North Cyprus fell into that category, for example. In practice, the author State often explained why it did not recognize a situation; the United Kingdom's opinion on Taiwan was a good example of such practice.

<sup>3</sup> A/48/874 – S/1994/189, annex; see also *ILM*, vol. 31, no. 6 (November 1992), p. 1526.

19. Paragraphs 52 *et seq.* of the report also discussed the general possibility that the act of recognition, besides being declaratory, might be hedged around with conditions, something which might appear inconsistent with its unilateral nature. In that context, the European Community Declaration on Yugoslavia<sup>4</sup> of 16 December 1991 had been less an act of recognition as such than a directive establishing the rules for declarations by European States on the recognition of States emerging from the former Yugoslavia. To be recognized, such States were obliged, as a first step, to adopt the appropriate constitutional and political measures to guarantee that, for example, they had no territorial claims in respect of neighbouring States. As paragraph 57 of the report stated, however, the Declaration was not in itself an act of recognition. The power of recognition had not been transferred by States to the European Community. Although based on the Community's Declaration, recognition was ultimately formulated through individual acts. A unilateral act of recognition could be formulated individually, collectively or even in a concerted manner, but, as in the case of the unilateral act in general, that did not affect its unilateral nature.

20. The intention of the author State was an important element, since, as an examination of declarations of recognition by States showed, the legal nature of the act lay in the expression of intent to recognize and in the creation of an expectation. In its judgments in the *Nuclear Tests* cases, ICJ had ruled that, when the State making the declaration considered itself bound, that intention gave its position the nature of a legal commitment.

21. As to form, an act of recognition could be formulated in writing or orally, through a diplomatic note or any other declaration expressing the intention of the State. In the non-formalist system of public international law, the form of the act of recognition was in itself of no importance. That was as true of an act of recognition as of unilateral acts in general. As ICJ had stated in the *Temple of Preah Vihear* case, where the law did not provide for any particular form, the parties were free to choose the form most convenient to them, as long as their intentions were clear. After examining, by way of reference, the various acts and conduct by which States recognized a *de facto* or *de jure* situation or a legal claim, the Special Rapporteur had concluded that the best approach was to retain the act of recognition expressly formulated for that purpose, but to link it with the draft definition of unilateral acts considered by the Commission and referred to the Drafting Committee. He had therefore proposed, in paragraph 67 of the report, the following definition of the act of recognition:

A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself.

22. That suggested definition, which was based on the general opinion expressed in the literature on the topic, contained elements that resembled, to a certain extent, the draft definition that the Drafting Committee would consider during the current session: the formal, unilateral na-

ture of the act, even if collective in origin; and the valid expression of will, formulated by a subject entitled to do so—a State, in the case in question—and by a person authorized in that regard, having a lawful purpose that did not contravene any rule of *jus cogens*, with the intention of producing legal effects, which generally meant the opposability accepted by the author State from the time of its declaration or from a time indicated in the declaration.

23. Chapter II of the report dealt briefly with the validity of the unilateral act of recognition by following closely the precedent set with regard to the unilateral act in general: the capacity of the State and of persons; the expression of will of the addressee(s); the lawful object; and, more specifically, conformity with peremptory norms of international law.

24. Chapter III examined the question of the legal effects of the act of recognition, in particular, and the basis for its binding nature, referring once again to the precedent of the unilateral act in general. He pointed out first of all that, according to most legal writers, the act of recognition was declarative and not constitutive. In particular, the declarative nature of the act of recognition of a State was provided for in various international texts, including the Convention on Rights and Duties of States, which had been adopted at the Seventh International Conference of American States, held in Montevideo in December 1933, and which stated that the political existence of the State was independent of recognition by other States. That idea had subsequently been taken up by the Institute of International Law, which considered that recognition was merely the acknowledgement of the existence of the State. The declarative nature was also reaffirmed by articles 13 and 14 of the Charter of the Organization of American States and by the arbitral commission of the European Community.

25. An interesting question was raised, albeit in a different manner, by the act of non-recognition, which, irrespective of whether it was express or tacit, also had important legal implications. The non-recognition of an entity as a State affected the exercise of its rights under international law, such as, for example, rights deriving from the law concerning State immunity and the impossibility of being admitted to an international organization. However, the effects of non-recognition were basically a question between the non-recognizing State and the entity which was the object of non-recognition and which could be recognized by other States.

26. As for the legal effects of the act of recognition, it was important that the recognizing State should conduct itself in accordance with its statement, as in the case of estoppel. From the moment the statement had been made or from the time specified therein, the State or other addressee could request the author State to act in accordance with its statement. The act was therefore opposable to its author from that moment on.

27. The binding nature of the unilateral act in general and of recognition in particular must be justified, whence the adoption of a rule based on *pacta sunt servanda* and called *acta sunt servanda*. Legal certainty must also prevail in the context of unilateral acts. As ICJ had recalled in the *Nuclear Tests* cases, mutual confidence was an inher-

<sup>4</sup> See *Bulletin of the European Communities*, vol. 24, no. 12 (1991), pp. 119–120.

ent condition of international cooperation. However, the binding nature hinged on good faith, and the Court had made good faith one of the basic principles governing the establishment or fulfilment of legal obligations, regardless of their source.

28. Chapter IV dealt in general with the application of the act of recognition with a view to drawing conclusions about the possibility whether and conditions under which a State might revoke a unilateral act. An act of recognition was opposable to the author State from the time of its formulation or the time indicated in the declaration of recognition itself, and that was to some extent equivalent to the entry into force of a treaty. Its acceptance was not necessary: the fact that the act was enough in itself had been confirmed by the international courts. The author State assumed a legal obligation which was opposable to it, on the understanding that it could not impose obligations on third parties without their consent. Chapter IV also referred briefly to the spatial and temporal application of the unilateral act in the case of the recognition of States in particular. Such matters, which were dealt with in detail in the law of treaties, particularly in the 1969 Vienna Convention, should be clarified in connection with the topic under consideration.

29. At the end of the report, he also considered the modification, suspension and revocation of unilateral acts, namely whether States could modify, suspend or revoke acts unilaterally, in the same way as they had formulated them. The question of the termination of acts was very important, and the general principle could be established that the author could not terminate the act unilaterally unless that possibility was provided for in the act or there had been some fundamental change in circumstances, as was stipulated, for instance, in the law of treaties. The revocation of the act would thus depend on the conduct and attitude of the addressee, which once again was similar to estoppel. In the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ had considered that, since the acceptance of the Court's jurisdiction was undeniably unilateral in form, the unilateral nature of a declaration did not imply that the declaring State could modify the scope and contents of the declaration. Further examples were those of the declaration by the Government of Guatemala of 14 August 1991 officially recognizing the right of Belize to self-determination<sup>5</sup> and the declaration of 11 September 1991 establishing diplomatic relations with that country. Guatemala's Constitutional Court had reviewed the declarations to see whether recognition was definitive and whether an official communication and declaration by the President of the Republic were valid and produced legal effects. On 3 November 1992, the Court had issued a ruling affirming the validity of those declarations on the grounds that the act of recognition was the result of a change in the dispute between the two countries following the independence of Belize, although that could not be considered as a definitive measure under the Constitution.<sup>6</sup> A minority in the Court, including the President, had questioned the validity of the acts, stressing that in

accordance with the Constitution of Guatemala they should have been submitted to the Congress for approval. Three days after the ruling was issued, the President of Guatemala had officially announced that the recognition was not definitive and had reiterated his willingness to abide by the Constitution by putting any definitive agreement on the matter to a referendum. Several days later, the Congress had endorsed the agreement, thereby complying with constitutional requirements. That was an interesting case from the viewpoint of the validity of a unilateral act relating to a matter subject to legislative scrutiny and the possibility of the unilateral revocation of an act by the author State.

30. In conclusion, he said that the sixth report was general in nature in keeping with the Working Group's decision to have a break in its work. Further consideration was required of how the Commission should complete its work on the topic. It was worthwhile establishing some general principles, and relevant practice should also be studied. During the International Law Seminar, which was now getting under way, a group of participants under his supervision and that of Ms. Isabel Torres Cazorla from the University of Malaga would conduct an in-depth study of such practice. The Drafting Committee already had several draft texts before it, and the Working Group would have the task of deciding how the topic should be studied in the future. Perhaps there could be an exchange of views on other unilateral acts such as promise, whereby the State also assumed unilateral obligations on which common rules and principles could be drafted, even though it was difficult to characterize unilateral acts definitively. The Commission's work might be based not on the sixth report but on the relationship between an act of recognition in its various forms and in relation to different objects, and unilateral acts in general, which the Commission had been studying for several years. As it had not been possible to obtain outside assistance for a systematic study, compilation and presentation of State practice in respect of unilateral acts, he suggested that the International Law Seminar might first conduct some bibliographical research, the results of which would be presented at the end of the session. Thereafter, work on the topic would continue in cooperation with the University of Malaga and would be the subject of a document to be submitted to the Commission in 2004.

31. Mr. PELLET said that the worst criticism that could be levelled at the Special Rapporteur's sixth report was that it did not indicate where it was supposed to lead the Commission. Personally, he had always championed the topic of unilateral acts of States, and so the Special Rapporteur, who had devoted most of the introduction of his report to a justification of the very existence of the topic, had had no difficulty in convincing him that the consideration of unilateral acts might be of great practical value, since it was advisable for States to know when the unilateral expression of their will or intentions would, quite apart from any treaty-based link, constitute a commitment on their part. Intellectually, moreover, the topic might be fascinating if a study of it could explain the alchemy whereby a sovereign State trapped itself by expressing its will or how it could derive legal obligations from its sovereignty, even when it was not necessarily dealing with another State.

<sup>5</sup> A/46/368 – S/29953.

<sup>6</sup> See J. A. González Vega, "El reconocimiento de Belice ante la Corte de Constitucionalidad de Guatemala: la sentencia de 3 de noviembre de 1992", *Revista Española de Derecho Internacional*, vol. 45, no. 2 (July–December 1993), pp. 580–585.



That type of question had to be asked in order to build a conceptual framework.

32. The Special Rapporteur was much less persuasive when he went from defending his topic to defending his choice of method or, rather, the new method followed in his latest report, which plainly marked a significant methodological turning point compared with the work done so far. A move seemed to have been made away from an overall approach—which took the law of treaties or the law of State responsibility as its model and tried to give an overview of the law of unilateral acts in order to identify general rules—to a case-by-case approach, although the Special Rapporteur's oral introduction had gone some way towards lessening that impression. While he personally had not been one of the members who had advocated the new approach, he would have no objection to it in theory, provided that he could see what the purpose of a case-by-case study was. The Special Rapporteur described the general legal rules applicable to recognition, but he did not conclude with a summing up of the lessons he had learned from that description, with draft guidelines, which would be fairly pointless, despite what the Special Rapporteur explained in paragraph 8, or with draft articles, a draft resolution or a draft recommendation, even though he had, during his oral introduction, appeared to believe that he had submitted new drafting proposals for the definition of unilateral acts. That was all the more puzzling because it was hard to see how those proposals, which were scattered throughout the report, fitted in with the draft definition already referred to the Drafting Committee.

33. He himself was not radically opposed to a case-by-case approach, provided that three conditions were met. First, the Commission had to be sure that it was not giving up on its ultimate goal, which should still be a set of draft articles accompanied by commentaries, but not necessarily a preliminary draft convention. He would be in favour of the topic of unilateral acts of States only if the aim of the study was to prepare comprehensive draft articles containing general rules.

34. Second, case studies such as those the Special Rapporteur had devoted to recognition in his sixth report should be only preparatory studies, or, as had been said in the Sixth Committee by the representative of Greece (whom the Special Rapporteur quoted in paragraph 11 of his report), they should merely represent a first stage making it easier to proceed to the identification of the general rules that would be applicable to unilateral acts of States.<sup>7</sup>

35. However, the third condition was that each case study should help pave the way for the achievement of the final objective. The report under consideration did not seem to do that, for the Special Rapporteur drew no conclusions from his study of recognition. At the end of his report, he could have been expected to deduce general rules, and it would have been interesting to see how he made the transition from the specific to the general. He had seemed to suggest, during his oral introduction, that the definition of

recognition was the same as that of unilateral acts. In his own personal opinion, that was not true.

36. The question was how conclusions of that kind could be drawn from the case studies towards which the Special Rapporteur seemed to be moving. The first step would be to prepare a two-way table in which such information could be represented. The rows of the table would show the various categories of unilateral acts according to their purpose: recognition, promise, waiver and so on. That did not give rise to any particular problems, although in practice it was far from obvious, as could be seen from the difficulties mentioned by the Special Rapporteur in paragraph 21 of his report in connection with the Ihlen declaration,<sup>8</sup> named after the Norwegian Minister for Foreign Affairs. The Special Rapporteur rightly held that the declaration could be seen as a promise, a waiver or recognition, but that appeared to contradict what was said in paragraph 22 of the report, namely, that an act of recognition was not easily confused with a waiver or a promise. Unfortunately such confusion was possible and even frequent, hence the need to find distinguishing criteria. If the consideration of the topic had made it possible to dispel such uncertainty, it would have been worthwhile.

37. The columns of the table should list the various legal issues which were raised by unilateral acts in general and which should be given in-depth consideration: What was/were the criterion/criteria making it possible to tell the difference between the various unilateral acts or categories of unilateral acts? Who was entitled to enter into a commitment on behalf of a State? It was far from certain that legal authority to recognize was identical to legal authority to promise, or that legal authority to recognize a State was the same as legal authority to recognize the applicability of a rule. It would be necessary to find out on what conditions the expression of the will of a State to be bound was valid and what was/were the effect(s) of that expression of the will of a State. It was probable that the effects differed considerably from one category of act to another. Could the act in question be withdrawn, and on what conditions? The Special Rapporteur obviously had those questions in mind, and he touched on them in some places in his report, but more careful thought should be given to their formulation in order to arrive at an interpretation grid on which everyone could agree. A working group might be set up to devise a table of that kind, a task that was simple only at first sight, for the success of the study as a whole would depend on the accuracy of the headings. Nothing could be forgotten, but at the same time it was necessary to be as clear and precise as possible. Given the reason for studying the subject, once the row and column headings had been defined, the boxes would have to be filled in so as to determine the common features of the various categories of acts, rather than the features that made them different. As soon as those common features had been found, it should be relatively easy to identify the general rules which applied to unilateral acts and would form the actual substance of the draft articles.

38. The CHAIR announced that the Drafting Committee for unilateral acts was composed of: Mr. Kateka (Chair), Mr. Rodríguez Cedeño (Special Rapporteur), Mr.

<sup>7</sup> See *Official Records of the General Assembly, Fifty-seventh session, Sixth Committee, 24th meeting (A/C.6/57/SR.24)*, and corrigendum, para. 74.

<sup>8</sup> See pp. 69 and 70 of the PCIJ judgment in the *Eastern Greenland* case.

Brownlie, Mr. Candioti, Mr. Daoudi, Mr. Economides, Ms. Escameia, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Ms. Xue, Mr. Yamada and, *ex officio*, Mr. Mansfield (Rapporteur).

*The meeting rose at 6 p.m.*

## 2771st MEETING

*Tuesday, 8 July 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Du-gard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET, continuing his comments from the previous meeting, recalled that he had expressed doubts about the methodology used by the Special Rapporteur and wondered how the Special Rapporteur could tie his monographic studies in with the ultimate objective of the exercise, namely the preparation of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will. For his own part, he had suggested the use of a detailed table with, horizontally, the various categories of unilateral acts and, vertically, the legal issues that needed to be addressed. If common elements were found in the various categories, then general rules applying to unilateral acts could be developed as the very substance of the draft articles.

2. The sixth report (A/CN.4/534) was an attempt to go in that direction, but it was not sufficiently rigorous. Horizontally, the category of recognition was proposed, but the question was whether there was really a single category of unilateral acts, a homogeneous unit that could be called recognition. He thought not. The category must be more clearly delineated, something the report failed to do.

3. The Special Rapporteur referred frequently to concepts that he rightly described as similar to recognition, such as acquiescence and acceptance. The three were by no means equivalent, however. Plainly, the horizontal categories had to be further refined. In addition, it was by no means certain that acts of non-recognition must be addressed simultaneously with recognition. The subject deserved further consideration, but, *a priori*, non-recognition seemed to be more closely related to a quite different category, namely protest.

4. The Special Rapporteur devoted much attention to the classic issue of whether recognition of States was a declarative or constitutive act, rightly concluding that it was purely declarative. But what was true of recognition of States was not necessarily true of recognition of other entities. The Special Rapporteur had given an interesting analysis at the previous meeting of Guatemala's statement in 1991 in which it had recognized that Belize had the right to self-determination.<sup>2</sup> In fact, however, that had been an acknowledgement of the existence of a legal rule, not recognition in the legal sense of the term. Acknowledgement itself could probably not be ranked as recognition. If ever it could, then Guatemala's statement had been declarative, not constitutive.

5. In paragraph 90 of his report, the Special Rapporteur wrote that in some cases, for instance the *Eastern Greenland* case, the constitutive theory of recognition had been argued. True, but there was nothing surprising about that, since the State was a fact and had an existence in international law regardless of how it was viewed. On the other hand, extension of a State's territorial jurisdiction, which had been at issue in the *Eastern Greenland* case, raised an entirely different question: it flowed, or could flow, from recognition by other States, as was demonstrated in the *Eastern Greenland* and *Temple of Preah Vihear* cases, but there, recognition of territorial jurisdiction did not have, and could not have, the same effects as recognition of a State.

6. All of this implied that totally different concepts could not be lumped together, as he feared the Special Rapporteur had a tendency to do, and that even if recognition was an individual category, it produced different effects depending on its object. Those effects varied according to parameters other than the object as well, one of them being the addressee's reaction. The addressee could make use of recognition, and that very proposition—that use could be made of a unilateral act—was the primary foundation for the notion of the unilateral act, as ICJ had recalled in the all-too-famous *Nuclear Tests* cases.

7. If the addressee said nothing and did nothing, however, the option of making use of a unilateral act was merely a virtual one, a possibility, and the State that had given the recognition was much freer to go back on that act than if the beneficiary had used it as the basis for taking certain measures that it would otherwise not have taken. In such cases, the question of estoppel came up, but that did not mean the act was bilateralized, as the Special Rapporteur wrongly suggested in paragraph 119 of his report. The act remained unilateral, but the will of the State was ensnared more firmly than when there was

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2770th meeting, footnote 5.

no reaction. In the international order, every expression of will by a State—whether by a treaty, a unilateral act or other means—was an ensnarement of that will. Yet the reaction of the addressee was probably also a unilateral act, and that changed the parameters as well as the effects of the act. Even if the addressee of the act of recognition remained passive, the author of the act could reverse it, but the whole situation changed, depending on the object of recognition. Recognition of States, however, was a poor choice for the Special Rapporteur to dwell on, as it involved too many specific problems to be used as a basis for drawing conclusions.

8. It was surprising that, in discussing recognition of States, the Special Rapporteur had made no reference whatsoever to the classic distinction between *de jure* and *de facto* recognition. It was an interesting distinction in that it posited various levels of the State's capacity to go back on its recognition, *de jure* being definitive, whereas *de facto* was conditional. When the Special Rapporteur affirmed in paragraph 52 of the report that recognition could not be conditional, he was following Strupp,<sup>3</sup> whose arguments were proved wrong later in the report.

9. He questioned the wisdom of focusing on recognition of States, which was a unique institution that had been extensively studied and which produced by virtue of its object—the State—effects too specific to permit generalization. It would have been better to look at other objects of recognition and to use recognition of States as a counterpoint for comparison of other kinds of recognition. He had expressed the fear that Mr. Sreenivasa Rao might become the García Amador of liability, and now Mr. Rodríguez Cedeño seemed to be courting the same danger with regard to unilateral acts. Mr. García Amador, the first, and talented, Special Rapporteur on State responsibility, had never discovered the angle from which to come to grips with the topic. Similarly, Mr. Rodríguez Cedeño produced stimulating reports but failed to provide any proposals for future action. Where was the Commission going with the topic?

10. Perhaps the cumulative effect of the monograph category-by-category approach taken in the sixth report would serve as a trigger, as the brilliant ideas of Special Rapporteur Ago had in the context of State responsibility.

11. Mr. MELESCANU said he agreed with Mr. Pellet that the Commission had to give serious thought to how it would proceed with the topic. The subject was a difficult and delicate one, as important to international law as reservations to treaties, aiming as it did at the codification of one of the fundamental sources of public international law. It was not surprising, then, that the Special Rapporteur was running into so much difficulty.

12. As to the table suggested by Mr. Pellet, the Commission could certainly try to work on individual categories, but it should do so only with a specific purpose: to derive from them rules that applied generally to unilateral acts. What were the common elements in the various unilat-

eral acts? For example, on the basis of the very interesting distinction between *de facto* and *de jure* recognition one could draw conclusions about the legal effects of those two categories of recognition. Another possible question to address was whether the establishment of diplomatic relations should be deemed to constitute implicit recognition. It was certainly a solemn legal act, and even if the State had not made a formal declaration of *de jure* recognition, it had established a legal situation whose legal effects could hardly be denied. Finally, recognition of States was an act in which political considerations played a very important role, even to the extent of being used as a means of exerting political pressure.

13. Mr. PAMBOU-TCHIVOUNDA said he was still undecided about a question raised by Mr. Pellet: namely, when a State had taken a certain stance, whether through recognition or protest, was it ensnared to such an extent that it could not go back to its initial position? Mr. Pellet had given the example of an addressee who reacted to an act of recognition and had suggested that, in such circumstances, the author of the act could not revert so easily to its original position. He had doubts about that, however, and about the extent to which the *Eastern Greenland* case could be generalized to provide a legal basis for prohibiting an author of an act from returning to its original position.

14. As for *de facto* recognition, while the establishment of diplomatic relations could be considered equivalent to recognition, nothing prevented a State from suspending diplomatic relations unilaterally. In such cases, did the act of recognition come to an end as well?

15. With respect to Mr. Pellet's comments on the case of Guatemala and Belize, it was somewhat difficult to understand why a State should adopt such a weak, neutral position. Had Guatemala's unilateral act *vis-à-vis* Belize been intended solely for the purposes of acknowledging the right to self-determination? Surely there must have been more to it than that?

16. Mr. ECONOMIDES said that preparing an analytical table on unilateral acts as a starting point for discussion would entail a great deal of effort, possibly with rather disappointing results. The question at issue was exactly which unilateral acts the Commission should study. The original criterion established by the Commission some years ago had been to consider all unilateral acts that created international obligations *vis-à-vis* another State or States, the international community or subjects of international law. The Commission would greatly simplify its task if it examined the various categories of acts on the basis of that criterion. The objective was not the study of unilateral acts *per se*, but their study as a source of international law.

17. Mr. DAOUDI endorsed Mr. Pellet's remarks regarding the table. It was not solely the responsibility of the Special Rapporteur to find a way of furthering the progress of work on the topic. The Commission as a whole must help him find a suitable approach for developing a set of rules on unilateral acts in public international law. Only through research could the Commission establish whether such general rules existed. The purpose of the table was to find elements in common among the different categories of acts. However, the crux of the matter lay in defining

<sup>3</sup> K. Strupp, *Grundzüge des positiven Völkerrechts*, 5th ed. (Bonn/Cologne, Röhrscheid, 1932), quoted by J. F. Williams in "La doctrine de la reconnaissance en droit international et ses développements récents", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 44 (1933), p. 210.



the *instrumentum* or procedure whereby an act or declaration of will gave rise to State responsibility. That could not be done by studying the contents of individual acts or categories of acts. A treaty was the product of the will of two parties, whereas a unilateral act was a declaration by a subject of international law that gave rise to international obligations. The subject undertook those obligations of his own will, not the will of others. As to the point raised by Mr. Pambou-Tchivounda, in the case of an international legal act whereby a subject of international law undertook certain obligations of his own will, revocation entailed international responsibility, for without the latter there would be no legal act.

18. Mr. PELLET said that the case of Guatemala and Belize was far more complex than his earlier remarks had implied. The Special Rapporteur had referred to Guatemala's recognition of the right to self-determination, whereas in his view it was merely an acknowledgement. He did not agree with Mr. Pambou-Tchivounda that such a position was neutral or insipid. A State's retraction of a statement that was in effect a legal absurdity was of significance, since it allowed the State in question to re-enter international legality. In the report the Special Rapporteur applied a very broad concept of recognition. By way of example, when a State surrendered at the end of a war, was that tantamount to recognition that the country had lost the war? He did not believe so, but the concept of recognition given in the report implied otherwise, and that irked him.

19. Mr. Melescanu had said that the subject of unilateral acts was as important as that of treaties. That was not true in quantitative terms, since there were far fewer unilateral acts. However, such acts were certainly more mysterious since they involved only one sovereign State. Mr. Pambou-Tchivounda was justifiably intrigued by the problem of retraction. It must be possible for a State to undo what it had done under certain circumstances. One example was the border dispute between Burkina Faso and Mali prompted by a statement by the Head of State effectively accepting that Burkina Faso should extend its borders halfway into Mali's territory. The relevant regional African commission having decided that Mali was in the wrong, the lawyers acting for Burkina Faso, including himself, had attempted to ensnare Mali by pointing out that since the Head of State had made such a statement he should be taken at his word. ICJ, however, in its judgment in the *Frontier Dispute* (Burkina Faso/Republic of Mali) case, recognizing that the Head of State had spoken out of turn, had decided that the circumstances of the case should be taken into account. It had, of course, been the right decision, but there was no denying that the Head of State had said what he had said. The example illustrated that everything hinged on circumstances, and there were indeed circumstances in which States were ensnared by their own will and could not always find a way out. States should be reminded that they must not do exactly as they pleased. It was one of the objectives of the topic under study, the question at issue being exactly when States should not do so.

20. He did not concur with Mr. Daoudi: it was far more difficult to find an *instrumentum* for a unilateral act than for a treaty. On the other hand, he was more persuaded by Mr. Economides' remarks that it was important to know when States wished to undertake obligations. The exist-

ence of a formal *instrumentum* would help, but it was not necessary.

21. As to the comments on the establishment and suspension of diplomatic relations, he would stress that *de facto* recognition was not the same as implicit recognition. *De facto* recognition was provisional, and there was no binding legal act involved, whereas under a unilateral act a party signified its willingness to undertake certain obligations. The establishment of diplomatic relations might be considered as recognition equivalent to a legal act, but no more than that. Hence he did not understand why the Special Rapporteur kept reverting to the subject. Moreover, when diplomatic relations had been established, which implied recognition, and were subsequently suspended, the recognition could not be retracted. It was an interesting point, since it showed that States could not make one statement and then counter it by an act to the contrary. However, it was an interesting point for the sake of argument alone, and it did not fall within the scope of the Commission's study.

22. He was not wedded to the idea of a table. Nonetheless, it was important for the Commission to refrain from issuing different instructions to the Special Rapporteur every year. Basically, he was not in favour of monographs, unlike members of the Working Group. However, if monographs were going to be used, they should be prepared in accordance with a certain methodology. What really bothered him was the prospect of the Drafting Committee's starting its work that afternoon, when it was clear from the debate that it was premature to do so.

23. Mr. GAJA said that the Special Rapporteur had attempted to comply with the Commission's request to provide an analysis of the main unilateral acts before adopting some general conclusions. As a member of the Working Group, he had been in favour of such an approach, which was intended to examine specific and common elements of the acts in question. However, the sixth report had not yielded the desired results. The analysis should have focused on relevant State practice for each unilateral act: for instance, with regard to recognition, its legal effects, the requirements for its validity and questions such as revocability and termination. State practice should have been assessed so as to decide whether it reflected only specific elements or some more general principles relating to unilateral acts.

24. The main aspects of recognition were dealt with in the report, but on the basis of theoretical and abstract propositions. Moreover, the examination of State practice was very limited. While he welcomed the initiative referred to by the Special Rapporteur for collecting information on State practice, it was regrettable that the Commission would have to take decisions without such material to hand at the present session.

25. The analysis of State practice would not provide all the answers, particularly since distinctions between the various acts were not clear-cut. However, it would have been useful for discussion on whether recognition was a form of acceptance or acquiescence or something else—a

matter on which, as Mr. Pellet had observed, the report remained unclear.

26. By way of example, paragraph 96 of the report identified the legal effects of recognition following Anzilotti's textbook,<sup>4</sup> but made no reference to State practice. Subsequent references were made to another textbook. He was surprised that no reference was made to what was generally considered the main work on recognition by Verhoeven.<sup>5</sup> Verhoeven concluded that recognition had no legal effect whatsoever. Clearly, that opinion was only tenable if the effects of recognition were separated from those of acceptance.

27. ICJ tended to understand "recognition" as being a form of acceptance or acquiescence, as was clearly shown in two passages to which the report referred in the section on legal effects. Thus, in the *Arbitral Award Made by the King of Spain on 23 December 1906* case, mentioned in paragraph 100 of the report, the Court had held that Nicaragua had "recognized the award as valid" [p. 213] and had also referred to Nicaragua's "acceptance". Even more clearly, in its judgment in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court had had acceptance in mind when it considered the wording of a treaty provision in which the parties stated that they recognized the border in question. Clearly, no unilateral act had been involved, so it was not a good example for the purposes of the report, apart from the use of the word "recognition" rather than "acceptance" in relation to the States' attitude. A third example was provided by a passage in the judgment in the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case, in which the Chamber constituted by the Court had said that acquiescence was "equivalent to tacit recognition manifested by unilateral conduct" [p. 305], which the other party might interpret as consent.

28. Although such passages did not contradict the Special Rapporteur's proposition concerning the legal effects of recognition as preventing contestation in the future, they did not—since they linked recognition with acceptance or acquiescence—provide adequate support for the existence of a specific consequence of recognition. His conclusion, therefore, was that research on the question—along with others that had been dealt with more succinctly by the Special Rapporteur—should be carried much further. One way of doing so would be to appoint a small working group with the task of assisting the Special Rapporteur, in the sense of actually working alongside him in the examination of what was an extraordinarily complicated topic.

29. Mr. DUGARD said that, interesting and challenging as the report was, he took issue with some of the Special Rapporteur's statements. For example, the assertion in paragraph 1 of his report that the Commission must examine any legal institutions that it was asked to or must respond appropriately to the requests made by Governments was an exaggerated description of the Commission's subordi-

nate role to its perceived political masters. The Commission was ultimately the master of its own house, being made up of independent experts who were not slaves to Governments or the Sixth Committee. The use of such language merely served to confirm the opinion of those who thought otherwise.

30. The purpose of the report appeared to be to illustrate the nature of unilateral acts by the study of recognition as a unilateral act. Paragraph 17 of the report, however, drew a false distinction between recognition as an institution and unilateral acts of recognition. It was impossible to examine the one without the other.

31. Although recognition as a unilateral act had been on the list of topics suggested by Lauterpacht as a subject suitable for codification in 1947,<sup>6</sup> the topic had repeatedly been rejected by some as being too controversial or political. However, the present report came perilously close to examining recognition of States as an institution through the back door. He would welcome a direct study of the topic, despite its controversial nature.

32. Some of the Special Rapporteur's comments on recognition as an institution could not go unchallenged. As Mr. Gaja had said, too little account had been taken not only of State practice but also of theory, as developed in the work of Chen, for example. The Special Rapporteur's comments were of great interest but required further scrutiny. He had, for example, ventured into the debate on whether recognition was a declaratory or a constitutive act. That debate usually related to the consequences of recognition. The Special Rapporteur nonetheless looked at it from the standpoint of the nature of the act of recognition, whether declaratory or constitutive. The majority of writers considered it declaratory, but that interpretation did not cover all cases: an examination of State practice led to quite different conclusions. Thus, the purpose of the United States in recognizing Panama in 1903 had been to secure the right to build the Panama Canal, and that recognition, premature as it might have been, had been constitutive. Similarly, the recognition by four or five African States of the breakaway region of Biafra had taken place in order to prevent the violations of human rights occurring during the war with Nigeria. Turkey had recognized the Turkish Republic of North Cyprus, and, in the apartheid era, South Africa had recognized its own Bantustans. Most recently, Bosnia and Herzegovina had been recognized by the European Union and admitted as a Member State of the United Nations while it was still engaged in a full-scale war and had no effective Government. Its recognition, under the terms of the Convention on Rights and Duties of States, had been designed precisely to terminate the conflict. Such examples might be held to be unfortunate, but in each case the intention of the recognition had been to create a State. Hence, it could not be simply said that the act of recognition was declaratory in nature; it might well have a constitutive purpose.

33. With regard to criteria for recognition, there appeared to be a contradiction between the first and second sentences of paragraph 35 of the report. In his view, criteria undoubtedly had a role to play in the recognition

<sup>4</sup> D. Anzilotti, *Cours de droit international* (Paris, Sirey, 1929), p. 347.

<sup>5</sup> See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (Paris, Pedone, 1975).

<sup>6</sup> See H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947).

of States, although the Convention on Rights and Duties of States might no longer constitute a full statement of the criteria, since it might be necessary to have regard to human rights, self-determination and United Nations resolutions in recognizing a State. The question then arose whether recognition was discretionary. In that context, it was regrettable that paragraph 39 gave no consideration to Lauterpacht's controversial view that States were under a duty to recognize an entity that met the requirement of statehood expounded in the Convention.

34. Raising the question of whether admission to the United Nations was a form of collective recognition, the Special Rapporteur correctly dismissed the question as irrelevant to the topic. His remarks did, however, whet the appetite as to whether admission to the United Nations was a form of collective recognition or not. There was a further contradiction between the suggestion in paragraph 54 of the report that collective recognition was possible because a United Nations vote constituted a form of declaration and the statement in paragraph 32 that collective recognition did not fall within the Commission's mandate. The issue required further study.

35. A further question was whether non-recognition was discretionary. Paragraph 45 of the report suggested that it was not: the fact that the Security Council could direct States not to recognize a new entity that claimed to be a State surely gave rise to the duty of non-recognition. As for the withdrawal of recognition, in the case of failed States the Special Rapporteur suggested in paragraph 96 that no withdrawal of recognition was possible, whereas paragraph 101 acknowledged that in some circumstances such withdrawal was indeed possible. The matter was important in view of the growing phenomenon of failed States, but again the Special Rapporteur whetted the reader's appetite yet failed to pursue the topic.

36. Finally, the Special Rapporteur said that implied recognition was not relevant to the study. Nevertheless, since no form was required for the act of recognition, it surely followed that implied recognition could exist. Thus, in the past, South Africa had maintained diplomatic relations with Rhodesia, which implied recognition. Yet the Special Rapporteur dismissed the point.

37. He congratulated the Special Rapporteur on a provocative report, which nonetheless lacked the requisite clarity: it touched on a host of controversial issues, without examining any of those that had troubled jurists for over 100 years. Indeed, it simply added to the growing awareness that recognition, as a unilateral act, was very difficult to codify. The report mixed theory and practice, with the result that it was vulnerable on both counts: State practice was inadequately examined, while the account of recognition as a unilateral act was not convincing.

38. He was uncertain how the Commission should proceed—whether it should adopt a theoretical approach or should examine State practice in detail. He agreed with Mr. Gaja that the latter would be more fruitful. An examination of State practice would enable the Commission to establish the common principles relating to the nature of recognition.

*The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.*

39. The CHAIR said that, following informal consultations on how best to proceed, support had emerged for the establishment of a small *ad hoc* group that would meet before the text was referred to the Drafting Committee. The group would convene immediately, with the task of defining the basis and objective of the study of unilateral acts with a view to progressive development.

40. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he fully supported the Chair's proposal and suggested that the *ad hoc* group should be chaired by Mr. Pellet, who had expressed a willingness to start at once, thus enabling the Drafting Committee to undertake its work on the topic during the session.

41. The CHAIR said he took it that the Commission was in favour of establishing an *ad hoc* group that would work on definitions and undertake research into State practice, beginning immediately after the end of the meeting.

*It was so decided.*

*The meeting rose at 12.25 p.m.*

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## 2772nd MEETING

*Wednesday, 9 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

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### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOSKENNIEMI commended the Special Rapporteur's decision to turn from the generalities of unilateral acts to the specific topic of recognition and, in particular, the recognition of States. By the same token, he was not in favour of drawing up a grand table contain-

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



ing all type of unilateral acts, as advocated by Mr. Pellet. In relation to the general approach outlined in the introduction to the sixth report (A/CN.4/534, paras. 1–16), he noted that the Special Rapporteur had doubts about the existence of unilateral acts as a legal institution, but argued that, even if they did not exist as an institution, the Commission would have to take them up, even though he also said that the subject might be too complex to be subjected to codification. The fact was that the topic was not susceptible to codification because it did not exist as a legal institution, unlike treaties and the succession of States, topics having an entire set of rules, principles and institutions. Unilateral acts did not describe a set of formal arrangements but rather the sociological reality of State activity, which might occur unilaterally but could often be found in the context of interaction with other States, with the result that States sometimes found themselves bound by their actions. Unfortunately, lawyers and ICJ had, in the *Nuclear Tests* cases, for example, based such obligations on a concept of unilateral acts that implied the presence of a set of formal acts fulfilling certain conditions of validity. That approach was, however, nothing more than an *ex post facto* construction, since in all such cases the obligation depended on informal considerations: estoppel, equity, reasonableness, justice or general principles of law. That being so, although the Court had ruled in the above-mentioned case that unilateral declarations bound the State making them when it was that State's intention to assume such an obligation, it had corrected its unfortunate interpretation of unilateral acts by stating that good faith and the need for confidence in international relations sometimes required a State to be bound. All such acts depended on the context. The topic of unilateral acts was not susceptible to codification because it denoted an area of informal State interaction that fell outside the formal law of treaties, even if it could justifiably be said that obligations sometimes emerged from it. It would, however, be a mistake to try to parcel up that area of law into formalistic categories.

2. As for the specific act of recognition, the report did not, as other members of the Commission had already pointed out, make any useful reference to academic research, whether recent or not, and, more importantly, it paid little attention to the academic dilemmas or the tone of the debate on the topic. Nor was it practical enough: the review of State practice was sparse and haphazard, as well as containing some contested interpretations of such practice. On the other hand, the Special Rapporteur had only recently embarked on that aspect of the subject and should be congratulated on his willingness to consider the practice, since academic abstractions in the area of recognition were indeterminate and of little use in grappling with the practical problems of recognition. Generally speaking, the Special Rapporteur's treatment of recognition was characterized by a formalistic attitude that limited recognition to a formal act, with the result that—although the report did not say so in so many words—implicit or tacit recognition would need to be excluded from the compass of the study. It was, however, fair to wonder why, in practice, recognition should include a governmental declaration communicated through a diplomatic procedure, but exclude the formal act of a bilateral treaty on the grounds that it did not expressly refer to recognition. The distinction between express and tacit recognition, which arose out of the for-

malistic and voluntaristic notion put forward by the Special Rapporteur and his identification of recognition as an expression of willingness to be bound, was inapplicable in practice, not only because the distinction was strange in itself, but also because of the more general problem referred to above, namely, that recognition, promise, waiver or estoppel constituted not a legal institution but informal State activities.

3. The State would generally agree to be bound, in a reciprocal fashion, but most often it had no intention of being so. It was for lawyers to tell political decision makers that their actions could impose an obligation on the State against their will, but it was not their business to provide decision makers with a procedural device whereby they could formulate an act having the effect of binding the State, if they so wished. The topic of unilateral acts of States was on the Commission's agenda in order to deal with the grey area of State conduct in cases where the will to be bound was not clear, or where it was necessary to establish criteria to determine whether an obligation had been created outside the framework of a formal act. The topic of recognition, and recognition of a State in particular, might present a window of opportunity in that regard by enabling the Commission to deal with the reality that existed as a legal institution, having the corresponding formal characteristics. By undertaking a practice-oriented study on the recognition of States and perhaps also the recognition of governments, it could set about drawing up guidelines or articles regulating the institution.

4. Mr. BROWNLIE said that, procedurally speaking, Mr. Koskeniemi's comments raised the question whether the Commission should continue its consideration of a subject that had been on its agenda for several years, and, if so, whether it should rely on the Special Rapporteur's sixth report or should revise its agenda. Second, although the word "recognition" appeared in the rubric "recognition of States", the latter was clearly a separate topic. No one could believe that a study of the recognition of States necessitated a study of the recognition of governments. The Commission would therefore be turning from the question of unilateral acts to that of the possible subject matter of such acts, which would include much, if not all, of international law. It was a little unfair to say that no such legal institution as unilateral acts existed, since they were quite widely accepted as a category of study and as an area of problems. Indeed, they could cause difficulties. The United Kingdom had decided some time ago that the subject was so complex that it was not susceptible to codification. It could, however, be the topic of a structured study using the material contained in the Special Rapporteur's previous reports, which could be refined and presented in a systematic way. The sixth report, meanwhile, dealt with recognition, with what was recognized and with the legality of the act itself; and that went beyond the scope of the subject.

5. Mr. PAMBOU-TCHIVOUNDA said that it was impossible not to be shocked by Mr. Koskeniemi's questioning of the existence of unilateral acts of States as a legal category and his assertion that such acts reflected the sociological reality of relations between States. After all, the same could be said of treaties, which were also concluded within a given context, since the realities that governed the development of law on the international stage

were realities of interest. Unilateral acts of States had both a theoretical and a practical existence, as was evidenced by the numerous references to State practice appearing in the Special Rapporteur's sixth report.

6. Mr. MELESCANU said that he endorsed Mr. Brownlie's view. The current discussion was pointless, since the topic of international acts was indeed on the agenda of the Commission, which should do its best to carry out its mandate. He had not been convinced by Mr. Koskenniemi's argument: the assertion that only the will of the State was of any account, together with the denial of the legal existence of unilateral acts whereby States decided unilaterally to undertake international obligations, was self-contradictory. Unlike Mr. Koskenniemi, who also thought that, if States expressed their will clearly, there was nothing to codify, he believed that there was a need for the codification of the rules governing issues such as the conditions for the validity of a unilateral act and its consequences, from the point of view of liability, for example. In any case, if the Commission decided, once the study had been completed, that there was insufficient material for codification, it was free to adopt a resolution to that effect to submit to the General Assembly. At the current stage, to ensure that the work advanced, it would be preferable to refrain from casting doubt on both the topic and the manner of its treatment.

7. Mr. CHEE said that he could not agree with Mr. Koskenniemi's statement that recognition was not an institution of international law. He read out to the Commission the definition of recognition contained in two public international law treaties.

8. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he would respond to all the comments that had been made when the general debate continued at the Commission's next meeting, but he felt compelled to give a reply to Mr. Koskenniemi, who would not be present at that meeting, on the question of existence of unilateral acts of States. It could hardly be argued that international law covered acts, conduct, activities or absences of reaction that could be attributed to States in international relations but were not linked to treaties. He was referring to specific acts, which had specific characteristics and produced legal effects. They were acts whereby States unilaterally undertook obligations in the exercise of their sovereignty. As such, they should be regulated by specific rules in order to increase confidence and security in international relations.

9. Mr. ADDO said that unilateral acts undoubtedly existed, but whether the topic was really ready for codification was open to question, given the paucity of State practice. The Commission should, perhaps, wait for the *ad hoc* working group to complete its work, so that it could suggest the best way forward.

10. Mr. MANSFIELD (Rapporteur) said he had not heard Mr. Koskenniemi saying that unilateral acts of States did not exist, but had understood him as saying that it was difficult, even impossible, to codify rules governing such acts with the same clarity and degree of detail as rules for the law of treaties. Moreover, he tended to agree with Mr. Koskenniemi that it was pointless to try to find the will of States to be bound by a series of acts where such will pat-

ently did not exist, and that a study of practice and cases where States had undertaken obligations might result in the formulation of guidelines, but not the drafting of detailed rules and precise definitions such as those on the law of treaties. Whatever the case, it showed the wisdom of the Commission's decision to set up a working group on the subject.

11. Ms. XUE said she was of the opinion that what was important was to determine whether certain unilateral acts by States constituted a separate source of international obligations. If State practice showed that that was indeed the case, there was ample justification for considering the matter. The Special Rapporteur had done the right thing by beginning the study of different acts with the concept of recognition, for, although the acts tended to be based on political considerations, they also had legal effects in relations among States, for instance, in the field of treaty obligations or diplomatic privileges and immunities. Thus, when a State recognized the Government of the People's Republic of China as the sole legitimate Government in China, the country was legally entitled to expect a certain conduct on the part of the State concerned.

12. Mr. DAOUDI said that, if he had understood Mr. Koskenniemi's statement correctly, he was not denying the existence of unilateral acts, but the existence under international law of the legal institution known as "unilateral acts", which was likely to lead to codification. During the previous session, the majority of the members of the Commission had decided that work on the topic should be continued and had recommended that the Special Rapporteur should examine unilateral acts one by one.

13. The current discussion should have taken place when the Sixth Committee had requested the Commission to study the topic of unilateral acts. It was in that context and in response to the question whether it should continue or abandon its study of the topic that the Commission had decided to establish a working group to study how the topic should be dealt with. For that reason, he did not consider it useful to continue discussing the matter before the Working Group's report became available.

14. Mr. NIEHAUS expressed surprise at Mr. Koskenniemi's remarks, which seemed to deny the existence of unilateral acts. Such a position, about which some members had raised doubts, was difficult to accept.

15. The topic was a complex one, as the Special Rapporteur had clearly shown, but it would be a serious error simply to deny the existence of unilateral acts, when they were unanimously recognized by doctrine. Likewise, to say that unilateral acts were informal, which implied that there was no intention to be bound, was not true. There were unilateral acts whereby States expressed their will to undertake obligations, although it was a different type of obligation from that arising under a treaty act. That was why the decision to set up a working group with the task of responding to questions raised by the Sixth Committee was justified. The Commission would find itself in an embarrassing situation if it concluded that it had been working for several years on a subject which did not exist. The Working Group must therefore be given the opportunity to continue its work with a view to reaching a satisfactory conclusion.

16. Mr. SEPÚLVEDA considered that one of the tasks of the Working Group would be to clarify, not the feasibility of the topic, but the possible validity of the study on unilateral acts. He did not share the Special Rapporteur's view expressed in paragraph 1 of the report, according to which the Commission, as a consultative organ of the General Assembly, must consider all topics on its agenda. That was not sufficient justification. First the legal nature of unilateral acts as well as their legal effects would have to be clarified. The introduction should indicate why unilateral acts entailed legal consequences and established rights and obligations.

17. As far as recognition was concerned, he considered that the inductive method proposed for dealing with the matter was appropriate. However, the distinction drawn in chapter I between the different categories of recognition was inadequate, and that might lead to some confusion about the recognition of States, the recognition of Governments, the recognition of the belligerent State, the recognition of insurrection, recognition *de jure* or the recognition of territorial changes. All those acts produced different effects, which were not studied as they should have been in the report. The basis for a unilateral act by a State, on the one hand, and the institution of recognition in its various legal forms, on the other hand, had not been dealt with clearly enough in the report to explain why unilateral acts of States and the institution of recognition had to be considered.

18. With regard to methodology, he considered that a system should be used which would, in the view of the Sixth Committee, justify the feasibility of a study of the topic by the Commission.

19. The CHAIR, speaking as a member of the Commission, acknowledged that Mr. Koskeniemi's comments on the subjective element of will in unilateral acts were relevant. It was true that international law sometimes recognized the effects of some unilateral conduct, even in the absence of any intention to produce such effects. That had been clearly demonstrated in the *Nuclear Tests* cases, in which ICJ had attributed an intention to the declaration by the representative of France which he probably had not had. Intention was thus a very important element to be considered by the Working Group, particularly as far as defining the topic for study was concerned.

20. As Mr. Brownlie had said, moreover, State recognition was a separate topic. In that connection, the purpose of the study must be to analyse recognition in general as a category of unilateral acts, rather than to try to analyse the very specific aspects of recognition.

21. Mr. KOSKENNIEMI said he fully shared Mr. Melescanu's view that it would be indefensible and unwise to give up the study of unilateral acts after so many years. It had not been his intention to propose such a move or to claim that the Commission had any alternative, as some members seemed to believe. On the contrary, he considered that the establishment of a working group to deal with the subject was a good idea—a step in the right direction.

22. So why then had there been all those questions on the feasibility of the topic? Probably because adopting of general positions affected the way in which a given or spe-

cific opinion was formed on the question of recognition. He had merely wished to make some general comments and to draw attention to the ambiguous nature of the legal concept of institution, which was not well defined, with a view to the forthcoming discussion.

23. In that respect, he agreed with the first sentence of the report ("It is true that it has not been clearly established that the institution of unilateral legal acts exists..."); that was admittedly surprising, but fully reflected his point of view. What was the point of questioning the existence of unilateral acts as an institution, when there was no doubt about the existence of treaty law or State succession as institutions? Drawing an analogy with internal law, he pointed out that a contract was undeniably an institution of internal law, regardless of the cultural context, like marriage. But could it be said that due diligence was a legal institution? What those three notions had in common was that they were legal terms and concepts, but there was a great difference between them: contract and marriage were governed by a set of rules and principles, but also by institutional practices and history; that was not the case of due diligence. It was not a legal institution in that there was no act of due diligence to which a set of rules, principles and criteria could be applied. So when it was stated that unilateral acts were not a legal institution in the sense of the law of treaties or State succession, the same distinction was being drawn, and it would have practical consequences with regard to codification. That was why the first sentence of the report made sense only if such a distinction was drawn; but the drawing of such a distinction had many consequences.

24. Mr. MOMTAZ, welcoming the fact that the Special Rapporteur was to be assisted by a team of university research scholars, said that such help would enable him to deal in greater depth with one very important aspect of the topic, State practice. That team could perhaps take up the question raised by Mr. Melescanu, namely, to what extent States which had entered into a commitment through a unilateral act were liable if they did not honour their commitments. That would entail codification based on State practice. Personally, he did not share the opinion expressed by the Special Rapporteur in paragraph 4 of his report that work should focus more on a progressive development approach than on codification. The question was not one of establishing general rules on the subject, but of identifying a minimum number of rules which had been drawn from State practice and could then be regarded as the lowest common denominator. Care therefore had to be taken not to make all of the rules on the law on treaties applicable to unilateral acts.

25. The institution of unilateral acts had undeniably proved useful to the international community, in that it enabled a State to enter into a legal commitment without having to sign an agreement, and thus to defuse a situation that placed peace and international security in jeopardy. That was why the binding nature of a unilateral act had to be emphasized in order to obviate the risk of completely destroying its stabilizing effect in international relations. The Special Rapporteur was right in that regard to refer to the principles of *acta sunt servanda* and good faith in relation to unilateral acts. Those principles certainly applied to all unilateral acts and to recognition in particular. As Ms. Xue had said earlier, when a State recognized a Gov-



ernment, it assumed an obligation to that Government. If, however, all the principles of the Vienna system of the law of treaties were transferred to the context of unilateral acts as a whole, the latter would no longer have a *raison d'être*.

26. The main questions arising in respect of recognition were whether States, through such an act, were free to enter into a commitment towards an entity which had declared its independence, and whether that freedom to enter into a commitment was comparable to the freedom to enter into a commitment by signing or ratifying a treaty. It was hard to believe that a State was free to grant recognition to any entity that wanted such recognition. Those doubts were substantiated by the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community<sup>2</sup> which were mentioned in paragraph 37 of the report and whose purpose had been to reconcile the right to self-determination with the need for international stability. A unilateral act did indeed have a stabilizing effect. In an endeavour to reconcile the interests of the international community and the act of recognition, Mr. Boutros Boutros-Ghali, the former Secretary-General of the United Nations, had said in his concluding statement to the Congress on International Law, held in 1995, "To suggest that any social or ethnic entity which decides that—often for reasons which are ambiguous and sometimes reprehensible—it is different from its neighbours, should be recognized as a State would be a very perverse way of interpreting the right of peoples to self-determination."<sup>3</sup> In other words, States would appear to have a rather vaguely defined obligation of non-recognition. A difference therefore existed between a unilateral act of recognition, a commitment to another State into which a State was free to enter, and a treaty-based undertaking.

27. The same considerations held good with regard to the recognition of Governments, a topic to which the Special Rapporteur had unfortunately not referred. It was clear, for example, that most States had not recognized the Taliban government, despite the fact that it had controlled almost the entire territory of Afghanistan, primarily because that government had not respected human rights or fundamental freedoms. A unilateral act was not therefore discretionary. It was against that background that consideration should be given to the withdrawal of a *de facto* act of recognition of a State, to which Mr. Pellet had referred at the previous meeting.

28. All that showed the advantages and limitations of the category-by-category approach adopted in the sixth report. A unilateral act of recognition had specific characteristics which were difficult to transpose to all the other categories of unilateral acts. It would therefore be advisable to pursue the category-by-category approach initiated by the Special Rapporteur in order to define the specific characteristics of each category of unilateral act and to exclude from the draft articles those which were not shared by all unilateral acts. Hence it would seem that not many common rules would be drawn from State practice.

29. Mr. PAMBOU-TCHIVOUNDA said it was regrettable that there was not a single rule—not even the start of one—in the sixth report, which also did not contain a single draft article.

30. As to the debate on the discretionary nature of recognition, to say that there were rules of international law which established an obligation of non-recognition or at least an obligation for States to ensure that the law endorsed an initiative in respect of recognition was one thing, but to declare that States could not freely determine whether a situation should be recognized, even if that meant that they might make a mistake, was another. In the example mentioned by Mr. Momtaz of the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community, the concern had been to safeguard the rights of minorities within existing borders. In Africa, the inviolability of borders was regarded as a peremptory norm. Conceivably, the rebellion in Côte d'Ivoire might cause the country to split into three separate States which the African Union was unlikely to recognize. But what of non-African States which might, on account of their own interests, well wish to recognize some of those States? The rules of international law might restrict freedom of recognition, but they did not prevent a State from taking the initiative of venturing into recognition. That was the crux of the problem of the discretionary nature of recognition.

31. Mr. MOMTAZ, replying to Mr. Pambou-Tchivounda on the question whether the report under consideration identified a rule which might apply to all categories of unilateral acts, said that the principle of *acta sunt servanda*—of good faith in the fulfilment of commitments entered into under a unilateral act—might be one rule that must apply to all unilateral acts. That was the conclusion reached by the Special Rapporteur.

32. As to the second point raised by Mr. Pambou-Tchivounda, he himself had not said that a State was not free to evaluate the criteria for the recognition of States and Governments. What he had meant was that those criteria were becoming increasingly strict in order to reconcile questions of security and the maintenance of peace with States' freedom of action in matters of recognition. States were still free to evaluate those criteria.

33. Mr. ECONOMIDES, referring to some of the points made in the interesting, stimulating report submitted by the Special Rapporteur, noted that it was stated in paragraph 26 that "silence is not always interpreted as acquiescence". That meant that, as a general rule, silence was interpreted as acquiescence, save in exceptional circumstances. That sentence was absolute. In his view, very great caution was required when treating silence as acquiescence, especially if such passive conduct had been adopted by a weak State in its dealings with a powerful State.

34. He disagreed with the opinion the Special Rapporteur expressed in paragraph 99 of his report that a State could "persistently oppose a general custom, which would mean that the latter is not opposable to it". It was true, as Mr. Melescanu had noted at the preceding meeting, that customary international law had not yet been codified, but the Special Rapporteur's view was at variance with Article 38, paragraph 1 (b), of the Statute of the International

<sup>2</sup> See *Bulletin of the European Communities*, vol. 24, no. 12 (1991).

<sup>3</sup> Press release SG/SM/5583/Rev.1 – L/2710/Rev.1 of 17 March 1995, p. 4.

Court of Justice, since, unlike a treaty, custom was binding on all States without distinction, even those which opposed it. Custom was not an optional legal rule.

35. An act of recognition was not declarative. Admittedly, an act of recognition did not create the new State which already existed at the time of its recognition as a State, but there was no denying that, on the basis of recognition, a whole nexus of relations was established between recognizing and recognized States, and that nexus of relations was more constitutive than declarative in nature.

36. It was also regrettable that, when referring to the obligation of non-recognition under United Nations decisions, the Special Rapporteur did not mention the relatively recent case, to which Mr. Dugard had referred at the preceding meeting, of the State of Northern Cyprus, which had been established unlawfully.

37. Like Mr. Pellet, he regretted that the Special Rapporteur had not made more of the classical distinction between *de jure* recognition, which was irrevocable, and *de facto* recognition, which was both temporary and of a trial nature and therefore revocable.

38. The procedure for admitting new Members to the United Nations could not be regarded as a collective act of recognition of those States. A recent example which gave the lie to any such tendency was the attitude of Greece, which had voted in favour of the admission of the former Yugoslav Republic of Macedonia to the United Nations while maintaining its decision not to recognize that State.

39. The purpose of the sixth report was to make the Commission think about how to handle the codification and progressive development of unilateral acts of States. He was convinced that the first thing to do was to define unilateral acts of the State restrictively and, on the basis of that fundamental definition, to begin preparing the provisions of the draft. The unilateral acts on which the Commission's work must focus were those that could be a source of international law on the same basis as treaties, custom or binding decisions of international organizations. In other words, as he had already said at the preceding meeting, a unilateral act must create an international obligation towards another State, several States or the international community as a whole, or even towards other subjects of international law. Any other unilateral act must be excluded from the scope of the study.

40. For essentially didactic reasons, the doctrine divided unilateral acts into various categories such as promise, recognition, waiver and protest. He did not consider that list to be exhaustive. In addition, a single unilateral act might be placed in more than one category. The famous Ihlen declaration<sup>4</sup> might be taken as an example: as the Special Rapporteur stated in paragraph 21 of his report, it recognized a situation, but it also contained a promise and even a waiver. Obviously, what mattered in that case was the legal effect of the unilateral act, not its actual categorization. He was therefore sceptical about the need for further specific methodological studies. On the basis of State practice, as many speakers had pointed out, basically what was needed was to identify unilateral acts

which could create international obligations and to draft a limited number of rules applicable to them—both customary rules and rules derived from progressive development. True, State practice was not rich as far as unilateral acts that created international obligations were concerned. States were highly averse to assuming such obligations unilaterally with nothing in return, since that was by definition contrary to their foreign policy. When they did assume such obligations, they usually did so unwittingly or as a result of open or unavowed constraint. The purpose of the study was accordingly to alert States to effects of their unilateral acts that could sometimes be harmful to them.

41. In conclusion, he said that he was still in favour of the codification of unilateral acts of States, but thought that the Commission should not be overly ambitious and should produce a relatively short text including the basic, fundamental principles that applied to such acts. He was also of the view that the title of the topic should be broadened to read: "Unilateral acts of States as a source of international law".

42. Mr. FOMBA congratulated the Special Rapporteur on the efforts he had made in preparing his report and noted that he had done what the Commission had asked of him. It might be asked, however, whether the results were perfect in spirit and letter, specifically with regard to the categorization and evaluation of State practice. At all events, the most important thing was to criticize constructively. He would not enter into the substantive discussion on recognition of States, which might, despite appearances, be considered to constitute a fairly unique category of unilateral acts and which was also probably the best known. He would therefore make just a few very brief comments on form and the methodological approach to the topic.

43. On form, following the introduction, the report was divided into four parts dealing with recognition, the validity of the unilateral act of recognition, the legal effects of recognition and the application of acts of recognition. The ordering and internal consistency of those components could probably be improved. In fact, the four parts were based on two main concepts, namely, the definition and scope of recognition, on the one hand, and the applicable legal regime, on the other. There was also, at least for the time being, no section entitled "Conclusions and recommendations".

44. As to the usefulness of the topic, even though unilateral acts of States were not placed by international law on the same footing as treaties, they were no less important and should be seen as such with a view to adding to the full array of sources of international law.

45. At present, it was too early to determine what form the final product might take. Among the various options, however, he would prefer the preparation of as comprehensive a set of draft articles as possible, accompanied by commentaries. On that point, however, a number of speakers, particularly Mr. Momtaz, had called for some caution, and their opinion should be taken into account. As to the methodological choice between a case-by-case study and a comprehensive study, he preferred the latter, but, since the Commission had already committed the Special Rapporteur to an empirical approach, it was now a question of

<sup>4</sup> See 2770th meeting, footnote 8.

capitalizing on the work already done. He therefore agreed to a series of monographs, but with a view to bringing together and systematizing the conclusions that could be drawn. That was why he found merit in Mr. Pellet's idea of a table containing a preliminary assessment of the various categories of unilateral acts for the purposes of comparison and systematization. The Working Group that had been set up could do useful work along those lines. What was needed was an evaluation questionnaire that was as rigorous, clear-cut, comprehensive and coherent as possible. There were many fundamental questions, including the generic definition of unilateral acts, its applicability to all the possible categories, the identification of specific features, the conceptual and methodological framework, the deciphering of the intellectual and operational process from the standpoint both of internal and of external logic, and the current situation and prospects for incorporation in international law.

46. As to the scope of the study, whereas the Commission's mandate had initially been limited to unilateral acts of States, the codification process would be incomplete if it was not followed up by a study of unilateral acts of international organizations.

47. The definition proposed of unilateral acts by the Special Rapporteur in paragraph 67 of his report was not without interest, but he would refrain from commenting on it until the text proposed by the Working Group had been made available.

48. While account must be taken of the *acta sunt servanda* principle, caution should be exercised in applying, *mutatis mutandis*, the Vienna regime particularly with regard to the question of the modification, suspension and revocation of unilateral acts.

*The meeting rose at 12.35 p.m.*

## 2773rd MEETING

*Thursday, 10 July 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

## Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIR extended a warm welcome to Mr. Matheson, the new member of the Commission, and invited the Commission to resume its discussion of the sixth report on unilateral acts of States (A/CN.4/534).

2. Ms. XUE said that the sixth report was very useful in that it studied the subject matter from one specific aspect and thus provided a more solid basis for the Commission's deliberations. The topic deserved serious study for the purposes of the codification and progressive development of international law. State practice showed that certain unilateral acts did give rise to international obligations, and it would therefore be desirable to lay down some rules for such acts in the interests of legal security and in order to lend certainty, predictability and stability to international relations.

3. The topic was complicated and difficult because it encompassed various kinds of unilateral acts performed by States, some of which, such as the recognition of States or Governments, could be directly assimilated to existing legal regimes, while others, such as promise or denunciation, could not. It also touched on the very nature of State conduct and on States' willingness to be bound by their own acts. In international relations, most unilateral acts of States were political in nature, yet they were often as solemn and important as legal commitments and were normally upheld by States as a matter of honour. In practice, States were reluctant to regulate the matter mainly for foreign policy reasons, but the scope of the topic needed to be defined in order to maintain a proper balance between States' individual interests and the need to strengthen the legal system. The establishment of a working group to produce such a definition was therefore welcome.

4. The report did not study State practice in sufficient depth and failed to focus on acts of recognition that had a direct bearing on the rules governing unilateral acts. In the classical doctrine of recognition, constitutive theory contained strict rules on the criteria for the recognition of a State or Government and turned on the issue of legality, but declaratory theory was gradually prevailing with the development of State practice. In recent years, some States had gone so far as to stop giving formal recognition to a new State and directly decide whether to establish diplomatic relations with it. Hence the contents of the criteria for the recognition of a State or Government should not be examined, but the Commission should consider at what point such recognition took effect. Since recognition was essentially a political act which produced legal effects, the State which had been recognized rightfully expected such an act to have certain legal consequences that would be governed by international law.

5. Care had to be taken not to interpret silence and acquiescence as being synonymous, especially when territorial matters were concerned. She took issue with the

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



assertion in paragraph 28 of the report that admission of a State to the United Nations might possibly constitute collective recognition. During the Cold War, the fact that a State might be party to an international convention or a member of an international organization had certainly not been regarded as formal recognition, as had been illustrated by the refusal of the People's Republic of China to recognize Israel or the Republic of Korea for many years, and it was her belief that States still tended to separate the issues of recognition and membership.

6. The examples of non-recognition given in paragraphs 42 to 45 were not truly unilateral acts, because the legal obligation not to grant recognition in such instances stemmed from the relevant resolutions and decisions of organizations. The issue of Taiwan offered a better example of the effects of non-recognition. China had diplomatic relations with about 160 States, most of which had made a clear unilateral statement in the agreement establishing those relations that they recognized Taiwan as an integral part of Chinese territory and the Government of the People's Republic of China as the sole legitimate Government of China. Often such non-recognition thereafter had legal implications for representation in international organizations.

7. Recognition was a discretionary, mainly political decision, while non-recognition tended to be obligatory by operation of the law, although both gave rise to legal effects which, irrespective of whether they were intended by the author State, were governed by international law.

8. In chapters II and III of the report, the Special Rapporteur specified the conditions for recognition but adhered too rigidly to the practice followed in treaty making. Although a unilateral act had to be attributable to a State and meet certain requirements for it to be legally binding, it did not have to satisfy the same or similar conditions as those for concluding a treaty. Unilateral acts were technically and practically much simpler. Again, the affirmation in paragraph 79 that an act of recognition was an expression of will which must be formulated without defects was not wrong, yet it was not clear what was meant by "without defects".

9. The Commission should examine State practice with regard to recognition in greater detail with a view to formulating general rules on unilateral acts. The Special Rapporteur deserved to be thanked for his praiseworthy efforts and his contribution to the Commission's consideration of the topic.

10. Mr. PAMBOU-TCHIVOUNDA said the Special Rapporteur should be congratulated more on the efforts he had put into the report than on the results they had produced because, owing to his sincere belief that the instructions he had received from the Commission at the previous session prevented him from pursuing the approach followed in the five earlier reports,<sup>2</sup> the sixth report was inconsistent with its predecessors, since it dealt with only

one subject and could have been subtitled "Recognition of States". It was not immediately clear how that subject fitted in with the overall topic of unilateral acts of States. Recognition was simply one type of unilateral act; the two were not necessarily identical. Legally speaking, the essence of a notion lay less in the diversity of its constituent parts than in its technical function.

11. The nature of recognition, which the Special Rapporteur had unfortunately tackled by investigating its legal effects, might help to clarify the notion of unilateral acts of States, but it was doubtful whether it was a deciding factor. Similarly, it was questionable whether the sum of the identifying characteristics of various kinds of unilateral acts of States made it possible to infer that such acts always fulfilled the same technical function. They comprised one of the means whereby a State, acting in full knowledge of the facts, entered into commitments *vis-à-vis* other subjects of law. Like all other means to that end, a manifestly unilateral act brought into play the prerogatives inherent in State sovereignty, as well as those stemming from treaty or customary law and, in all cases, such a testing of State sovereignty was aimed at protecting political, economic, financial, strategic or military interests.

12. That technical function called for an equally functional, and not an abstract, definition of unilateral acts of States. Such a definition would be useful if it made it possible to determine a set of parameters, such as form, procedure, competence, reasons, purpose or the aim of a unilateral act, which would in turn serve as a basis for working out general principles and standards.

13. For that reason, it was clear why, in the preceding reports, the Special Rapporteur had sought to discover in the Vienna Conventions of 1969 and 1986 some premises on which general rules governing unilateral acts of States might rest. It had, however, been obvious that the method had its limitations and had caused some difficulties. The issues had been poorly stated and no attempt had been made to devise even a tentative conceptual framework, which would have made it possible to distinguish between the specific features of the rules for treaty making and those of rules governing unilateral acts of States. Nevertheless, agreement on those topics would ultimately have been reached if it had not been for the sixth report, which had altered the whole line of attack. The initial approach to the subject, which had focused on general aspects common to all unilateral acts of State such as formulation, validity and interpretation, had been abandoned. Naturally, it would also have been wise to consider the reasons for an act, its effects, any links with treaty law or customary law, general legal principles, change of circumstance, responsibility and settlement of disputes.

14. The sixth report had not, however, completed that initial work, despite the fact that it had led to the drafting of several articles. The attempt to formulate common rules should be resumed and completed before embarking on the second stage of work, which would consist in drawing up different rules applying to specific subjects. The sixth report was premature and badly put together. The examination of the basis for the obligatory nature of recognition could not be dealt with under the heading of

<sup>2</sup> First report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486; second report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1; third report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505; fourth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519; fifth report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add.1 and 2.

the legal effects of recognition. Moreover, the report was repetitive.

15. The parallels drawn between treaties and unilateral acts in paragraphs 109 *et seq.* of the report were further proof that earlier work was incomplete. The tendency to treat such basic questions as temporal application as inconsequential was regrettable, since it was a central issue and its substance deserved to be considered at length, rather than merely forming the subject of a “comment”, the term employed in paragraph 111. The Special Rapporteur should therefore go back to the drawing board if he wanted to savour the fruits of his labours.

16. Mr. MELESCANU said that unilateral acts of States were fundamental to public international law and were recognized by legal theory, in State practice and in the case law of ICJ, as had been demonstrated in the *Nuclear Tests* cases. In textbooks, unilateral acts of States were regarded as a source of public international law in the same way as customary law, treaty law and the binding decisions of international courts.

17. The codification of such acts was vital. Some, like wrongful acts of States giving rise to an obligation to compensate for the damage they had caused, had already been codified, and it was therefore high time to do the same for lawful acts of State in order to see in what circumstances they could produce legal effects. If possible, the law on the subject should also be developed progressively. Any other working method at the current stage would be unacceptable and futile.

18. As for the Commission’s approach to the issue, the general strategy mapped out in the first report was still wise, namely that the typology of unilateral acts should be established first, before focusing on the legal effects of those acts, their application, their validity, the duration of their validity and their modification or termination. The basic criterion determining what unilateral acts should be covered by the report was their ability to give rise to legal effects.

19. Three draft articles, accompanied by a commentary, had been presented in the second report, and after a long debate it had been deemed advisable to look at each category of unilateral acts, like promise, recognition, waiver and protest, before any further general rules were formulated. That sagacious decision had formed the basis of the sixth report, which should, however, be supplemented with references to legal theory and State practice. The work done by the Special Rapporteur was commendable and he personally supported it.

20. His main objection to the sixth report, however, was that it was a short monograph on the legal institution of recognition of States that addressed intellectually stimulating issues but drew the Commission away from its final objective, which was to determine to what extent recognition produced legal effects. Chapter III was the most interesting part of the report, but, like Mr. Economides, he would have preferred to see more attention paid to the difference between *de jure* and *de facto* recognition, something that could have practical implications. He would also have liked to see references to recognition of States and recognition of Governments, since they were two in-

stitutions that were much used and on which there was much State practice.

21. He agreed that recognition had a declarative and not constitutive effect, as was clearly illustrated by article 13 of the Charter of the Organization of American States, cited in paragraph 86 of the report. Moreover, recognition implied that the State granting it accepted the personality of the new State, with all the rights and duties that international law prescribed for the two States. He would add that recognition was not an institution specific to a given historical period. It continued to function to the present day, as was illustrated by the practice of the Arbitration Commission of the European Community, under which the recognition of a State by other States was purely declarative.

22. It would have been better to have a more extensive analysis of the legal effects produced by *de jure* recognition, which in his opinion included recognition of the territorial boundaries of the State recognized and the obligation to establish diplomatic relations and to negotiate and sign international agreements. By way of illustration, one might look at the practice of the Federal Republic of Germany *vis-à-vis* the German Democratic Republic and of Romania’s approach to the creation of an independent Moldova.

23. The comment in paragraph 107 concerning the basis of the binding nature of unilateral acts was true, as was the fact that unilateral acts in general and acts of recognition in particular were opposable in respect of the author State. The principle of *acta sunt servanda* adduced by the Special Rapporteur, on the lines of the principle of *pacta sunt servanda* as applied to treaties, must be incorporated in the Commission’s conclusions. It should, however, be accompanied by a *rebus sic stantibus* clause, as in the law of treaties, meaning that, if a fundamental change of circumstance could affect the object of a unilateral act, then so could the unilateral act be affected.

24. The Commission had started out with a theoretical analysis and moved on to a case-by-case study, with the intention of postponing the development of general rules. Mr. Gaja’s very welcome proposal to establish a working group had made it possible to re-examine the Commission’s methods of work with a view to charting the broad outlines of its future course of action. He nonetheless believed that, once the working group decided on a given approach, the Commission should agree in principle to follow that approach.

25. Two practical problems arose. What was to happen now with the case-by-case approach? If the codification work on international treaties had proceeded on that basis, it would still be at a very early stage. Drafting small monographs on specific unilateral acts was unlikely to be very fruitful, though he fully agreed that the work could not remain entirely at the level of theoretical abstraction, with no reference to State practice. A happy medium must be found in which the Commission’s work would be neither too theoretical nor too focused on specific details. The primary objective should not be to describe every aspect of the institution of unilateral acts, but rather to determine what their legal effects were. That would reveal

State practice on the basis of which general rules could be codified and drafted.

26. The second practical matter was whether the Commission was going to codify unilateral acts alone or the behaviour and acts of States as well. He was in favour of a classic approach, namely, to deal solely with unilateral acts, to see to what extent a specific act of a State could, in certain circumstances, produce legal effects. However, he was also open to the idea of elaborating rules under which certain State conduct, in certain very clearly defined circumstances, could produce legal effects. Exploring that domain might be fruitful, and Mr. Gaja's informal proposal might hold some promise. Above all, however, the objective of the Commission's endeavours must be kept in mind: to draw the attention of States to the fact that, in certain circumstances, their statements or acts could produce legal effects, and that to engage in unilateral acts therefore entailed a certain degree of responsibility.

27. Mr. BROWNLIE said his position was so far from that of all other members of the Commission that he felt quite depressed. He was in the same state of mind as a Cypriot colleague who, having heard the other side's arguments before the European Court of Human Rights, had torn up his original speech and given another one. While he would not go quite that far, he did find it depressing that the Commission was still discussing methodology, and needed to do so, even though it had been working on the topic since 1996. Yet another depressing fact was that everyone was using the conventional rubric of unilateral acts, even though the true subject of discussion was the conduct of States.

28. He wished to express his sincere recognition of the extraordinary patience and fortitude shown by the Special Rapporteur. He had been criticized, but had not always been given much help. The effort was a collective enterprise, however, and if it turned out to be a can of worms, it would not be the Special Rapporteur's can but that of the Commission.

29. He was greatly troubled by one preliminary issue: the need for the Commission to be consistent in the conduct of its business. The topic had been placed on its agenda in 1997, and the first report by the Special Rapporteur had been considered in 1998. The topic had been given prominence in 2002 in the Commission's report to the General Assembly in the work of its fifty-fourth session,<sup>3</sup> in which the discussion of the Special Rapporteur's fifth report was summarized at length. At its 2727th meeting, on 30 May 2002, the Commission had established an open-ended informal consultation, to be chaired by the Special Rapporteur.<sup>4</sup> Thus, in 2002 there had been no indication of any serious problems in the work on the topic, no suggestion that the Commission was about to leave the charted path.

30. Those historical facts had to be recalled in the light of the statements made at the previous meeting. Mr. Koskenniemi had not formally proposed terminating the project, but all his reasoning had pointed in that direction. It was somewhat disturbing that some members had

found his exposition to be seductive. The superficial attractions of his position must be rejected, however, for two entirely independent reasons.

31. First, a change of position by the Commission after the topic had been on its agenda for six sessions would convey the impression that the Commission was unable to conduct its own affairs. Second, Mr. Koskenniemi's case for dismissing unilateral acts on grounds of absence of coherence and lack of legal quality was weak. Mr. Koskenniemi suggested that the informal transactions of States were of little significance and not worthy of the Commission's attention. That position was contradicted by a vast array of evidence and, quite simply, by the realities of international relations.

32. Nevertheless, whatever the intellectual and analytical problems, unilateral acts played a substantial role in State relations, as was demonstrated by a number of cases considered by ICJ. In the *Fisheries* case, the United Kingdom had long remained silent while the Norwegian system of straight baselines had evolved, and it had been held bound by that system, even though that might have been thought anomalous under general international law. The *Arbitral Award Made by the King of Spain on 23 December 1906* case had concerned the not unimportant question of the validity of an arbitral award. In the *Passage through the Great Belt* case, there had been no Finnish protest in relation to the building of a bridge—a pity. The *Nuclear Tests* cases had turned on the French attitude to nuclear testing in the atmosphere. In the *Corfu Channel* case, the Court had used as part of the evidence the “attitude” of Albania. In the *Military and Paramilitary Activities in and against Nicaragua* case, reference had been made to the annual report of the Court. In the *Certain Phosphate Lands in Nauru* case, it had been very important that, after independence, the Head of State had made a number of representations to Australia about compensation for the taking of phosphate. The *Temple of Preah Vihear* case had been won on the basis of a map in annex I to the memorial of Cambodia which had been in circulation in the negotiations between the two States from 1908 to 1958. In the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case, both sides had relied on forms of estoppel.

33. Those nine examples were by no means exhaustive, of course, and the argument that they reflected only the special world of ICJ was not acceptable. They all reflected significant and recurrent phenomena of State relations. The Court must not be treated as being in a special category: it dealt with real problems faced by States, and it was very much a part of the real world.

34. If the topic of unilateral acts was set aside on the basis suggested by Mr. Koskenniemi, the Commission would be ignoring doctrine, which was quite extensive. There was a respectable quantity of State practice as well. The Commission would appear to be acting both arbitrarily and arrogantly if those familiar and substantial materials were set aside.

35. The inevitable conclusion was that unilateral acts formed an area of legitimate legal concern, namely conduct of States that fell outside the concept of treaty making. There were some extremely difficult problems, of course, such as the relationship of the topic to the law of

<sup>3</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. VI.

<sup>4</sup> *Ibid.*, vol. I.



treaties, an analogy that was not at all helpful, as there was a major distinction between unilateral acts and treaties. For treaties, there was a clear distinction between the determining or precipitating conduct—the making of the treaty—and the legal analysis of the consequences. For unilateral acts or conduct, the precipitating act or conduct was difficult to separate from the legal process of constructing the results.

36. A second problem was that the subject matter of unilateral acts was unusually susceptible to overlapping classifications. The *Nuclear Tests* cases were frequently discussed as a form of unilateral act or estoppel but could also be characterized, with some justification, as an example of the operation of the principle of good faith. In paragraph 107 of the report, the Special Rapporteur characterized it as a promise. The Ihlen declaration<sup>5</sup> could be analysed in terms of an informal agreement, as Hambro had pointed out in a famous essay.<sup>6</sup> A third problem was the question of informality, something Mr. Koskeniemi had over-emphasized. The real question was not form but rather the conduct of States in the absence of a real treaty relationship. The fourth and perhaps most basic problem was that the concept of a unilateral act was too restrictive in several ways, since it was the context and the antecedents that were legally significant. The fifth problem was whether there was a legal institution that corresponded to the concept of the unilateral act. That seemed to be a non-question, or at most a very theoretical one.

37. As to the awful question of methodology, the United Kingdom had proposed an expository study, but, as Mr. Addo had asked, where would it lead? He was not sure, but neither was he attracted by the draft articles approach. To come out with general principles in the form of treaty-type articles did not seem to correspond to the nature of the subject matter. There should rather be an archipelago of topics, each to be studied on its own. He appreciated the efforts made by the Special Rapporteur and others to pin down some principles and definitions, a necessary enterprise. An organizational question also arose: the Working Group was functioning, yet significant questions of methodology had not been addressed. That course of action was bound to lead to difficulties.

38. Finally, it seemed clear that recognition of States was a separate topic, not the one envisaged by the General Assembly when it had mandated the study of unilateral acts.<sup>7</sup> It consisted of two issues: What constituted recognition, and what were the criteria of statehood? The Commission would be taking on appalling difficulties—indeed, acting beyond the agenda approved by the General Assembly at its fifty-second session<sup>8</sup>—if it pursued the topic, although examples of recognition of States could certainly be used as part of the general analysis.

39. The main analytical point was that recognition, as a form of State conduct, was not confined to recognition

of States. The Ihlen declaration was an example of recognition, as was the annex I map in the *Temple of Preah Vihear* case. Unfortunately, in the discussion so far, there had been a general failure to distinguish political and legal recognition or non-recognition. Political non-recognition could be illustrated by the refusal of the Arab States to recognize Israel, except when it was to be charged with breaches under Article 2 of the Charter of the United Nations. In the *Loizidou* case, the question had been whether the Turkish Republic of Northern Cyprus qualified for recognition, and the European Court of Human Rights had taken the view that it did not. That had been a form of legal non-recognition, although it could have political implications as well. The question of recognition of States was necessarily linked to the criteria of statehood, and that was not a legitimate part of the rubric of unilateral acts.

40. Mr. GALICKI congratulated the Special Rapporteur on his ambition to continue with a difficult topic despite all the difficulties and voices of criticism. In the light of the discussion in the Commission and the Sixth Committee in 2002, he had presented a completely different approach, analysing mainly the institution of recognition and taking up such issues as the principal forms and characteristics of acts of recognition and their validity, legal effects and application.

41. The sixth report revealed some rather surprising changes in the author's attitude to the methods applied. He had previously been attempting to produce draft articles on specific matters such as the definition of unilateral acts, the capacity of States, the persons authorized to formulate unilateral acts, and so on, while planning to prepare other, more general ones, in keeping with the framework of the Vienna regime on the law of treaties.

42. The report did not draw any conclusions about how to develop draft articles. On the contrary, the Special Rapporteur seemed ready to abandon that approach in favour of less rigid guidelines. The approach now proposed, which seemed to contradict that outlined in the fifth report, raised other issues and would entail a substantial amount of further study on unilateral acts. The Special Rapporteur should be more consistent in his decisions on methodology.

43. Notwithstanding some of the doubts raised, he was in favour of continuing work on the topic, in keeping with the decision of the Sixth Committee as endorsed by the General Assembly. The question was how to consolidate the results of the work done so far. In that connection, he welcomed the establishment of an *ad hoc* working group to assist the Special Rapporteur in defining the scope of the topic for study. It was evident from the fifth and sixth reports and discussions thereon that in particular the concept of recognition and its relevance to unilateral acts needed to be more clearly defined. Different forms of recognition—explicit, implicit, *de jure*, *de facto*—should be considered. Likewise, it should be remembered that not only States were “objects” of international recognition. What of governments, insurgents and belligerents? Given that the Commission had early on refused to accept the proposal to consider the international recognition of States, the institution of recognition in the context of uni-

<sup>5</sup> See 2770th meeting, footnote 8.

<sup>6</sup> See E. Hambro, “The Ihlen declaration revisited”, in D. S. Constantopoulos *et al.*, eds., *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Bonn, Schimmelbusch, 1957), pp. 227–236.

<sup>7</sup> See General Assembly resolution 51/160 of 16 December 1996.

<sup>8</sup> General Assembly resolution 52/156 of 15 December 1997, para. 8.

lateral acts must be examined very carefully, with a very precise definition of its scope.

44. It had also emerged from the discussion of the sixth report that there was an urgent need to define clearly the concept of unilateral acts. The Commission was now suffering the consequences of its failure to do so at an earlier stage. It was to be hoped that the *ad hoc* working group would remedy the situation, on the basis of formulas already agreed upon, where possible. Mr. Melescanu was right to say that the Commission should first of all identify common features in the unilateral acts, understood as sources of international legal obligations, as stressed by Mr. Economides. For practical reasons, the definition of unilateral acts should be rather restrictive, thereby providing a narrower but clearer scope for the study.

45. An additional factor, one which seemed to be thwarting attempts to create a unified concept of unilateral acts as sources of international obligations and must also be given due consideration, was the absence of a clear legal position on unilateral acts in domestic legislation. Such uncertainty was one of the main reasons why unilateral acts were not more widely used by Poland, and the same might well apply to other countries.

46. Finally, to make headway on the topic and bring it to a successful conclusion the Commission should undertake more active study of State practice regarding unilateral acts in general and cases of recognition as one form of those acts in particular. It might be the only means of establishing common principles that were not confined to *acta sunt servanda* or to a principle of good faith, thereby ensuring that the Commission's work would be effective and really useful for States.

47. Mr. CHEE said the Special Rapporteur had done hard work in the sixth report but might have approached the subject differently. In order to simplify his task and define the scope of the study, he should have drawn a distinction between the institution of recognition and the regime of recognition of States and Governments, with a view to providing separate definitions. According to Jennings and Watts in *Oppenheim's International Law*,<sup>9</sup> recognition involved acceptance by the State of any fact or situation occurring in its relations with other States. However, in the context of recognition of States and Governments, it must be distinguished from a looser use of the term conveying mere acknowledgement or cognizance of an existing situation. Those two issues were dealt with under separate headings in most textbooks on international law, including *Oppenheim's International Law*, which listed four categories of unilateral acts: declaration, notification, protest and renunciation.

48. The best definition of a unilateral act of declaration was to be found in the *Nuclear Tests* cases (*Australia v. France*) and (*New Zealand v. France*). According to ICJ, "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly,

and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made" [p. 267, para. 43, and p. 472, para. 46, respectively].

49. As to other cases mentioned in the report, attention should be drawn to the statement in paragraph 21 that the Ihlen declaration recognized a situation, but also contained a promise and even a renunciation. He pointed out that the Ihlen declaration had been made in response to the Danish Minister's intervention requesting Norway to refrain from making any difficulties in the settlement of the Greenland question in return for Denmark's readiness to concede in the Spitzbergen question. The declaration had thus been made as a reply, as a bilateral commitment between the two countries. It was neither a unilateral promise nor a one-sided renunciation. The interdependence of bilateral transactions had been noted by PCIJ, which considered it beyond dispute that a reply of that nature given by the Minister of Foreign Affairs in response to a request by the diplomatic representative of a foreign power on a question falling within his province was binding upon the country to which the Minister belonged.

50. Judging from the last sentence of paragraph 99 of the report, the Special Rapporteur seemed to accept the persistent objector rule in customary international law. Although the rule, which was based on lack of consent by the persistent objector, was accepted by many academics, in practice there had been only two cases decided by ICJ on the rule: the *Asylum* case (1950) and the *Fisheries* case (1951). In the former, the Court had denied the application of a special custom among Latin American countries, pointing out that even if the special custom had existed, it was not applicable to Peru, which had persistently opposed application of it. In the latter case, the Court had denied the United Kingdom's claim to the 10-mile rule applicable at the entrance to the Bay of Norway as part of customary international law, stating that, since Norway had persisted in its opposition to the 10-mile rule, it had been immunized from applying it. D'Amato noted that those two cases raised issues of special custom rather than general custom.<sup>10</sup>

51. Clearly, the persistent objector rule hindered the evolution of international law that was required to keep pace with the developments of a changing world. For instance, Grotian principles on the freedom of navigation and fishing on the high seas had recently undergone drastic changes, those areas now being subject to an array of new international regulations. One example of the futility of the persistent objector rule in the development of international relations was the expansion of the jurisdiction of the coastal State's seaward limit from 3 to 12 miles for the territorial sea and 12 to 200 miles for the exclusive economic zone—a change initially resisted but gradually accepted by Japan, the United Kingdom and the United

<sup>9</sup> See 2759th meeting, footnote 9.

<sup>10</sup> See A. D'Amato, "The concept of special custom in international law", *AJIL*, vol. 63 (1969), pp. 211–223, especially p. 212.

States as an inevitable evolution of the law of the sea. A further example of the evolution of international law was where States assumed new obligations to prevent harm to the environment. According to Jonathan Charney, the persistent objector rule was at best only of temporary or strategic value in the evolution of the rule of international law, unless one really believed that States had the independence to freely grant or withhold their consent to rules of customary international law.<sup>11</sup>

52. The Special Rapporteur should persevere with his work, which, with the assistance of members, would represent the work of the Commission as a whole.

53. Mr. KABATSI commended the Special Rapporteur on his efforts to tackle such a complex and unwieldy subject. Unquestionably, unilateral acts did exist and sometimes entailed legal obligations, and there was ample material on the subject in the form of academic articles and court decisions. The problem was how to identify common features with a view to establishing a set of rules allowing for subsequent codification. In that connection, the suggestions made included how and by whom such acts were formulated and conditions for their validity and revocation.

54. Despite the fact that little progress had been made since 1997, every year the Sixth Committee had encouraged the Commission to continue its work, and, as the Special Rapporteur underlined in paragraph 1 of the report, irrespective of the outcome, the study must be completed. Yet it could not be said that no progress had been made, as was borne out by Mr. Melescanu's comparison with the second report and the survey on relevant academic work and court decisions. To be sure, more information on State practice would be welcome and he looked forward to a greater response from States in that regard. Perhaps the report would have been better received if it had dealt with the issue of recognition more generally in the context of unilateral acts in international law, rather than focusing specifically on the concept of recognition itself. He hoped that with the assistance of the *ad hoc* working group the Special Rapporteur would find the best way forward. He shared the optimism of other members of the Commission like Mr. Mansfield, who believed in the viability of the topic.

*Mr. Melescanu (Vice-Chair) took the Chair.*

55. Mr. KOLODKIN said that, although he had previously regarded the topic of unilateral acts with a degree of scepticism, the content of the sixth report and the establishment of the *ad hoc* working group gave rise to some optimism.

56. Mr. Koskenniemi's assertion that there was no such institution as unilateral acts of States, and that hence it could not constitute a subject for the codification of international law, might seem radical. Yet it was surely more realistic than the view that it would be possible to produce a set of draft articles. Even were such a text to be submitted to States, there must be some doubt as to whether

it would advance any further. A law on unilateral acts of States could hardly be regarded as being on the same level as the law of international treaties. Unilateral acts, in most cases at least, were far more political expressions of will than were international agreements: they were not a result of negotiations, every stage of which was regulated by international law. They were therefore significantly more flexible than international agreements and, by the same token, could not be as stable.

57. Some general principles could nonetheless be discerned. While noting that the nature of unilateral acts could only be fully grasped on the basis of the peculiarities displayed by their various types, Wilfried Fiedler had acknowledged that some general criteria could be perceived.<sup>12</sup> To identify such criteria, a comparative analysis would be required: various types of unilateral acts would need to be examined. He therefore welcomed the Special Rapporteur's avoidance of any attempt to formulate general provisions and to take as his focus in the sixth report one type of act, that of recognition.

58. The report must clearly be regarded as merely the first approach to the topic of recognition. It was his impression that the Special Rapporteur had not attempted to bring forward any specific features of recognition as a unilateral act for the purpose of comparing them with the features of other unilateral acts, but had sought rather to fit recognition into the general framework already established in his previous reports. Recognition should, however, be considered only to the extent that it was expressed as a unilateral act. Recognition through or as a result of the establishment of diplomatic relations or other agreements should not find a place in the report. That also applied to recognition as the result of a decision by an international organization, if indeed such a decision amounted to recognition. The Special Rapporteur had himself imposed that restriction. It was therefore unclear why he had included paragraphs 28–31 and 36, which dealt with acts of recognition that were not unilateral. It was possible that recognition merited a study of its own, but only as a separate topic.

59. The Special Rapporteur rightly pointed out, in paragraph 46 of his report, that there was no norm of general international law that required States to formulate an act of recognition, which reflected the discretionary nature of recognition. He doubted that, when a State voted for the admission of another State to the United Nations, it was bound by that vote and could not withdraw its recognition at a later date. Mr. Economides and Ms. Xue had spoken about the situation in which States, although voting for the admission of a new member, continued not to recognize the State concerned. Such votes were, however, the result of political considerations, above all; they had nothing to do with international law. All States were aware of the political nature of voting in the General Assembly, so there were no grounds for claiming legal precedence or for evoking estoppel. On the other hand, the unilateral act of recognition was also used above all as a political instrument.

<sup>11</sup> See J. I. Charney, "The persistent objector rule and the development of customary international law", *BYBIL*, 1985, vol. 56, pp. 1–24, at p. 24.

<sup>12</sup> See W. Fiedler, "Unilateral acts in international law", in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. IV (Amsterdam, Elsevier, 2000), pp. 1018–1022.



60. It was becoming ever clearer that recognition of a State involved not only the traditional considerations—possession of territory, settlement, effective government and independence in international relations—but also a host of others. Thus, the new independent States of Europe had been recognized, but the Taliban had not. Moreover, recognition was increasingly accompanied by purely political criteria or conditions.

61. If recognition was regarded as a political act, doubt must hang over the Special Rapporteur's assertion that the modification, suspension or revocation of an act of recognition was possible only if it was provided for by the act itself, with the agreement of the addressee or under the conditions outlined in paragraphs 121–123. Mr. Dugard had asked whether recognition could be withdrawn in the case of failed States. It was worth looking at some other hypothetical examples. The report stated that admission to the United Nations was an act of recognition, or its equivalent. However, what was the situation where a State was excluded from the United Nations or had its membership rights suspended? If the unilateral recognition was hedged round with various political conditions and if, following the recognition, the State stopped observing them, could the recognition be withdrawn? Moreover, the State that had formulated conditions for recognition as a unilateral act could change those conditions, cancelling some or adding others. It would be remembered in that context that, in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ had said that the right to change or withdraw was inherent in any unilateral act of a State.

62. Although basically a political act, recognition nonetheless gave rise to legal effects. The assertion—even within the Commission itself—that recognition was of a purely declaratory nature was therefore open to question. Various forms of recognition should be examined from various points of view. For example, in the 1990s, there had twice arisen the question of the recognition of two States that were claiming to be continuing the personality of the preceding States. He had in mind the recognition of the Russian Federation as the continuing State of the Soviet Union and the Federal Republic of Yugoslavia as that of the Socialist Federative Republic of Yugoslavia. Although the circumstances were similar, Russia's status had been recognized, while that of the Federal Republic of Yugoslavia had not. The legal effects of continuity had therefore arisen only for the Russian Federation. In that case, recognition—in what had been a basically political act, as had been the non-recognition of the Federal Republic of Yugoslavia as the continuing State of the Socialist Federative Republic of Yugoslavia—had had a clearly constitutive effect. Much remained to be said on the question of whether recognition was declaratory or constitutive, and it was regrettable that the report only contained arguments in favour of the former approach.

63. Finally, the Special Rapporteur was right in saying, in paragraph 8, that a decision on the final form to be taken by the outcome of the Commission's work would facilitate progress. In his view, the Commission's conclusions could not be fitted into the rigid framework of draft articles.

*Mr. Candioti resumed the Chair.*

64. Mr. SEPÚLVEDA said that the report represented a praiseworthy effort to systematize a topic that had been extraordinarily elusive, owing to its complexity: indeed, within the Commission itself there was considerable disagreement as to the nature and scope of unilateral acts. It was difficult even to achieve any shared understanding of the definition of such acts or their essential elements. The problem had been compounded by the paucity and limited nature of government contributions. It was therefore essential for the Commission to look into State practice, on which much had been written, and at the same time take into consideration the judgements of international courts. It was clear from the report that some progress had been made, but it would have been advisable to make more use of such judgements, both those mentioned in the report and others, as could be relevant to the topic. An examination of decisions by national courts could also be helpful, such as those delivered in courts in the United Kingdom and the United States concerning recognition in relation to the civil war in Spain or the Soviet Union. He also drew attention to the *Sabbatino* case in the United States, which had related to the recognition of the Government of Fidel Castro.

65. He welcomed the establishment of the *ad hoc* working group, which could bring together all the elements for a definition of unilateral acts and streamline the organization of the Commission's work. The first few meetings of the group had already shown the success of such a procedure. The main question to be considered was the legal effects of unilateral acts, which had three central elements: the manifestation of consent by a State; the creation of international rights and duties; and the repercussions of the first two elements.

66. As ICJ had said in the *Nuclear Tests* cases, such consent must be of an autonomous nature: no counterpart was required to produce a legal effect, although an objecting State might, of course, formulate a protest addressed to one or more States, indicating its intention to repudiate or not to accept the legal consequences of a unilateral act. Hence there was a paradox between the autonomy of the act and the potential questioning of it.

67. As to the question of establishing rules for general application, he believed that, although few, unilateral acts had enough common denominators for the Commission's purposes. It would, however, be essential to establish specific rules for each category of act, including recognition, promise, protest and waiver. A harder task would be to classify the effects of unilateral acts, for they often could not be pigeonholed. The recognition of belligerency and insurgency—if that strange and anachronistic institution still existed, given that it had been invented as a means of establishing some South American States in the early 1900s—fell into a different category again. Of particular interest would be State practice with regard to territorial changes.

68. Certain aspects of the report should be thoroughly reviewed, especially paragraphs 17–67. The different categories of recognition were jumbled up and it was hard to sort them out. The same went for the section on legal effects (paras. 82–108): the extended discussion on whether recognition was declaratory or constitutive over-

shadowed the more important question of the legal effects themselves.

69. Clarification was required on a number of specific points. First, the link between unilateral acts and admission to membership of the United Nations and other international organizations should be established. Following debates in the General Assembly in the 1950s, in an advisory opinion ICJ had reaffirmed the criteria set out in the Charter of the United Nations. The question remained, however, whether States that voted for a given admission were thereby bound or whether an additional, independent act of political will was needed to give legal effect to the vote.

70. Second, State practice concerning recognition of Governments and the establishment or withdrawal of diplomatic or consular relations needed to be determined. Some States maintained diplomatic relations without formally recognizing a government. The question was whether that practice had replaced recognition or whether examples of such non-recognition were isolated.

71. Third, the question of the recognition of belligerency, insurgency and neutrality should be cleared up. The three categories of recognition had been modified and expanded since 1945 through the codification of international humanitarian law, but the nature of unilateral acts in that context needed to be determined.

72. Fourth, in the nineteenth and twentieth centuries a distinction had been introduced between *de jure* and *de facto* governments. He wondered whether that distinction held good and whether the effects of unilateral acts were the same as in the past.

73. More research was required on State practice concerning the recognition or non-recognition of territorial changes. The topic was of particular importance given the radical transformation in the world's borders since 1945. The principles on which States based their practice should be determined, and the inherent contradiction between the permissibility of force and the institution of non-recognition of territorial changes should be examined.

74. Further consideration should be given to the legal basis for unilateral acts: the reasoning that gave States legitimacy to undertake such acts. Again, a survey of the nature and scope of the concept of "good faith" would be welcome. Finally, thought should be given to whether unilateral acts only imposed obligations or whether they also gave rights.

75. Mr. BROWNLIE said that the Commission should not be wasting its time discussing a subject that was not on its agenda. Indeed, recognition of States and Governments, or belligerency, neutrality and other such topics, could not be discussed without a consideration of the substance of the matter to which that recognition related. The General Assembly had not put those topics on the agenda, and their discussion raised a serious question about the conduct of persons who might decide to stay away from plenary meetings when such topics were discussed. Meanwhile, the Commission was moving ever further away from the subject on the agenda.

76. The CHAIR recalled that, at the previous session, the Commission had agreed that the Special Rapporteur would consider the topic of recognition. It was important for all views on the matter to be heard.

*The meeting rose at 1.05 p.m.*

## 2774th MEETING

*Friday, 11 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIR invited the members of the Commission to continue their consideration of the Special Rapporteur's sixth report on unilateral acts of States (A/CN.4/534).

2. Mr. KEMICHA said that, with hindsight, the scepticism with which the Commission had welcomed the sixth report on unilateral acts of States seemed exaggerated, to say the least. It could be explained by the newness and complexity of the subject matter, but also possibly by the Special Rapporteur himself, who had initially given the impression in his report that he had some doubts about the feasibility of the topic. He had referred to statements by representatives of States in the Sixth Committee and also by members of the Commission as justification for the approach he had adopted of focusing in the report on a particular type of unilateral act—the recognition of States.

3. By means of that example, the Special Rapporteur had attempted to illustrate, sometimes easily but more often with great difficulty, that the act of recognition lent itself to codification through the simple technique of transposing the Vienna regime on the law of treaties, details of which he had given throughout the sixth report. One could

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

not but be impressed by the number of references in the report to the law of treaties and the Vienna regime. Admittedly, the transposition offered opportunities for codification, but it did have its limits: there was no guarantee that the exercise was applicable to other unilateral acts. Whatever the answer to that question might be, there remained a more basic concern, namely, the risk of losing sight of the specific nature of unilateral acts, whereby the State could assume obligations outside the treaty framework. As various members of the Commission had said, one must be wary of extending the Vienna regime to unilateral acts. Those acts represented an expression of will by States in the same way as treaties, and to question whether or not they were a legal institution was of little importance at present. As Mr. Economides had pointed out, the facts were more important than their classification.

4. Those acts were carried out to produce legal effects and engage the author State, and it should therefore be possible to categorize and even codify them, not only because that was what the Sixth Committee wanted, but also because that would ultimately help bring about legal stability at the State level. It was therefore in the Commission's interest to examine State practice, above all through doctrine and jurisprudence, and to identify characteristic features with a view to the establishment of a set of formal rules, a kind of common language, a code by which each State could measure the legal scope of its acts.

5. Mr. Sreenivasa RAO said that the Special Rapporteur's sixth report was as rich as the previous ones and that the ideas and observations it contained inevitably attracted attention, whether or not they fell within the Commission's immediate purview. Many members had already expressed their views in that regard, and it was now important for the Commission to give the Special Rapporteur guidance on the direction he should take. It was to be hoped that his energetic efforts would be channelled through a collective contribution by the Commission in a more productive framework.

6. While it was wise to focus the report on recognition, as one aspect of unilateral acts as a whole, studying the recognition of States *per se* would be counterproductive. Nowadays, moreover, the recognition of Governments attracted greater attention among the international community than the recognition of States. The recognition of States or Governments was in any case discretionary and not governed by legal criteria.

7. As a reasonable starting point for the drafting of the draft articles, perhaps the Commission might give an initial exposé on positive law—a restatement. In order to do so, it would have to be asked what the legal status of some of those unilateral acts was, how they were undertaken, what expectations they raised and by what combination of factors they could give rise to legal obligations. While there were of course unilateral acts which created obligations by and in themselves, more often than not those obligations were the result of a series of declarations and events, and it was that process, that genesis which the Commission must study.

8. Mr. ECONOMIDES, referring to the comment by Mr. Melescanu at the preceding meeting that the study of the topic should cover not only unilateral acts but also the uni-

lateral conduct of States, including silence, said that, with unilateral acts alone, the Commission's task was already extremely difficult, and he feared that if conduct was also considered, it would become virtually impossible. The members of the Commission must show wisdom, as their predecessors had done when drafting the text which was to become the 1969 Vienna Convention by totally ruling out oral agreements. As a compromise, the Commission might provide for a "without prejudice" clause, according to which the draft articles would not apply to unilateral conduct, which would continue to be governed by customary international law.

9. Mr. MOMTAZ, referring to the statement by Mr. Melescanu implying that the Commission had already partly codified the law applicable to unilateral acts by preparing its draft articles on State responsibility, said that, if that statement was true, it would be a strong argument to put to those who were still sceptical about the existence of unilateral acts as legal institutions. He asked Mr. Melescanu whether he thought that those who had prepared the draft articles on State responsibility had also had unilateral acts in mind when they referred to internationally wrongful acts.

10. Mr. MELESCANU, replying to Mr. Economides, said it was on account of the interest shown by some members of the Commission in studying the conduct of States likely to create legal effects similar to unilateral acts that he had said it would be advisable not to disregard that aspect of the subject.

11. Replying to Mr. Momtaz, he said that his comment had been an immediate reaction to Mr. Koskenniemi's statement that the codification of unilateral acts was difficult, not because the question was complex but because such acts did not exist as a legal institution.

12. Mr. FOMBA recalled that at the preceding meeting, Ms. Xue had said that, unlike other unilateral acts, recognition was subject to a well-established regime. He did not think it could be said that, under current international law, recognition was subject to a clear, strict and universally accepted legal corpus. Attempts to classify unilateral acts according to doctrine seemed to show that recognition was regarded as a discretionary act within the realm of State sovereignty and, thus, as being beyond the scope of international law, subject to compliance with its peremptory norms.

13. Mr. RODRIGUEZ CEDEÑO (Special Rapporteur), summing up the debate on the report under consideration, thanked the members for their constructive, positive and stimulating comments, which had sometimes been justifiably critical, particularly on drafting matters and the fact that some aspects had not been elaborated on in enough detail. The debate had once again highlighted the problems to which the topic gave rise, with regard both to substance and to method.

14. Referring to the existence of unilateral acts as an institution and the advisability and feasibility of codification and progressive development, he, like the vast majority of members, believed that, even though it was impossible to refer to an institution *stricto sensu*, unilateral acts existed nonetheless. International practice showed that



States took action by means of those acts and by means of certain forms of conduct which had specific characteristics and which could sometimes give rise to legal effects. Some members were of the opinion that a study of the topic would not go far enough if it were confined to unilateral acts in the strict sense of the term, as defined by one school of thought.

15. In reply to some members' comments on recognition and the recognition of States, in particular, he explained that he had analysed that unilateral act because, in 2002, the Commission had asked him to do so and that decision reflected the Commission's wish to pause while considering how to proceed with its work. That particular unilateral act had been singled out in order to show what the general features of a unilateral act were, but the intention had not been to carry out a study on the recognition of States. That was why the report under consideration was essentially a reference document.

16. Many excellent works existed on the subject of recognition. There was no doubt that the nature, characteristics and legal effects of recognition varied according to its purpose. The criteria for and rules applying to the recognition of States or Governments were, or might be, different from those applicable to the recognition of belligerency, neutrality or insurrection or to declarations relating to territorial matters. Perhaps the report, which was confined to one form of recognition, had caused some confusion, but he had tried to avoid that by not including the complete legal theory on recognition and not referring to the many and, in other respects, most useful categories of *de jure* or *de facto* recognition, something that a few members of the Commission had regretted. Legal theory and international instruments, such as the resolution adopted by the Institute of International Law at its fortieth session,<sup>2</sup> did, however, refer to full or definitive recognition and to limited or temporary recognition.

17. The main purpose of the sixth report had been to follow the suggestions made by some members in 2002 and to show that the definition of unilateral acts of recognition *stricto sensu* might be similar to the draft definition studied by the Commission in previous sessions.

18. He was not sure that the investigation of unilateral acts one by one, the method proposed by some members, was the best way to proceed. Of course the topic must be considered in depth, and State practice had to be taken into account. A comparative study of the characteristics, nature and legal effects of unilateral acts was crucial and would be considered in future reports. The table recommended by some members might be useful in some respects, if elements taken from previous reports were used, if State practice in respect of unilateral acts was analysed and if an attempt was made to draw general conclusions.

19. The debate had shown that there were still considerable differences of opinion about the scope and even the purpose of the study. Since reference to unilateral legal acts *stricto sensu* might be restrictive and some Governments might demur, it had been suggested that the study should also cover other acts and conduct of States which

might produce legal effects. If that were done, the scope of the topic would have to be widened to encompass conduct whereby a State accepted, or could accept, international legal obligations *vis-à-vis* one or more other States or even the international community as a whole. That would certainly have implications for his earlier work, which had disregarded various forms of conduct by States which were outside the framework of the planned codification work. State conduct, including omissions, could have major legal effects, and, as some members had suggested, those questions could probably be discussed at a later stage, hence the need to provide for a saving clause. The Working Group should consider the matter.

20. Other very important, substantive issues had been raised during the discussions, including the criteria for formulating acts of recognition, the discretionary nature of the act, the possibility of attaching conditions to it, the need to give further consideration to recognition, treating admission to the United Nations as an act of recognition and unilateral revocation or suspension of acts, especially acts of recognition.

21. It was generally held that recognition was a discretionary act. In addition, a unilateral act should not usually, in theory, be subject to conditions, for that would be tantamount to creating a treaty-based relationship, if the addressee agreed to the conditions in question, whereas the act of recognizing a State was a very special case and its characteristics were not always similar to those of other acts of recognition.

22. State practice seemed to indicate that States formulated acts of recognition in given circumstances, some of which were provided for by international law relating to the establishment of States, while others were more political in nature. Although it was true that an act subject to conditions implied the reaction of another party, a feature which deprived it of its unilateral character, it was equally true that that situation often occurred in practice. The question therefore deserved careful attention.

23. Collective recognition through a United Nations resolution had given rise to doubts. It had been accepted by some States, such as Spain and Sweden, for example, but not by others. Sometimes the admission of new members to the United Nations was not free from political considerations and the legal consequences could differ according to the way in which the practice was interpreted. In that connection, the admission of new States to the Organization in the 1990s had sometimes been highly controversial, a case in point being that of the Federal Republic of Yugoslavia.

24. Reference had also been made to difficulties arising out of the termination of unilateral acts in general and, in particular, whether a State could unilaterally revoke such an act. The conclusion had been reached that a State did not possess such arbitrary power. Revocation could be subject to limitations, and a restrictive approach taking account of circumstances and possible harm to third parties had to be adopted. If a State could revoke a unilateral act at any time, without giving any reasons, the *acta sunt servanda* rule and the good faith rule would be called into question.

<sup>2</sup> See *Annuaire de l'Institut de Droit International*, Brussels session, April 1936 (Paris, Pedone, 1936), pp. 300 *et seq.*

25. As far as the criteria which might be applicable to the recognition of a State were concerned, recognition was in theory not only a discretionary act of a State, but also an act which was not usually subject to restrictions, save in extreme circumstances (for example, when a Security Council resolution prohibited the recognition of a State, a Government or a particular situation).

26. Legal opinion on the Ihlen declaration<sup>3</sup> was divided; for some writers, it was a unilateral act, mainly of waiver, while others contended that it was a conventional act because it was a reply to a request from the Danish Government. He personally believed that the reasons for the declaration did not necessarily make it conventional. In the *Nuclear Tests* cases, the French declarations, which were usually regarded as a promise, had been made in response to proceedings instituted by certain countries which had believed that they were affected by French nuclear explosions in the South Pacific. ICJ had itself found that there was no denying the unilateral nature of those declarations or of the declaration as a whole, which must be regarded as a single legal act composed of several declarations.

27. As things stood, it was too early to decide on the form of the final product, given the divergence of opinions on the subject, although his work to date had been aimed at the drafting of a set of articles. It was necessary to meet the concerns of the members of the Commission and to find acceptable compromise solutions without a radical change of method. In that connection, he was looking forward to receiving the Commission's instructions.

28. State practice should unquestionably be investigated in greater depth, and he would be at pains to do so in his next report. In his future reports, he would also pay more attention to international precedents and legal theory. He intended to send all members of the Commission the outline of his seventh report so that they could express their opinions and give him a clearer idea of the direction his study should take.

29. Mr. Sreenivasa RAO said that, instead of sending the outline of his study to all members of the Commission, the Special Rapporteur should submit his observations to three or four colleagues or ask the Working Group chaired by Mr. Pellet to work with him.

**Diplomatic protection<sup>4</sup> (continued)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>5</sup> A/CN.4/L.631)**

[Agenda item 3]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)\*\***

30. Mr. DUGARD (Special Rapporteur), introducing the addendum to his fourth report on diplomatic protec-

tion (A/CN.4/530 and Add.1), said that the Commission had completed the most important part of the work on diplomatic protection. It had sent draft articles on the diplomatic protection of corporations and shareholders (2764th meeting, para. 19) to the Drafting Committee and adopted the draft articles on the institution of diplomatic protection, the diplomatic protection of natural persons and the exhaustion of local remedies (2768th meeting, para. 38). One substantive issue still had to be considered: the diplomatic protection of crews of ships by the flag State. There was a division of opinion on the subject, both in the Commission and in the Sixth Committee, but in 2004 he would produce a draft article on it.

31. Three questions remained to be considered: the diplomatic protection of legal persons other than corporations, *lex specialis* to cater for bilateral investment treaties, and dual protection of an individual by an international organization and by a State. It was essential to the Commission's reputation that the second reading of the draft should be completed before the end of the current quinquennium.

32. As to *lex specialis*, which was covered in his draft article 21, there was no conflict between the document that Mr. Koskenniemi had prepared on the same subject for the Study Group on the Fragmentation of International Law and his own work. Many of the ideas advanced by Mr. Koskenniemi could even have been included in the addendum, and he thanked him for drawing his attention to the dictum of ITLOS in the *Southern Bluefin Tuna* case, in which the Tribunal had said that the principle of *lex specialis* was a general principle of law recognized in all legal systems and that, if the *lex specialis* contained dispute settlement provisions applicable to its content, the *lex specialis* prevailed over any similar provision in the *lex generalis*.

33. As was indicated in paragraph 106 of the report, foreign investment was largely protected by bilateral investment treaties, which provided two routes for the settlement of investment disputes. They could provide for the direct settlement of an investment dispute either between the investor and the host State before an *ad hoc* tribunal or a tribunal established by ICSID or by means of arbitration between the State of nationality of the investor (a corporation or an individual) and the host State. Where the dispute resolution procedures provided for in a bilateral investment treaty or by ICSID were invoked, customary law rules relating to diplomatic protection were excluded. Those procedures offered advantages to the foreign investor, as they avoided the political uncertainty inherent in the discretionary nature of diplomatic protection. ICJ had acknowledged the existence of such a special regime in the *Barcelona Traction* case.

34. Article 21 aimed to make it clear that the draft articles on the diplomatic protection of corporations and shareholders did not apply to the special regime provided for in bilateral and multilateral investment treaties. They served essentially the same function as article 55 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>6</sup> and reflected the maxim *lex specialis derogat*

\* Resumed from the 2768th meeting.

\*\* Resumed from the 2764th meeting.

<sup>3</sup> See 2770th meeting, footnote 8.

<sup>4</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>5</sup> See footnote 1 above.

<sup>6</sup> See 2751st meeting, footnote 3.

*legi generali*. The application of *lex specialis* was justified by the fact that there was a clear inconsistency between the rules of customary international law on the diplomatic protection of corporate investment, which envisaged protection only at the discretion of the national State and only, subject to limited exceptions, in respect of the corporation itself, and the special regime for foreign investment established by special treaties, which conferred rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal. That was why a provision along the lines of article 21 was indispensable in order to make it clear that there was a special regime for bilateral or multilateral agreements.

35. Recalling that the fourth report on diplomatic protection was devoted entirely to a particular species of legal person, the corporation, he introduced article 22, which applied the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made in the cases of other legal persons, depending upon their nature, aims and structure. It must be emphasized that the focus of attention in the draft articles should be on the corporation and that it was not possible to draft articles dealing with the diplomatic protection of each kind of legal person other than the corporation. The members of the Commission were well aware that legal persons could be created by municipal law and that there was no consistency or uniformity among legal systems in the conferment of legal personality. There was today a wide range of legal persons, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all those legal persons provided one explanation for the fact that writers on both public and private international law tended to focus their attention on the corporation. There was, however, another reason, which was that corporations engaged in foreign trade and investment. Thus, it was most often legal persons that were involved in investment disputes and that were most likely to request diplomatic protection. Other legal persons, of course, could require such protection. Several decisions of PCIJ stressed the fact that a commune or a university, for example, could have legal personality. There was no reason why a State should not protect a university if it was injured abroad, provided that it was entirely a private entity, since, in the case of a state-controlled university, it would be the State itself that was directly injured. Foundations, which were also private institutions, did good works abroad and should benefit from diplomatic protection.

36. The same applied to non-governmental organizations. Some authors did not agree, however, and considered that a non-governmental organization had an insufficient link with the State in which it was registered to allow the State to protect it. Thus, Doehring argued that the worldwide membership and activities of a non-governmental organization resulted in a situation in which an injury to it could not be seen as an injury to the State of registration.<sup>7</sup> That was an interesting line of argument which in his opinion paid too much attention to

the *Nottebohm* judgment and too little to the *Barcelona Traction* judgment. It certainly illustrated the complexity of the topic of diplomatic protection in respect of legal persons other than corporations.

37. Partnership illustrated that complexity particularly well. In most legal systems, particularly common-law ones, partnerships were not legal persons. In some legal systems, however, they were endowed with legal personality. A partnership might thus be considered a legal person in one system but not in another, something which underlined the total lack of uniformity among States in their approach to conferring legal personality on entities.

38. He had given those examples in order to show that it would be impossible to draft distinct provisions to cover the diplomatic protection of the various kinds of legal persons. The only course was the one already adopted, namely, to focus attention on the corporation, the kind of institution that had been the subject of the decision by ICJ in *Barcelona Traction*, and then to draft a general clause extending to other legal persons *mutatis mutandis* the principles expounded in respect of corporations. That was what the provision in article 22 sought to achieve.

39. Most cases involving the diplomatic protection of legal persons other than corporations would be covered by draft article 17, which was currently before the Drafting Committee in the revised form set out in paragraph 122. The draft article had been extensively debated, but the Drafting Committee had adopted it provisionally. Under article 22, a State would have to prove some connection of the kind described in article 17 between itself and the injured legal person as a precondition for the exercise of diplomatic protection. The language of article 17 was wide enough to cover all types of legal persons, however different they might be in their activities, structure or purpose. Articles 18 and 19, which had been referred to the Drafting Committee and dealt with cases in which shareholders could be protected, would not apply to legal persons other than corporations, while article 20, dealing with the principle of continuous nationality, would apply. In other words, the provisions on diplomatic protection of corporations were being taken as the starting point and applied *mutatis mutandis* to other legal persons. The Commission had often expressed misgivings about the use of Latin maxims. In paragraph 123, he suggested an alternative article 22 in which the words *mutatis mutandis* were replaced by an equivalent but wordier formulation. He himself preferred the Latin phrase, which had the advantage of being more economical and more elegant, and he hoped that the Commission would agree with him.

40. Mr. KOSKENNIEMI said that, as currently drafted, the provision in article 21 dealt only with the protection of corporations and their shareholders. Special arrangements—local, bilateral or multilateral regimes—could well be concluded between States on diplomatic protection in general, however. He therefore wondered where in the draft convention such special regimes should be placed. On the face of it, they should appear at the end of the draft articles in a *lex specialis* clause covering all the kinds of arrangements that might be concluded between

<sup>7</sup> See K. Doehring, "Diplomatic protection of non-governmental organizations", M. Rama-Montaldo, ed., *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al profesor*

Eduardo Jiménez de Aréchaga (Montevideo, Fundación Cultura Universitaria, 1994), pp. 571–580.



States, and he asked whether the Special Rapporteur had any intention of coming up with a more general provision or whether the exception contained in article 21 was the only one that would appear in the draft convention.

41. Mr. DUGARD (Special Rapporteur) said that he had not considered the matter from the perspective of other forms of *lex specialis*, since in practice the main focus was on bilateral investment treaties. Mr. Koskenniemi was, however, correct in saying that there were other arrangements in which diplomatic protection was included and that it might be wiser to provide for a general *lex specialis* clause outside the chapter dealing exclusively with corporations. The emphasis must be on bilateral investment treaties, but the Commission could well broaden the scope. He hoped that the proposal might be revisited during the general debate, but there was no reason why it should not be approved and referred to the Drafting Committee for the amendment of article 21.

42. Mr. BROWNLIE, endorsing Mr. Koskenniemi's comment, said that he had some reservations about article 21 relating more to the commentary than to the provision itself. He felt uneasy when members of the Commission insisted on putting *lex specialis* provisions in all its texts, since the applicability of such provisions surely went without saying. *Lex specialis* was a general principle. Even if a *lex specialis* provision was included, there was no need to spend a lot of time cataloguing what were regarded as the situations producing *lex specialis*, and especially giving particular prominence to bilateral investment treaties. It was not the usual practice to spell out the cases of *lex specialis*. It would be much safer—as well as being the normal approach—simply to state the principle. Those members of the Commission who worked in the field of arbitration were aware that restrictions on diplomatic protection applied, *inter alia*, to the standards of conduct set out in bilateral investment treaties. It was extremely common for the parties to present arguments on the interpretation of various parts of a treaty, in cases of doubt, by referring to the principles of general international law that were applicable at the time of the conclusion of the treaty; that was an altogether standard way of interpreting treaties.

43. He was concerned that the emphatic language of the commentary might give rise to misunderstandings. That applied in particular to the penultimate sentence of paragraph 112 of the report, which contained the phrase “special regime for foreign investment”. While it was generally true to say that the *lex specialis* envisaged by the Special Rapporteur clearly related to what might be termed the procedural regime, the phrase in question encompassed substantive provisions dealing with the standards of conduct of the State playing host to foreign investment. That suggested that there was a total divorce between customary international law and general international law as far as bilateral investment treaties were concerned. And that was not the case, either in principle or in the practice of arbitration. It was perfectly normal for teams of lawyers, whether representing the respondent State or the claimant, to bring in matters of general international law, and, if one team did so, the other automatically did the same. It might therefore be preferable to adopt more cautious language in the text of the commentary. It was unneces-

sary, since it was not common practice, to specify cases of *lex specialis*.

44. Mr. CHEE noted that the Special Rapporteur spoke of corporations in general. In order to clarify the thinking of the Commission, it might be advisable to define the nature of corporations, whether commercial or not.

45. Mr. NIEHAUS said that, in draft article 17, as revised, the criterion of the “analogous link” was too vague and would only complicate the granting of diplomatic protection. A distinction could be made between a corporation's *siège social* and administrative headquarters, but to speak of an “analogous link” with the State exercising the diplomatic protection gave the impression that reference was being made to the nationality of the shareholders, something that would complicate the concept of the nationality of the corporation. He asked the Special Rapporteur what his intention had been in proposing such wording, which might create additional difficulties.

46. Mr. DUGARD (Special Rapporteur), replying to Mr. Niehaus, said that the question had been debated at length during the consideration of the fourth report and that it would be inappropriate to reopen the debate in the context of the report currently being considered by the Commission. He therefore referred Mr. Niehaus to the summary records of the debate on the matter.

47. He reserved his position on the extremely pertinent comment by Mr. Chee, which related to a question that had already been dealt with, together with the other provisions relating to the nature of corporations. He believed that the question should be dealt with in the commentary rather than in the body of the draft article, but he would return to the matter in greater detail at a later stage.

48. Mr. Brownlie's comments were so substantial that they merited further reflection, and he reserved the right to provide a more detailed response at a later stage. He agreed with Mr. Brownlie that it might be unnecessary to include a *lex specialis* clause in the draft articles, since it was a general principle. That was for the Commission to determine, however. As for the commentary, he had dealt with the question of bilateral investment treaties in detail in order to emphasize the need for a provision of that kind. He had probably overstated the issue in suggesting, in paragraph 112, that customary international law was completely excluded, but there obviously existed circumstances in which it was not included. Mr. Brownlie's comments concerned the wording of the commentary to article 21, should it be adopted, but they should also be considered in the light of the fact that the Study Group on the Fragmentation of International Law was considering the question of *lex specialis*, thus enabling the Commission to debate a most important general principle, which applied to any draft articles it might prepare.

*The meeting rose at 11.35 a.m.*

## 2775th MEETING

Tuesday, 15 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### Cooperation with other bodies (continued)\*

[Agenda item 11]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed the President of the International Court of Justice and invited him to address the Commission. Judge Shi Jiuyong had himself served on the Commission from 1987 to 1993 and was thus familiar with the Commission's work.

2. Mr. SHI (President of the International Court of Justice) said the Court was most appreciative of the fact that exchanges of views with the Commission had become customary, and it was a particular pleasure for him to return to the very room where he had sat as a member of the Commission between 1987 and 1993, and as Chair in 1990.

3. The Court was the principal judicial organ of the United Nations, with the function of deciding disputes between States in accordance with international law, whereas the Commission was charged with the codification and progressive development of international law. The link between the two spoke for itself. Both contributed to the strengthening of international law. There was, moreover, interaction between the two bodies at every level. Some Commission members appeared regularly before the Court as counsel or agents of parties, bringing to bear not only their advocacy skills but also their valuable knowledge of the Commission's work, which in turn nourished the Court's deliberations. More important still was the fact that, since the election to the Court of Sir Benegal Rau in 1952, members of the Commission had regularly been elected to sit as judges of the Court. Two had been elected in October 2002, with the result that, of the current 15 Judges, 7 were former members of the Commission. Furthermore, several members of the Commission had served as judges *ad hoc* in cases before the Court.

4. The close relationship between the two was completed by the profound respect and consideration shown by each for the other's work. While the Commission systematically referred to the judgements of the Court in its codification enterprise, the Court had similar recourse to the Commission's work to determine the content of the law or interpret various rules of international law. If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means.

5. The first occasion on which the Court had referred to the Commission's work was in its judgments on the *North Sea Continental Shelf* case in 1969, when it had had recourse to the Commission's discussions on the question of delimitation between adjacent States to determine the status of the principle of equidistance embodied in article 6 of the 1958 Convention on the continental shelf. The Commission's work on the law of the sea had subsequently been used by the Court on several occasions, in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case and the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case.

6. The Commission's work had also been useful to the Court in many other areas. In the *Kasikili/Sedudu Island* case, and more recently in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had used the Commission's work to interpret various provisions of the 1969 Vienna Convention. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court had used the Commission's work to confirm the customary status of the principle of the prohibition of the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations. Article 12 of the 1978 Vienna Convention had similarly been found by the Court to be customary, notably on the basis of the commentary on article 12 of the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-sixth session,<sup>1</sup> in the *Gabčíkovo-Nagymaros Project* case. And, in the *Marine Delimitation and Territorial Questions between Qatar and Bahrain* case, the Commission's work had been used to confirm the definition of arbitration.

7. It was in the domain of State responsibility, more than any other, that the potential complementarity between the work of the Court and of the Commission had best been illustrated. The Commission's codification of the rules of State responsibility had been an invaluable guide to the Court when it had dealt with complex issues such as that in the *Gabčíkovo-Nagymaros Project* case. The Court had referred extensively to the draft articles on State responsibility adopted by the Commission on first reading<sup>2</sup> and to the accompanying commentary to interpret the notion of the state of necessity, to distinguish between a wrongful act itself and acts of a preparatory character, and to determine the conditions for lawful resort to countermeasures.

<sup>1</sup> *Yearbook ... 1974*, vol. II (Part One), p. 197, para. 2 of the commentary.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D, pp. 58–65.

\* Resumed from the 2764th meeting.

In doing so, it had not simply taken note of the Commission's work but had, in its turn, reinforced the value of the draft articles by declaring some of the principles contained therein as being of a customary nature; and it had done so some four years before the adoption of the draft on second reading<sup>3</sup> or before the General Assembly took note of the draft articles.<sup>4</sup> The recognition of the status of the draft articles had been further confirmed two years later in the advisory opinion in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when the Court had declared that the principle of attribution to the State of the conduct of its organs, reflected in the then article 6 (subsequently article 4) of the draft articles, possessed a customary character.

8. There had been important changes at the Court over the past year. Three new members had been elected—Judge Tomka from Slovakia, Judge Simma from Germany and Judge Owada from Japan—and the first two had been members of the Commission. Judge Koroma and he himself had been re-elected.

9. Since Judge Guillaume had addressed the Commission at the previous session, the Court had rendered a final judgment in three cases and ordered provisional measures in two others. The total number of 24 cases on the Court's docket remained the same, however, since three new cases had been filed with the Court over the past 10 months, a sure sign of its vitality and the trust placed in it by States.

10. The Court had handed down judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. In 1994, Cameroon had seized the Court of a legal dispute with Nigeria in respect of sovereignty over the Bakassi peninsula. It had subsequently widened the scope of its application, requesting the Court to determine the land boundary between the two States from Lake Chad to the sea and to delimit their respective maritime areas. It had also claimed reparation from Nigeria on account of damage suffered as a result of the occupation of Bakassi and Lake Chad and of various border incidents. Nigeria had responded by raising eight preliminary objections on the grounds of lack of jurisdiction and inadmissibility, which the Court had addressed in a judgment of 11 June 1998. Nigeria had gone on to submit a request for interpretation of that judgment (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*), on which the Court had ruled on 25 March 1999. Nigeria had then submitted counterclaims and Equatorial Guinea an application for permission to intervene, whose admissibility the Court had had to address.

11. The Court had held that treaties concluded during the colonial period, whose validity it confirmed, had fixed the boundary between Cameroon and Nigeria. In consequence, it had decided that, pursuant to the Agreement between Great Britain and Germany respecting (1) the Settlement of the Frontier between Nigeria and the Cameroons, from Yola to the Sea, and (2) the Regulation of

Navigation on the Cross River,<sup>5</sup> sovereignty over Bakassi lay with Cameroon. It had also determined the boundary in the Lake Chad area in accordance with the exchange of notes between the United Kingdom and France respecting the boundary between the British and French spheres of the Cameroons Mandated Territory<sup>6</sup> and rejected Nigeria's claims in that area. The Court had also defined the precise line of the approximately 1,500-kilometre land boundary between the two States in 17 other disputed sectors. It had gone on to determine the maritime boundary between the two States, taking into account the interests of third parties, including those of Equatorial Guinea, which had intervened in the oral proceedings. The Court had begun by affirming the validity of the Second Declaration of Yaoundé<sup>7</sup> and the Maroua Declaration,<sup>8</sup> whereby, in 1971 and 1975, the Heads of State of Cameroon and Nigeria had agreed on the maritime boundary separating the territorial seas of the two States. With regard to the maritime boundaries farther out to sea, the Court had adopted as the delimitation the equidistance line between Cameroon and Nigeria, which appeared to produce equitable results as between the two States. Finally, it had held that each State was under an obligation expeditiously and unconditionally to withdraw its administration and military and police forces from areas falling within the sovereignty of the other.

12. In December 2002, the Court had concluded the proceedings between Indonesia and Malaysia in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*. In its judgment, the Court had found that article IV of the 1891 Convention between Great Britain and the Netherlands Defining Boundaries in Borneo<sup>9</sup> for the purpose of defining the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which were under British protection did not establish any allocation line between the parties in the area of the islands, and that none of the parties had obtained title over the islands by succession. The Court had therefore relied on effectivities claimed by the parties and found that sovereignty over Pulau Ligitan and Pulau Sipadan lay with Malaysia.

13. The Court's most recent judgment had been in the case of the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*). The Court had recalled, first, that under Article 61 of its Statute, a revision could be requested by a party only upon discovery of a new fact, namely a fact that had existed at the time the judgment had been given but had been unknown to the Court and to the party claiming revision. The Court had determined that a fact that

<sup>5</sup> London, 11 March 1913 (Treaty Series No. 13 (1913) (London, H. M. Stationery Office), p. 231).

<sup>6</sup> London, 9 January 1931 (*ibid.*, No. 34 (1931) (London, H. M. Stationery Office), p. 1).

<sup>7</sup> ICJ, *Application Instituting Proceedings* of 29 March 1994, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case, annex 7.

<sup>8</sup> United Nations, *Treaty Series*, vol. 1237, no. 19976, p. 319.

<sup>9</sup> London, 20 June 1891 (*British and Foreign State Papers, 1890–1891*, vol. 83 (London, H. M. Stationery Office, 1897), p. 42).

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> General Assembly resolution 56/83 of 12 December 2001, para. 3.



occurred several years after a judgment had been given was not “new” within the meaning of Article 61. The admission of the Federal Republic of Yugoslavia to the United Nations<sup>10</sup> had occurred in November 2000, well after the 1996 judgment. The Court had accordingly found the application of the Federal Republic of Yugoslavia inadmissible.

14. The Court had also handed down orders for the indication of provisional measures in two cases filed over the past year. In the case concerning *Avena and Other Mexican Nationals*, Mexico had initiated proceedings against the United States regarding alleged violations of articles 5 and 36 of the Vienna Convention on Consular Relations, with respect to 54 Mexican nationals who had been sentenced to death in certain states of the United States. On 5 February 2003, the Court had indicated to the United States that it must “take all measures necessary” [pp. 91–92] to ensure that three Mexican nationals, for whom it found that the condition of urgency had been met, were not executed, pending a final judgment of the Court. It had also stated that the United States Government should inform it of all measures taken in implementation of that order and decided to remain seized of the matters forming the subject of the order until it had rendered its final judgment.

15. In the case concerning *Certain Criminal Proceedings in France*, Republic of the Congo had filed an application instituting proceedings against France seeking an annulment of the investigation and prosecution measures taken by the French judicial authorities further to a complaint concerning crimes against humanity and torture allegedly committed in Congo against individuals having Congolese nationality, filed by various human rights associations against the President, the Minister of the Interior and other individuals, including the Inspector-General of the Congolese armed forces and the Commander of the Presidential Guard. On 17 June 2003, the Court had found that the circumstances were not such as to require the exercise of its power under Article 41 of its Statute to indicate a provisional measure and rejected Congo’s request. In its application, Congo had indicated that it proposed to found the jurisdiction of the Court, pursuant to article 38, paragraph 5, of the Rules of the Court, “on the consent of the French Republic, which will certainly be given” [p. 103]. It had therefore been only France’s consent, on 8 April 2003, to the Court’s jurisdiction to entertain the application that had made it possible to open the proceedings. The case was exceptional in that it was the first time since the adoption of article 38, paragraph 5, in 1978 that a State had accepted, without prior special agreement, the invitation of another State to recognize the Court’s jurisdiction to entertain a case directed against it.

16. The Court had also taken a number of other decisions with which he would not burden the Commission. He would mention only that the Court had acceded to the request of the parties to form special chambers of five judges to deal with the case concerning the *Frontier Dispute (Benin/Niger)* case and the case concerning *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Fron-*

*tier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*.

17. The Court’s docket remained heavily burdened, and a number of cases were, or would shortly be, ready for hearing. The Court would therefore have to maintain its high level of activity. The *Oil Platforms* case was currently at the deliberations stage. Hearings would also be organized in several other cases before the end of the calendar year. The Court was considering ways and means of improving its working methods so as to ensure timely and efficient exercise of its judicial functions.

18. The Court and the Commission, in performing their respective tasks, each had to be constantly aware of the work accomplished by the other. The Commission’s programme of work for the current session was heavy, and many of the items on the agenda were of the highest relevance for several cases on the Court’s docket, including diplomatic protection, reservations to treaties, unilateral acts of States, the responsibility of international organizations, and others. The fragmentation of international law was also of interest. He assured the Commission that the Court would remain as attentive to its work as it had always been.

19. Finally, he congratulated the Commission on the fact that its proceedings were conducted in all the six official languages of the United Nations, whereas he had been obliged to make his statement in English because the official languages of the Court were, for historical reasons, restricted to English and French.

20. The CHAIR thanked the President of the Court for his very interesting statement and the useful information on the appointment of new judges, interaction between the Commission and the Court, the latter’s judgments, its docket and its official languages.

21. Mr. BROWNLIE asked whether the oral arguments presented to the Court were of value.

22. Mr. SHI (President of the International Court of Justice) said that the oral statements of the parties’ counsel helped members of the Court greatly in their deliberations, especially in cases like that concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, where counsel for Nigeria had raised eight points regarding jurisdiction and admissibility that had been argued so well and so forcefully that the members had spent long hours in closed session analysing those thought-provoking contentions.

23. The oral sittings proved tiring for elderly judges, but they afforded an opportunity to cover ground not dealt with in the written pleadings. For that reason, the members of the Court always read the minutes of the oral submissions with great care. The oral arguments of counsel were therefore heeded and were most valuable.

24. Ms. ESCARAMEIA said that the presentation of the substantive connection between the Commission and the Court had been very informative. Since the fragmentation of international law was a very real problem, she wished to know whether there were any contacts between ICJ, ITLOS, the *ad hoc* criminal tribunals and the International Criminal Court. Had such exchanges been dis-

<sup>10</sup> General Assembly resolution 55/12 of 1 November 2000.

cussed in ICJ? Had the latter invited the presidents of the other courts to describe their work, or would such a move detract from a court's independence and autonomy? Would such links foster an awareness of the difficulties encountered by each judicial body?

25. Mr. SHI (President of the International Court of Justice) said that the members of ICJ were concerned about the fragmentation of international law. To date, there had been no contacts between the various specialized judicial bodies, although it was indeed vital to arrive at a uniform interpretation of certain points of international law. The members of the Court had not discussed the matter formally, although they had exchanged views on the subject behind the scenes.

26. Some of the courts in question were not part of the United Nations system, while others were subsidiary organs of the Security Council. Nevertheless, it would be helpful if the General Assembly were to adopt a resolution indicating how to deal with the fragmentation of international law in international judicial bodies, some of which held differing views on specific legal issues.

27. Judge Guillaume, former President of the Court, had written a number of essays on the topic in which he had suggested that the Court, as the principal judicial organ of the United Nations, which considered all kinds of questions in the sphere of private and public international law, might give advisory opinions to other judicial bodies in the event of differences of interpretation. In the General Assembly, however, some States had rejected that idea on the grounds that it would turn the Court into an appeal body and the international community, as a whole, was not yet ready to accept such a step.

28. Mr. Sreenivasa RAO said it was gratifying that the President of the Court had mentioned the productive interactive relationship between the Court and the Commission. The workload and the complexity of the cases brought before the Court called for continuous adjustment and methodological reforms on its part. In that connection, the value of oral pleadings must be enhanced by introducing greater informality into them so they were no longer merely a repetition of the contents of written submissions, but became lively exchanges which would allow the Court to reach the crux of an argument.

29. The Court, other international judicial bodies and the Commission should contribute to the harmonious interpretation of legal issues in order to overcome the fragmentation of international law. In the beginning, several opinions might exist, but, as time went by, dissenting opinions often became the view of the majority. It was quite a normal process, and a creative means of fostering it must be found.

30. Mr. SEPÚLVEDA said that Judge Shi's description of the links between the Court and the Commission had been of particular interest to him, especially in the light of the Planning Group's recent discussion of relations between the Sixth Committee and the Commission. At times, those two bodies, both of which had important legal functions, seemed to be disconnected, although, admittedly, the Sixth Committee focused more on the politi-

cal aspects of issues, whereas the Commission's concerns were predominantly of a legal nature.

31. Judge Shi had drawn attention to the fact that the participation of members of the Commission as counsel in cases being heard by the Court raised the Commission's profile and that the opinions of the Commission, because of their soundness, served as a basis for the Court's decisions and judgments. In addition, some members of the Commission went on to become judges at the Court. The discussion which had just taken place had served to emphasize the intrinsic importance of the Commission.

32. The President of the Court, as a former representative in the Sixth Committee, no doubt knew what sort of links should exist between the Sixth Committee and the Commission. His presence at the Commission meeting had underlined the high esteem in which the Commission's members were held as they strove to achieve a better legal order.

33. Mr. MOMTAZ asked what difficulties the Court encountered in the exercise of its judicial functions and whether it was contemplating any revision of its Rules.

34. Mr. SHI (President of the International Court of Justice) said that, since the Court dealt with disputes between States, it had to respect the sovereign equality of those States and, as a result, had to allow them enough time to prepare their cases. It meant that well over two years could elapse between the submission of the original application, or the notification of a special agreement, and the presentation of replies and rejoinders in response to the parties' memorials and counter-memorials. That written stage was then followed by oral hearings for which some parties' agents required an additional five to six weeks of preparation.

35. Once the written pleadings were submitted and the oral hearings finished, the internal judicial procedure began. Before the formal deliberations in chamber, and in order to ensure the quality of the Court's judgments, each member had to write what were called Notes and were in fact preliminary judgments, addressing all the legal issues. Usually the drafting of the Notes took about a month and their translation another several weeks. They were then distributed to all members, and another week or so was allotted for them to be studied, after which the formal deliberations began.

36. Those lasted a week on average, two weeks in particularly difficult cases, and then began the process of drafting the Court's judgment. By the time the judgment was considered by the Court on second reading, several more weeks would have passed and various revisions made. A formal vote was then taken, following which individual opinions could be written. Unlike officials of domestic courts, members of the Court received very little assistance from law clerks, of which there were only five for the whole institution, and their recruitment had been authorized only a year ago.

37. It was thus very clear that the Court's proceedings were extremely time- and labour-intensive. Efforts could certainly be made to simplify the proceedings, but nothing must be done that might diminish the quality of the

judgments, and the reasoning behind them must be very clearly explicated.

38. A number of changes aimed at improving internal judicial methods had been made: members were no longer required to write Notes on preliminary objections in the jurisdiction/admissibility phase or on requests for provisional measures, as long as the legal issues were not too complicated, and the Court had taken steps to limit the duration of oral proceedings.

39. In short, any measures to streamline proceedings must be carried out in keeping with the principles of respect for the sovereignty of States and preservation of the quality of the Court's judgments.

40. The CHAIR warmly thanked the President of the International Court of Justice on behalf of the Commission for the very interesting information he had provided about the Court's functioning, which was valuable not only for the Commission's members but also for the members of the International Law Seminar who were attending the meeting. He asked the President to convey to the members of the Court the Commission's cordial greetings and its desire for further productive exchanges between the two bodies.

*Mr. Melescanu (Vice-Chair) took the Chair.*

**Diplomatic protection<sup>11</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>12</sup> A/CN.4/L.631)**

[Agenda item 3]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

41. Mr. GALICKI, referring to the recently issued addendum to the fourth report (A/CN.4/530 and Add.1), said it had been prepared by the Special Rapporteur with his usual competence, deep knowledge and openness. The title, "Proposed articles on diplomatic protection of corporations and shareholders", was somewhat misleading, since that was not the subject of the two draft articles contained in the addendum. Draft article 21, on *lex specialis*, excluded the application of some of the articles formulated earlier but did not specify which ones. Draft article 22 dealt with diplomatic protection of legal persons other than corporations and their shareholders. It was to be included in the third part, entitled "Legal persons", and the technical question to be solved was proper correlation of the titles of the articles throughout that part.

42. The two new draft articles covered exceptions to the main rules formulated earlier in the draft, but each did so in its own way. Article 21, based on the maxim *lex specialis derogat legi generali*, provided for the priority of special rules of international law where the protection of corporations or shareholders was governed by such rules. In paragraph 112, the Special Rapporteur cited the opinion expressed by the Commission in the commentary

to article 55 of the draft articles on State responsibility for internationally wrongful acts<sup>13</sup> that, for the principle *lex specialis derogat legi generali* to apply, there must be some actual inconsistency between two provisions or a discernible intention that one provision was to exclude the other. A requirement of actual inconsistency or discernible intention should perhaps be added to the text of article 21, thereby more precisely defining the scope of operation of *lex specialis* rules *vis-à-vis* general norms. A second aspect of article 55 on State responsibility was missing in article 21, namely that general articles should not apply solely "where" but also "to the extent that" the subject matter was governed by special rules of international law. That more extensively developed approach should be incorporated in the draft on diplomatic protection.

43. Mr. Koskenniemi had rightly pointed out that the operation of the *lex specialis* principle should not be limited to protection of corporations and shareholders but should be extended to other situations regulated by the draft articles. The matter seemed to be of crucial importance, especially in the light of the Commission's parallel work on the fragmentation of international law, where *lex specialis* was one of the main problems analysed.

44. Paradoxically, while Mr. Koskenniemi proposed a more extended formulation of the *lex specialis* principle, Mr. Brownlie suggested that a separate provision on *lex specialis* might not be necessary. True, its application to questions of diplomatic protection might derive from general principles of law. Yet even if one recognized the general nature of the *lex specialis* principle, in some situations like that of diplomatic protection, its practical application might require that additional particular rules be followed. Article 55 of the draft on State responsibility likewise confirmed the usefulness of having specific regulations on *lex specialis*.

45. In view of the widely diverging proposals made, a cautious approach should be taken: the idea of having an individual provision on *lex specialis* should not be rejected *in toto*, yet the suggestion of not confining the application of article 21 to diplomatic protection of corporations and shareholders seemed reasonable. Examples could be found of the application of that principle to other legal persons and perhaps even to natural persons—for instance, the self-contained regime of liability for damage caused by space objects. He was therefore in favour of modifying article 21 and possibly placing it somewhere other than in the third part, to make it applicable in a more general way.

46. As to article 22, he supported the view expressed by the Special Rapporteur in paragraph 113 that it was not possible to draft further articles dealing with the diplomatic protection of each kind of legal person. The main difficulty with the practical application of the article, as noted in paragraph 121, was the infinite variety of forms that legal persons could take. In general, the possibility of being registered as a legal person flowed from the internal legislation of the State, and the procedures and requirements established by individual States varied widely. Paragraph 121 gave an excellent example of such differentiation in the legal position of the European Economic

<sup>11</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>12</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>13</sup> See 2751st meeting, footnote 3.



Interest Grouping whereby, as the Special Rapporteur rightly pointed out, the same types of entities, endowed with equal legal capacities by a uniform statute, could be granted legal personality in one European Union member State and left without it in another.

47. One must also be conscious of the growing number of creatures of municipal law, as paragraph 117 put it, that might be interested in benefiting from their status of legal persons. The unlimited, unilateral extension by individual States of legal personality to various entities might create serious problems with the practical exercise of diplomatic protection of such entities *vis-à-vis* other States which might not necessarily be eager to recognize such legal personality. Even the very broad formula of *mutatis mutandis* application set out in article 22 did not seem to solve the problem. It might therefore be useful to include some sort of requirement of mutual recognition of legal personality of a given entity by the States concerned.

48. Despite those remarks, he thought both draft articles were necessary, were based on thorough research and were a useful addition to the set of articles previously accepted by the Commission. The draft articles, together with the comments made on them during the discussion, should therefore be referred to the Drafting Committee.

*Mr. Candioti (Chair) resumed the Chair.*

49. Mr. ADDO said he agreed with much of the Special Rapporteur's report. Draft article 21, which stipulated that when a bilateral or multilateral investment treaty was invoked the rules of customary international law did not apply, was not only acceptable: it stated the obvious. He concurred with Mr. Brownlie that there was no real need for including it, but it caused no harm and could be retained *ex abundanti cautela*. It should therefore be referred to the Drafting Committee.

50. As for draft article 22, it would be nearly impossible to draft articles for each and every specific legal person. Accordingly, use of the words *mutatis mutandis* was very apt. The phrase had become part of the vernacular, and there was no more succinct way of expressing the underlying idea. That article too should be referred to the Drafting Committee.

51. Mr. GAJA thanked the Special Rapporteur for a thoughtful and useful addendum to his report that highlighted two questions. As to the first of those questions, he agreed with the Special Rapporteur about the existence of many special rules on diplomatic protection. Some excluded or deferred protection, providing a method for dispute settlement that gave the investor a direct role. Others modified the requirement of nationality of claims or derogated from the local remedies rule. While most mainly affected diplomatic protection of corporations or their shareholders, a provision on *lex specialis* should not, in his view, be limited to them. He concurred with Mr. Galicki on that point: such a provision should have a wider scope and be placed among the draft's final provisions. If *lex specialis* was based solely on treaty provisions, however, a reference to it might not be necessary.

52. The Latin expression *mutatis mutandis* in draft article 22 was not, as was suggested in paragraph 123, a

maxim. In a legal text, it would be better not to use expressions in an unfamiliar language like Latin, and its equivalent could be found in most languages. His main problem with the expression, however, was that it conveyed very little about the circumstances that would entail the application of a different rule and about the contents of that rule. It therefore seemed preferable for a positive rule to be expressed with regard to legal persons other than corporations. To that end, an analysis of State practice would be needed, and that, unfortunately, was missing from the addendum to the report.

53. He would tentatively suggest wording along the lines that the State entitled to exercise diplomatic protection of a legal person other than a corporation was the State under whose law the legal personality had been granted, provided that the place of management was located or registration took place on the territory of the same State. An appropriate formulation could be found by the Drafting Committee so as to establish some formal link between the basic attribution of legal personality and the State deemed entitled to exercise diplomatic protection.

54. Mr. CHEE commended the Special Rapporteur on the addendum to the fourth report. The description in paragraph 109 of the advantages of bilateral investment treaties and ICSID for the current system of diplomatic protection under customary international law reflected the statement by ICJ in the *Barcelona Traction* case. Furthermore, in view of the extensive State practice regarding bilateral investment treaties and ICSID, it might be appropriate to conclude that article 21 was fit for codification. According to Verzijl, the frequency of a particular class of bilateral treaties or the constant repetition therein of a particular clause might in itself create a practice corroborated by general *opinio juris*.<sup>14</sup> Doehring also concluded that consistent treaty practice under certain conditions could effectively contribute to the formation of new law with regard to arbitration clauses.<sup>15</sup> Moreover, article 15 of the Commission's statute stated that the expression "codification" was used as meaning "the more precise formulation and systematization of rules of international law in fields where there already ha[d] been extensive State practice, precedent and doctrine". It was well known that the codification effort was made on the grounds that written law was superior to customary law.

55. In connection with article 21 he would also draw attention to State practice regarding the "stabilization clause" in contracts between the foreign investor and the host State. It was an additional and effective device for protecting the foreign investor's investment, had been upheld by several arbitral tribunals and commanded the support of distinguished jurists. That remark applied to bilateral investment treaties between foreign investors from developed States and developing host States. However, it seemed that problems arose in connection with bilateral investment treaties between foreign investors and developed host States. It might be appropriate for the Commission to look into such problems in the light of the globalized economy and the interdependence among States with respect to equitable economic relations.

<sup>14</sup> J. H. W. Verzijl, *International Law in Historical Perspective*, vol. I (Leiden, Sijthoff, 1968), p. 40.

<sup>15</sup> Doehring, *loc. cit.* (2774th meeting, footnote 7).

56. He wished to withdraw his earlier suggestion to add the word “business” before “corporation” in draft article 22, in view of the Special Rapporteur’s explanation in paragraph 117. Articles 21 and 22 were acceptable and should be referred to the Drafting Committee.

57. Mr. KATEKA commended the Special Rapporteur on his report and echoed his remark about completing the topic within the five-year period. Article 21 should apply generally to the whole set of articles on diplomatic protection and should not be confined to corporations alone. As Mr. Brownlie had suggested, it might not be necessary to have a provision on *lex specialis*. However, since a precedent had been set in the draft articles on State responsibility, there seemed to be no harm in incorporating such a provision in the present draft. Perhaps the General Assembly or a diplomatic conference would subsequently delete those provisions.

58. The title of article 22 should read “Other legal persons”, since that was what the article in fact dealt with. Furthermore, with reference to the last sentence of paragraph 122, he failed to understand why it spoke of articles 18 and 19, when most of the other legal persons concerned had no shareholders in the classical sense of company law. Finally, he was in favour of retaining the Latin expression *mutatis mutandis*.

59. Mr. MATHESON expressed gratitude for the warm welcome extended to him as a new member by the Commission and said he endorsed the remarks on the excellent quality of the report. As to article 21, he was in favour of specifying the application of *lex specialis*, although the Commission could be flexible as to what form that should take. It was appropriate not only to make clear how the principle related to the draft article but also to recognize the very important regimes which applied in the area of protection of investment. He also had some sympathy with the alternative idea that the article could be broader in scope. The matter could be dealt with in the commentary, but the Commission would no doubt prefer it to be incorporated in the draft articles proper.

60. As Mr. Brownlie had pointed out, certain parts of the report seemed too categorical in their description of the application of *lex specialis*. That was also true of the phrase in paragraph 108 that “customary law rules relating to diplomatic protection are excluded”. He suggested it would be more accurate to say that other regimes specifically derogated from customary law rules and would apply, but in other respects such rules would and did apply in arbitrations conducted in the area of diplomatic protection.

61. Mr. ECONOMIDES said that the *lex specialis* provision in article 21 should not be limited to corporations and their shareholders, but should also apply to natural persons who, for instance, acted under the terms of human rights treaties. The general provision should be placed at the end of the draft to cover all of the articles. He saw no reason why investment and human rights treaties should be excluded. In fact, the Commission should accord priority to them instead of setting in motion the unwieldy, political procedure of diplomatic protection.

62. He pointed out that the *lex specialis* exclusion was not absolute, but conditional. Although it would apply to

investment or human rights treaties, in certain circumstances, such as where a contracting State failed to comply with the judgment rendered, diplomatic protection could be reconsidered, as was indicated in the footnotes corresponding to the last sentence of the paragraph. The general provision should be drafted to reflect that situation. Also, he agreed that the phrase “These articles do not apply” at the beginning of article 21 should be replaced by a more specific reference to the articles in question.

63. As far as draft article 22 was concerned, he endorsed the use of the Latin expression *mutatis mutandis* but questioned the use of the term “principles”, suggesting that “provisions” might be preferable. Again, were all of articles 17 to 21 involved or only some of them? In his opinion, articles 21 and 22 could be referred to the Drafting Committee.

64. Mr. DUGARD (Special Rapporteur) said that initially he had tended towards a narrow provision in article 21 on the grounds that the most obvious *lex specialis* related to multilateral or bilateral investment treaties. However, there seemed to be support for a broader provision dealing not only with corporations but also with natural persons. He suggested, in order to expedite the proceedings, that rather than continuing discussion on the subject in plenary, the Drafting Committee should be assigned the task of redrafting the provision.

65. The CHAIR recalled Mr. Gaja’s comments on the expression *mutatis mutandis* as well as the need to recognize other legal persons or establish some formal link between them and the State concerned by diplomatic protection.

66. Mr. GAJA said that to use the expression *mutatis mutandis* was an easy solution, but it was important to be clear as to its exact implications. With regard to article 21, the Commission had a precedent in the topic of State responsibility, where the theme of *lex specialis* had been developed. However, he was not certain that, according to article 55 of the draft articles on State responsibility, *lex specialis* necessarily referred to treaties. This provision could also refer to some areas of general international law that were not covered by general rules. Perhaps a phrase to the effect that general rules might not cover all aspects of general international law would have been more appropriate. From the Special Rapporteur’s explanation he had understood that in his view in the case of diplomatic protection exceptions were based only on treaties. Perhaps that also needed to be specified.

67. Mr. DUGARD (Special Rapporteur) pointed out that there was very little State practice aside from that relating to the protection of corporations. There had been cases where States had afforded protection to non-governmental organizations, such as to Greenpeace in the dispute with France over the destruction of a ship in Auckland Harbour, but there was not enough State practice to be able to formulate general principles on the subject. For that reason, emphasis should be placed on the protection of corporations. The general provision to be drafted should lay down general principles to guide States in the diplomatic protection of legal persons other than corporations. The Commission could not hope to cater for each and every situation.

68. Mr. MELESCANU said that, in principle, he endorsed the idea of a broader provision on *lex specialis* to be worked out by the Drafting Committee, as suggested by the Special Rapporteur. However, he was concerned that if the exercise was not carried out properly, some difficulties would be encountered in the interpretation of the provision at a later stage. The discussion on general and special provisions had only just begun in the Study Group on the Fragmentation of International Law. The Drafting Committee would therefore have to clearly define the contents, scope and application of the *lex specialis* provision.

69. Mr. BROWNLIE, referring to concerns expressed about the relative absence of State practice, said it could be held that the positions of delegations of States before international tribunals were a form of State practice. Paragraph 119 of the report referred to the few pertinent decisions of PCIJ, and further research into the pleadings there might provide some State views. As for Mr. Melascanu's remarks on the approach to follow, he pointed out that, for the purpose of progressive development, one needed something to work on before it could be developed. Perhaps the Commission need say no more with respect to article 2 than that there was some unfinished business to be done.

*The meeting rose at 1 p.m.*

## 2776th MEETING

*Wednesday, 16 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### **The responsibility of international organizations (concluded)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)**

[Agenda item 7]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the Drafting Committee's report on the respon-

sibility of international organizations (A/CN.4/L.632), said that in his first report (A/CN.4/532) the Special Rapporteur had proposed three articles, all of which had been referred to the Drafting Committee. The latter had examined them and adopted three texts, an encouraging development which held out hope for the progress of the Commission's work on the topic. Following is the text of the draft articles adopted by the Committee:

#### **Article 1. Scope of the present draft articles**

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

#### **Article 2. Use of terms**

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

#### **Article 3. General principles**

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

2. The topic was in fact a sequel to the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>2</sup> That did not mean that the Commission would simply copy the articles on State responsibility, but rather that it would follow the basic trend that had taken shape in respect of that topic. However, when an article on the current topic embodied the same legal principle as an article on State responsibility, the language should remain the same in order to avoid any confusion or ambiguity.

3. Draft article 1, on the scope of the draft articles, was composed of two sentences which the Drafting Committee had preferred to separate and place in two different paragraphs.

4. Paragraph 1 corresponded to the first sentence of article 1 proposed by the Special Rapporteur and had its origin in article 57 of the draft articles on State responsibility for internationally wrongful acts. It indicated that

\* Resumed from the 2763rd meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st session, footnote 3.



the subject matter was the international responsibility of an international organization for an act that was wrongful under international law. The Drafting Committee had retained the text proposed by the Special Rapporteur with two drafting changes. It had deleted the word “question”, which it deemed superfluous. The new text therefore referred to “the international responsibility”, not to the “question of the international responsibility”. The last part of the paragraph had been drafted in the singular instead of the plural. That was a purely stylistic change and consistent with the Commission’s previous codification exercises. The last part therefore read “for an act that is wrongful” and not “for acts that are wrongful”. It had been suggested that reference should be made to “its internationally wrongful act”, but the Drafting Committee had rejected that suggestion, since it could have been argued that that formulation did not cover cases in which an international organization was responsible for the wrongful acts of its members under circumstances similar to those considered in Chapter IV of the first part of the draft articles on State responsibility. For the sake of clarity and in order to preclude any ambiguity, the Drafting Committee had therefore decided to retain the drafting style proposed by the Special Rapporteur.

5. It had further been suggested in the plenary that article 1 should deal with attribution. After considering the question, the Drafting Committee had decided that it was unwise to address that issue at the current stage for fear of limiting the scope. For example, it was not yet certain whether the draft articles should exclude situations in which an organization had accepted certain obligations that had to be fulfilled by one of its members and that member had then failed to do so. In that situation, the wrongful act might, in principle, be attributable to that State, but the Commission might decide that, under certain circumstances, the organization would have to bear responsibility. Paragraph 1 was therefore drafted in general terms. It did not give any indication of the acts for which an organization might be responsible or the circumstances under which a State might be responsible for an act of the organization. The commentary would explain that the article simply indicated what sort of issues the articles covered without providing a solution in advance. Paragraph 1 was drafted in such a way that it also covered the responsibility of an international organization which was a member of another international organization.

6. Paragraph 2 corresponded to the second sentence of article 1 proposed by the Special Rapporteur and dealt with the responsibility of a State for an internationally wrongful act of an international organization. It complemented paragraph 1 and filled a vacuum. The Drafting Committee had made some slight drafting changes. To be consistent with paragraph 1, the word “question” had been deleted and the words “conduct of an international organization” had been replaced by the words “the internationally wrongful act of an international organization”, to make it clear that reference was being made to the possible responsibility of a State for a *wrongful* act of an international organization.

7. It should also be noted that paragraph 2 did not refer to the responsibility of a “member State” of an organization, but only to the responsibility of “a State”. That was a deliberate choice in order to make provision for the situa-

tions covered by Part One, Chapter IV, of the draft articles on State responsibility for internationally wrongful acts, in which a State might not be a member of an organization, but might, for example, direct, assist or coerce an organization to commit a wrongful act.

8. Article 2 (Use of terms), which so far defined only the term “international organization”, had been extensively discussed in the plenary before being referred to an open-ended Working Group, which had drawn up a text that the plenary had subsequently referred to the Drafting Committee. The Committee had worked on the basis of that text.

9. During the plenary debate, the comment had been made that a wide variety of organizations operating across the globe could regard themselves as “international”. Their members ranged from States to non-State entities. As it would be difficult to take account of all those organizations, it would be necessary to indicate clearly what type of “international organizations” the draft articles covered. That did not, however, mean that the principles and rules which would ultimately be prepared—or at least some of them—would not apply to other organizations. That point should be explained in the commentary. Some members had found the definition of “international organization”, as proposed by the Special Rapporteur, rather abstract and had asked for an explanation of the *types* of existing international organizations, so as to have a clearer idea of what the definition should include. Other members, however, had been of the opinion that the definition would have to rely on some genuine and verifiable characteristics. The text produced by the open-ended Working Group had been formulated on that basis. The article identified three criteria which an international organization should satisfy in order to fall within the scope of the topic: mode of establishment, legal personality and membership. The Drafting Committee had made only a few modifications to the text submitted by the Working Group.

10. As it stood, the text comprised two sentences. The first dealt with the first two elements of the definition, namely, the mode of establishment and the legal personality of the organization, and the second dealt with the membership requirement. As far as the mode of establishment was concerned, an “international organization” within the meaning of the draft articles had to be established by a “treaty” or “other instrument” governed by international law. The general view in the Drafting Committee had been that an international organization that came within the purview of those articles should be created by an act under international law clearly expressing the consent of the parties. The word “treaty” was broadly defined in article 2, paragraph 1 (a), of the 1969 Vienna Convention. The same definition was to be found in article 2, paragraph 1 (a), of the 1986 Vienna Convention. That definition also applied to the term “instrument”. The inclusion of both terms in the definition proposed in article 2 was useful as it covered declarations, resolutions, covenants, acts, statutes and the like. The Drafting Committee had considered other alternatives such as “agreements”, “forms of expression of consent”, “acts of international law” and “other means”, but had finally settled for “instrument” as the most appropriate term in the context. Article 2 likewise specified that such treaties or instruments should be “governed by international law”, a notion that

was also to be found in article 2, paragraph 2 (a), of the 1969, 1978 and 1986 Vienna Conventions. The aim was to distinguish between treaties and instruments governed by international law and other instruments regulated by national law.

11. The second criterion was that such an international organization should possess “its own legal personality”. The definition proposed by the Working Group had contained the bracketed phrase “distinct from that of its members”. The Drafting Committee had deleted it because it agreed with the general view expressed in the plenary that the phrase was superfluous, since that condition was already implied in the requirement of independent legal personality.

12. The third criterion was that there must be “States” among an organization’s members, for some international organizations’ members included other international organizations, territories and non-governmental organizations. The presence of States as members was indispensable in order to delimit the scope of the topic and exclude non-governmental organizations from the definition. The words “other entities” at the end of the sentence referred to international organizations, territories and non-governmental organizations, which could be members of an international organization. No express mention had been made of international organizations consisting solely of international organizations. In the view of the Drafting Committee, such international organizations were rare. It had, however, agreed in principle that there was no reason why the draft articles should not also apply to such international organizations.

13. Article 3 (General principles) reproduced articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts, except that it replaced the word “State” with the term “international organization”. The article proposed by the Special Rapporteur had received considerable support in the plenary and the Drafting Committee had therefore retained it, apart from changing the words “is attributed” in subparagraph (a) to the words “is attributable”, so as to be consistent with the wording of draft article 2 on State responsibility.

14. The point had been made in the plenary that the general principle embodied in article 3 was incomplete, since it covered only the responsibility of an international organization for an internationally wrongful act. It did not apply to the responsibility of a State for a wrongful act of an international organization, as dealt with in article 1, paragraph 2. The Drafting Committee had agreed with that viewpoint, but had drawn attention to the fact that the Commission was not yet in a position to lay down a principle on State responsibility for a wrongful act of an international organization. While article 1 on the scope of the topic must clearly state the issues involved, the article on general principles did not need to be exhaustive at the current stage. When work on the topic had made sufficient progress and there was a better understanding of how and under what circumstances a State might incur responsibility for a wrongful act of an international organization, the Commission could decide whether it was advisable to state some general principles on that issue. It would be premature to formulate a legal principle without a deeper knowledge of the circumstances entailing

such responsibility and of possible exceptions, although plainly the Commission would have to consider that matter at some time. The Drafting Committee had also taken note of a proposal made in the plenary (2755th meeting), which read:

“An internationally wrongful act of an international organization may also entail the international responsibility of a State because:

(a) The State has contributed to the wrongful act of the international organization;

(b) The international organization has acted as a State organ.”

15. The Drafting Committee had also considered a further issue that had been raised in the plenary, namely, the fact that article 3 did not contain a provision equivalent to draft article 3 on State responsibility, which stated that the characterization of an act of a State as internationally wrongful was governed by international law and was not affected by its characterization as lawful by internal law. The Drafting Committee held that that provision did not apply to international organizations and that that point should be explained in the commentary.

16. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 1.

*It was so decided.*

17. Mr. MELESCANU said that, on the basis of the first three articles, he could see that, despite its similarities to the topic of State responsibility, the responsibility of international organizations had its own distinguishing features. He was among the members of the Commission who would have preferred a broader definition of international organizations. It was difficult to keep the definition within close confines, although he understood the practical requirement of limiting its scope on the basis of objective criteria. Having heard no strong objections to the idea that the draft articles might also cover the responsibility of other international organizations, he proposed that a “without prejudice” clause should be included to indicate that it could also apply to other international organizations not covered by the narrow definition given.

18. With regard to article 3, the best solution would be to consider the problem of the responsibility of States for the acts of international organizations in the context of the draft articles on State responsibility for internationally wrongful acts, because by taking it too far the Commission might become deadlocked.

19. Mr. PAMBOU-TCHIVOUNDA said that he had reservations about draft article 2. He had difficulty understanding the linear presentation of the article, which seemed to state two different things. The first sentence corresponded well to the title, but the second dealt with the composition of the international organization. Article 2 should therefore be entitled “Definition and composition”.

20. Mr. KAMTO said that he shared Mr. Pambou-Tchivounda’s views. Article 2 as drafted combined two elements that should be set out separately. In addition, the

use of the words “a treaty or other instrument governed by international law” might cause confusion. He had to admit that he had some difficulty seeing what the Commission was referring to. In his view, the definition of a treaty given in the 1969 and 1978 Vienna Conventions covered practically the whole range of international legal instruments expressing the will of the State to be bound. All the other ideas put forward in plenary fell under that definition. The Commission could perhaps explain what it meant by “other instrument governed by international law” so as to make its concerns clearer.

21. Mr. GAJA (Special Rapporteur) said that the Commission would be facing a never-ending task if it was to revert to questions that had already been discussed in plenary, then in the Working Group and finally by the Drafting Committee.

22. With regard to Mr. Melescanu’s comment on international organizations that were not covered by the definition proposed in article 2, he believed that the problem did not need to be addressed at the present stage and could be taken up again later.

23. He had no fundamental objection to Mr. Pambou-Tchivounda’s proposal that article 2 should be divided into two separate paragraphs, but thought the idea should have been brought up earlier to enable the Drafting Committee to look into it.

24. However, he did not agree with Mr. Kamto about the use of the words “other instrument”. The matter had been thoroughly discussed in plenary. The Drafting Committee suggested that examples of international organizations that had not been established by treaty should be given in the commentary. He thought that there might be implicit treaties in certain cases, something that would be mentioned in the commentary. He urged the members of the Commission not to reopen the debate on the substance of the issue.

25. Mr. PAMBOU-TCHIVOUNDA said that he was not trying to reopen the debate on substance, but thought that the two consecutive sentences clearly dealt with two different matters.

26. The CHAIR suggested that a logical connection should be introduced between the two sentences, for instance, with the words “such organizations could include as members ...”, in order to clarify the point.

27. Mr. Sreenivasa RAO thanked the Chair of the Drafting Committee for a job well done. The proposed text seemed well balanced and sufficiently clear. Perfection could always be sought, of course, but the Commission had made great progress in relation to its starting point.

28. Mr. GALICKI said that he endorsed article 2 as proposed by the Drafting Committee. It was carefully balanced and, more importantly, it faithfully reflected the discussion. Proposals designed to improve the definition of an international organization had been made. He thought the definition had two very important components: first, treaties alone must not be considered the basis for establishing an international organization; and, second, the members of international organizations were not only States. The inclusion of those two components was justified on the basis of the practice of international

organizations. Certainly, more criteria could be added and factors, sometimes artificial ones, could be included, but the two factors mentioned were the ones that he found to be the most important, as they gave a clear idea of what the Commission was thinking of when it referred to an international organization.

29. Mr. KAMTO said that he did not want to reopen a substantive discussion either, but that whenever someone could propose an idea for consideration that might clarify the Commission’s work, he or she should not hesitate to do so. His comments had been aimed solely at drawing attention to the fact that, when the Commission arrived at the stage of the commentary to the articles, it must take care to explain what it meant to say. He remained appreciative of the results achieved by the Drafting Committee and by the Working Group.

30. Mr. KATEKA (Chair of the Drafting Committee) said he hoped that the Commission would adopt the draft articles as they stood, with no amendments. The text was a balanced one and any addition, even the one proposed by the Chair, might upset that balance. During the next reading, the Commission could look into how to word things differently. For the present, he appealed to the members of the Commission to adopt draft article 2 as it stood.

31. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 2 on the use of terms, as proposed by the Drafting Committee and in the light of all the comments and observations which had been made during the meeting and would be reflected in the relevant summary record.

*It was so decided.*

32. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 3 on general principles, as proposed by the Drafting Committee.

*It was so decided.*

33. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee on the responsibility of international organizations, as a whole.

*It was so decided.*

### **Diplomatic protection<sup>3</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>4</sup> A/CN.4/L.631)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

34. Mr. KAMTO congratulated the Special Rapporteur on the draft articles included in his fourth report (A/CN.4/530 and Add.1) which he had submitted to

<sup>3</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>4</sup> See footnote 1 above.



the Commission, which were extremely useful and well thought out. It would appear, however, that the *lex specialis* provided for in article 21 did not correspond to the way it was provided for in article 55 of the draft articles on State responsibility for internationally wrongful acts.<sup>5</sup> As Mr. Gaja had said at the preceding meeting, article 55 was designed to cover cases when there was an actual contradiction between a general rule and a special rule. If article 21 had been designed with the same purpose in mind, Mr. Galicki would be right to say that it should be revised to include the concept of incompatibility between the two types of rules. But that was not the purpose of article 21 as proposed by the Special Rapporteur. For it to apply, there had to be a conflict between the provisions of an investment protection treaty and the future draft articles on diplomatic protection. Whereas article 55 introduced the idea of the settlement of conflicts between rules contained in two legal instruments of differing scope, article 21 embodied the principle that, as far as the protection of corporations was concerned, preference should be given to special procedures as opposed to the rules of diplomatic protection. That was why article 21 should be retained as worded.

35. The wording of article 21 showed that the future articles on diplomatic protection would probably be residual rules and would therefore be residually applicable. It had been pointed out that there was a very large number of bilateral and multilateral investment treaties, but attention could also be drawn to the development of regional systems for the protection of human rights involving a dispute settlement mechanism. He therefore agreed with the members who had suggested that the provision should be broadened to apply to the draft articles as a whole and placed at the end. It might also be that the final wording would be arrived at only later, when the Commission had an overall view of the articles, since it could then decide what the scope of the *lex specialis* should be.

36. Article 22 called for two comments. First, the examples given by the Special Rapporteur in paragraphs 117 to 121 of his report to illustrate the diversity of legal persons and the difficulty of finding “common, uniform” features in them were interesting, but the situation was like that only because the examples given confused the legal nature of legal persons with their purpose or object. If a proper answer was to be given to the question of what a legal person was instead of trying to determine the purpose for which it had been set up, it would be discovered that such entities, which were so varied in the way they were set up and in their activities, were covered by one and the same functional definition. The basic feature common to all legal persons was their capacity to have rights and obligations, and that was true in both internal law and international law. Thus, if the internal law of a State, which was the relevant legal order, designated an entity as being a legal person or provided legal elements enabling it to be identified as such, that was sufficient: the international legal order had to accept it as such for the purposes of diplomatic protection. It therefore appeared that, on that point, paragraph 117 of the report was debatable and too categorical.

37. The second comment related to the use of the words *mutatis mutandis*. He had listened to the concern expressed by Mr. Gaja at the preceding meeting about that Latin expression, the exact meaning of which might not be correctly understood by everyone. He had then looked at various international law and general law dictionaries and had seen that those words could be used without confusing persons for whom the draft articles were intended.

38. Since he was in favour of the wording proposed by the Special Rapporteur for articles 21 and 22, he supported the proposal that they should be referred to the Drafting Committee.

39. Mr. KEMICHA congratulated the Special Rapporteur on the excellent work he had done to enlighten the Commission on the use of dispute settlement procedures provided for, on the one hand, by bilateral investment treaties and, on the other, by the ICSID machinery established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The two mechanisms had the common feature of excluding the application of the rules of customary law concerning diplomatic protection, as was clearly indicated in article 27, paragraph 1, of the Convention. Everyone, including the Special Rapporteur, agreed that those mechanisms, which applied international arbitration techniques, offered better guarantees for investors than did diplomatic protection, which depended on the goodwill of States.

40. He therefore questioned whether an article 21 on a special investment protection regime, a *lex specialis*, should be included, since, from the standpoint of practice, such a special regime was the rule and diplomatic protection was the exception. He nevertheless understood the Special Rapporteur’s didactic approach and welcomed the wise decision he had announced at the preceding meeting to make the reference to *lex specialis* applicable to the draft articles as a whole. Subject to that reservation, he recommended that draft article 21 should be referred to the Drafting Committee.

41. He had no major difficulty with the use of the Latin phrase *mutatis mutandis*, in draft article 22, but he was concerned that States might use diplomatic protection to benefit legal persons other than corporations, such as non-governmental organizations. A decision to exercise diplomatic protection on behalf of a natural or legal person was highly political and depended on the discretion of the State that took it. In some cases, the State might be tempted to take up the cause of a legal person properly registered in its territory against another State with which it did not have diplomatic relations and for which it wished to create problems, for whatever reason, wrong or right. In paragraph 120 of his report the Special Rapporteur referred to Doebling’s view that a non-governmental organization had insufficient connection with its State of registration to qualify for diplomatic protection,<sup>6</sup> but he did not transpose it to or take account of it in the proposed wording of draft article 22. He would be grateful for an explanation of the Special Rapporteur’s position on that point and for an indication whether some sort of protective measure should be considered for that type of situation.

<sup>5</sup> See 2751st meeting, footnote 3.

<sup>6</sup> Doebling, *loc. cit.* (2774th meeting, footnote 7), pp. 573 *et seq.*

42. Ms. ESCARAMEIA, congratulating the Special Rapporteur on his excellent report, noted that Mr. Kamto had said, in relation to draft article 21, that article 55 of the draft articles on State responsibility did not necessarily apply because the situation was different. She was not sure that the situation was different. Her reading of the report was that the Special Rapporteur's intention had been to propose a replacement, even if some paragraphs were slightly too categorical, as Mr. Matheson had pointed out at the preceding meeting. Bilateral investment treaties or even multilateral agreements sometimes made no mention of diplomatic protection provided only for partial coverage or even set up mechanisms that ultimately failed. For that reason, it would be as well, from a pragmatic point of view, to insert, in draft article 21, the words "and to the extent that" between the word "where" and the words "the protection of corporations". Whenever the mechanisms foreseen failed or were not complete, the possibility of diplomatic protection should arise again. That was surely what the Special Rapporteur had had in mind.

43. There had been a lengthy discussion at the preceding meeting on the question whether a general rule on *lex specialis* should be adopted and not simply a rule applicable only to corporations. She agreed with the Special Rapporteur that a *lex specialis* rule should be mentioned wherever that was justified. Since special rules, rather than general rules, would apply to corporations, it would be useful to mention the fact in draft article 21. It was by no means certain, however, that the same would apply in all other circumstances, especially in the case of individuals. In fact, she feared that, if the draft articles said that there would be a *lex specialis* for every entity, including individuals, that might preclude the use of diplomatic protection whenever special human rights regimes came into play. Such regimes were usually based on multilateral conventions and made no mention of diplomatic protection, but they undoubtedly did not preclude it. If it was decided to draft an article on *lex specialis* that would apply to individuals or other entities, the impression might be given that whenever a special regime—concerning human rights, for example—was applicable, it was somehow impossible to exercise diplomatic protection. That was not the aim of the draft articles. She therefore thought that it would be best to be careful and state that a *lex specialis* rule could apply exclusively and in its entirety only when expressly provided for and that otherwise the general rules of diplomatic protection also applied.

44. With regard to article 22, she supported Mr. Kateka's suggestion concerning the word "other" in the title, since corporations were legal persons. As for the reference to articles 17 to 21, it was clear that articles 18 and 19 did not apply, since there was no longer any reference to shareholders in article 22. Indeed, she was not sure that the reference to article 17, or even to article 21, should be retained. It might well be that only the reference to article 20, and perhaps to article 17, should be retained, but she reserved the right to speak again on the subject.

45. The expression *mutatis mutandis* was too vague. She agreed with Mr. Gaja that it gave no indication of how the regime should be applied to other persons, and that it should be more precise. The Special Rapporteur had said that it was extremely difficult to find examples of State practice in that regard, although Mr. Brownlie had drawn

attention to some cases heard by PCIJ. In the current context of globalization, she believed that in the future there would be far more interaction between foundations, non-governmental organizations and universities, for example, and that other such legal persons would be increasingly involved in international activities. More research should therefore be done in order to work out a rather more specific regulation or principle. She therefore supported Mr. Gaja's comment on the need to establish a link between such organizations and the State presenting the claim for diplomatic protection. Such a link could be based on a principle similar to that contained in draft article 17 relating to the nationality of a corporation or could be something slightly different. It was not, however, necessary for both States to recognize the legal personality of the entity; only the State presenting the claim for diplomatic protection would need to do so. Otherwise, a State that did not recognize non-governmental organizations or allow them a legal personality would feel free to treat them or any other entities however it liked. Moreover, the rule had not been applied in the case of corporations because there were States which did not recognize the legal personality of corporations.

46. The definition of a corporation, for the purposes of the draft article, given in paragraph 117 of the report, should be clearly stated at the very beginning of the commentary or, in any case, as soon as the subject of corporations was introduced. There were, after all, corporations without shareholders or limited liability; the term could even be used to describe entities that were not enterprises and were not run for profit.

47. Notwithstanding her reservations, she thought that draft articles 21 and 22 should be referred to the Drafting Committee.

48. Mr. DUGARD (Special Rapporteur) drew attention to an extremely important point in the statement by Ms. Escarameia, namely, her reference to the difference between special regimes for foreign investment and special regimes for human rights protection.

49. The purpose of bilateral and multilateral investment treaties was to exclude the normal rules of diplomatic protection. Those engaged in foreign investment considered the customary rules of diplomatic protection inadequate, since they were dependent on the discretion of the national State to intervene. In practice, States were very reluctant to intervene to protect foreign investments. International investment treaties were therefore drafted precisely in such a way as to eliminate the discretionary element and also to confer rights on the shareholders, something which was not possible under customary international law as reflected in the *Barcelona Traction* case.

50. There was thus a tension between investment treaties and the customary rules of diplomatic protection, whereas there was no such conflict with human rights conventions. In such cases, the two regimes were designed to complement each other, to work in tandem. Where the rules of diplomatic protection did not apply, the human rights conventions did, and vice versa. If the Commission therefore decided that the best course of action was to draft a general provision on *lex specialis*, it would be essential to

bear in mind the important difference between bilateral investment treaties and human rights instruments.

51. Mr. KOSKENNIEMI said that the Special Rapporteur's explanation of the difference between bilateral or multilateral investment protection treaties and human rights instruments was correct, in that the former had the intention of setting aside the general rules of diplomatic protection, whereas the latter had no such intention. The treatment of investment protection treaties in terms of *lex specialis* was therefore not the right way to proceed. The fact that the rationale of such treaties was to set aside the general rules of diplomatic protection was simply an illustration of the dispositive nature of such rules, so the reference to an operation of *lex specialis* as a conflict settlement rule became redundant. There was no reason to apply an interpretative principle such as *lex specialis* when the rule from which it was meant to derogate was not *jus cogens*. That led him to believe that there was no need to mention *lex specialis* at all in the draft articles, for two reasons. First, such a reference could inadvertently lead to the inference that, if a special regime that was relevant in some broad sense was in place, the diplomatic regime was completely and immediately excluded, and that was not the case. Second, as other speakers had noted, the language used by the Special Rapporteur, particularly in paragraph 112 of the report, was too categorical and tended to suggest that the rules of diplomatic protection applied either completely or not at all. It might therefore be better, as Mr. Brownlie had first proposed, not to mention *lex specialis* at all because the principle would apply in any case and, if it was constantly mentioned, any instrument lacking a reference to it might give rise to an *a contrario* conclusion.

52. Mr. ECONOMIDES said that, in the case of both human rights and investment protection, the problem was not so much *lex specialis* as the priority to be given to remedies that were more effective than those provided by human rights instruments or investment treaties, compared to the weighty political procedure of diplomatic protection, which should be reserved for the more extreme cases. From that point of view, diplomatic protection was not totally excluded, in that it could come into play if the defendant State did not implement the decision arising out of the remedy of first resort. It was not that there was mutual and complete exclusion, as in the case of *lex specialis*, *sensu stricto*. Rather than a provision on *lex specialis*, therefore, it would be preferable to have a different kind of provision on the remedies that should be resorted to before diplomatic protection was invoked. That would, however, mean that the draft articles could not immediately be referred to the Drafting Committee for its consideration.

53. Mr. MANSFIELD (Rapporteur) said that, although it was quite clear that the Commission was simply codifying a residual rule relating to corporations, the situation was quite different in the case of natural persons. A blanket application of the *lex specialis* principle, as suggested in the draft articles, could create problems. The Commission should perhaps look at the matter in greater detail or even consider another provision. If the draft articles were referred to the Drafting Committee, the latter could consider requesting the Commission to establish a small group to examine the issue in greater depth.

54. Mr. BROWNLIE said that his doubts concerning the need to include a *lex specialis* provision related more to the commentary than to draft article 21 itself. On the other hand, although the Commission had always included the rule in any articles that it drafted, in the draft articles on diplomatic protection it had not only included *lex specialis* but seemed to want to define its meaning and even to venture into the complicated maze of relations and hierarchies that constituted international law. That had been the crux of the *Pinochet* case, in which general principles of international criminal law had begun to gain in importance without anyone taking into account that they were beginning to contradict the standard regime of immunity of Heads of State. It would take the Commission years to disentangle the question of priorities of that kind. The sensible course of action would therefore be not to include any *lex specialis* provision, or else to include it but to say as little as possible about its application.

55. Mr. MATHESON said that the answer might be simply to recognize that there were important special regimes in the area of investment protection and that the purpose of the draft articles was not to modify or supersede such special regimes. As a result, rules of customary law could continue to be used, to the extent that they were not inconsistent with those regimes. That idea could be stated in an article—which was the intention of draft article 21—or in the commentary.

56. Mr. KAMTO said that the debate had confirmed him in his view that draft article 21 related to a preference principle, giving more flexibility to investment treaties and more effectiveness to human rights instruments. In the draft articles, therefore, the *lex specialis* clause should, as in the draft articles on State responsibility, appear as a waiver clause at the end, worded in such a way as to ensure that all *lex specialis* regimes—investments, human rights, questions of immunity and so on—would be covered by the provision.

57. Mr. GAJA said that the problem of priorities related to the treaty regime and did not need to be defined in draft articles concerned with general international law. Apart from peremptory norms, all rules of general international law could be subject to derogation by treaty, including such rules as the exhaustion of local remedies rule. The Commission should therefore envisage a provision of a general nature.

58. Mr. CHEE said that international law was passing through a process of erosion, in which the rules of customary international law and of diplomatic protection were gradually being replaced by new State practice, such as bilateral investment treaties, of which there were currently more than 2,000. Priority should thus be given to such State practice.

59. Mr. DUGARD (Special Rapporteur) said he wished to make it clear that, when he had drafted article 21 and the commentary thereto, he had had in mind only bilateral and multilateral investment protection treaties; he had been concerned that corporations and their shareholders protected by such treaties might be prejudiced if there was no *lex specialis* clause. Mr. Brownlie and Mr. Matheson had correctly pointed out that, as it stood, the provision did not take sufficient account of the possibility of us-



ing customary international law in cases where there were gaps in investment treaties. It was an important criticism. Since he had not had human rights treaties in mind, he had not made draft article 21 a general clause applicable to the draft articles as a whole. The extension of the scope of the clause to human rights instruments was not without risk, however, as the following example would illustrate: a State whose national was detained without trial or tortured in another State could not exercise its diplomatic protection on behalf of its national if the defendant State was party to a human rights convention and the procedure under that convention consequently applied. The person detained or tortured would then be deprived of a protection that could have been more effective. Thus, a measure of prudence was in order when formulating the rule. The Commission currently had three options: it could avoid having any *lex specialis* provision at all; it could apply such a provision only to bilateral or multilateral investment treaties; or it could couch the provision in general terms. The fourth option mentioned by some members of the Commission, namely, to draft a more substantive provision, might lead the Commission into a whole new topic, that of the conflict between special regimes and customary law.

60. Mr. KOLODKIN said that he had no clear-cut position on draft article 21 but took note of Mr. Brownlie's remark that the provision might be superfluous, since, according to a general legal principle special law took precedence over general law for questions covered by the former. If the Commission decided to retain the article, it must determine whether it should apply to the draft articles as a whole—in other words, to natural persons as well. That would entail defining what was meant by special rules for protecting that category of persons, and that was no easy task. It might well be asked whether human rights treaties really constituted special laws which would rule out the possibility of the State having recourse to diplomatic protection. In that connection, it would be advisable to study practice of States and their views on the question, which seemed relevant to the discussions underway in the Study Group on the Fragmentation of International Law. Moreover, there was no reference in article 21 to a limitation which appeared in article 55 of the draft articles on State responsibility, namely, that article 21 should be applied not only in the case where, but also to the extent to which, the matter was governed by special provisions of international law. The introduction of such a limitation in article 21 would avoid the unjustified exclusion of the right to diplomatic protection. He was not certain that the subordinate clause in the text of the draft article was really necessary.

61. With regard to draft article 22, there did not seem to be enough information on State practice to justify a draft article on the diplomatic protection of legal persons other than corporations. The Special Rapporteur explained the reasons for the situation, but they did not solve the problem. The *mutatis mutandis* formula hardly seemed very useful under the circumstances. Could the members of an international non-governmental organization be likened to company shareholders? There was good reason to ask (a) what amendments and adjustments would have to be made to the rules in order to apply them to other legal persons, and (b) exactly what other legal persons they might be in view of the very broad range of persons concerned

and the different treatment given them by various legal systems, as the Special Rapporteur himself recognized in paragraph 121 of the report. Prudence was called for on the matter, which perhaps should remain outside the scope of the study.

62. Mr. MOMTAZ, referring to draft article 21, said it was clear that the provisions of the different draft articles introduced thus far by the Special Rapporteur could not be binding on States and were purely declaratory in nature. States were therefore free to agree not to apply such provisions in their relations. There had been many cases where an agreement had been reached to avoid applying the rules which the draft articles on diplomatic protection were trying to codify. A good example was the second Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by Iran and the United States, of 19 January 1981,<sup>7</sup> setting up the Iran–United States Claims Tribunal, which had jurisdiction to decide, under certain conditions, on claims filed by the nationals of one State against those of the other. The provisions of that declaration were undeniably special rules which derogated from those contained in the draft articles. In that connection, he did not see why the scope of article 21 should be limited to corporations and their shareholders and, like other members, was in favour of a more general provision which would be placed at the end of the draft articles and would apply to the provisions as a whole. He was thus in favour of the third option proposed by the Special Rapporteur.

63. There might be some doubt about the need for article 22, at least as far as the protection of non-governmental organizations was concerned, particularly since it was not based on established practice likely to be codified. He therefore endorsed the opinion of Doehring, as referred to in paragraph 120 of the report: in most cases, non-governmental organizations did not have a sufficient link with their State of registration to be able to claim diplomatic protection from it.<sup>8</sup>

64. Mr. FOMBA said the first question to be asked in connection with draft article 21 was the extent to which the expression *lex specialis* could be considered as being provided for and clearly defined in international law in terms of both form and substance. That was probably why Mr. Melascanu, with other members, had expressed some justifiable concerns. More importantly, pending the outcome of the debate on the fragmentation of international law, which should provide some clarifications in that regard, it should be recalled that Article 38, paragraph 1 (a), of the Statute of the International Court of Justice drew a distinction between general and particular international conventions. Moreover, the Court had used the expression *lex specialis* in a number of cases—for instance, in its decisions in the *Barcelona Traction and Military and Paramilitary Activities in and against Nicaragua* cases, where it had referred to the specific character of *lex specialis* (paras. 62 and 274, respectively). The Commission had included a provision relating to *lex specialis* in article 55 of its draft articles on State responsibility for internationally wrongful acts, and the legitimacy of that provision seemed to have been demonstrated by the Special Rap-

<sup>7</sup> *ILM*, vol. 20, no. 1 (January 1981), p. 230.

<sup>8</sup> See footnote 6 above.

porteur. In his view, the provision should be placed at the end of the draft articles.

65. As far as the wording of article 21 was concerned, the French text should use the words *des règles spéciales* instead of the words *les règles spéciales*. Like Mr. Economides, he thought that the contradiction between customary international law relating to diplomatic protection and special investment treaties was not absolute, but conditional.

66. With regard to article 22, he endorsed the Special Rapporteur's conclusions in paragraphs 122 and 123 of his report. The existence of legal persons other than corporations depended on different domestic laws, not on international law. As to whether such legal persons should be given diplomatic protection, it was too early, even though there did not seem to be any well-established practice, to reach a negative and definitive conclusion. For the individual, the governing criteria was nationality, just as for corporations nationality was defined according to their place of establishment, headquarters or other criteria; for legal persons other than corporations, the criteria should be the most relevant legal link established by analogy and *mutatis mutandis*. He endorsed Mr. Kateka's proposal on the title of article 22: "Other legal persons" would better reflect the contents of the provision. In conclusion, he considered that articles 21 and 22 could be referred to the Drafting Committee.

67. Mr. DAOUDI, referring to draft article 21, said that, if the Special Rapporteur's reasoning was followed and bilateral investment treaties were regarded as *lex specialis* that excluded the application of customary rules relating to the diplomatic protection of corporations and their shareholders, the following points would need to be borne in mind.

68. Bilateral investment treaties could provide for direct recourse to international arbitration either *ad hoc* or in the framework of an international body not only by corporations (legal persons) but also by natural persons (investors). Moreover, since those natural persons benefited from direct access to international courts in certain areas of international law, as other members of the Commission had pointed out at the preceding meeting, another means of indicating a derogation from the application of customary rules with regard to diplomatic protection needed to be found. It seemed that a general article applying to the draft articles as a whole, along the lines of article 55 of the Commission's draft articles on State responsibility for internationally wrongful acts, would be more in line with the Special Rapporteur's objective.

69. That was all the more justified in that article 21 provided for the exclusion of the application of the four draft articles. It was not clearly stated, however, that those provisions would not be applied if the respondent State did not comply with the arbitral award which settled the dispute. It was also not certain that, where an investment treaty was involved, the application of the provisions of the four articles as a whole could be ruled out, particularly in view of the reference to the nationality of corporations.

70. In draft article 22, the Special Rapporteur proposed the application *mutatis mutandis* of the principles embodied in articles 17 to 21 to legal persons other than corporations, the justification being that it was not possible to

draft further articles dealing with the diplomatic protection of each kind of legal person, according to paragraph 113 of the Special Rapporteur's report. In the commentary to the article, the Special Rapporteur cited the cases of universities and municipalities, as well as the case of partnerships. He nonetheless had the impression that the persons most likely to be included in the category of legal persons to which diplomatic protection was extended were non-governmental organizations, as was borne out by paragraphs 117 to 120 of the report.

71. In the first place, he was not sure that the rules relating to the diplomatic protection of corporations and their shareholders could be applied *mutatis mutandis* to other bodies, even subject to some changes. On the one hand, it was questionable whether the members of a non-governmental organization could be likened to the shareholders of a corporation. On the other hand, a non-governmental organization's link with a State was not at all the same as that of a corporation. Whatever sympathy one might feel for non-governmental organizations, giving the States where they were registered the possibility of exercising diplomatic protection over them would be giving certain States a further means of interfering in the internal affairs of other States. It was significant that, in paragraph 120 of his report, the Special Rapporteur referred to diplomatic protection in the context of internationally wrongful acts whose victims were legal persons, such as foundations in developing countries where they financed projects relating to social welfare, women's rights, human rights or the environment.

72. Although the Special Rapporteur's proposal was based on two examples of international jurisprudence, there was not enough international practice to support it. The Commission should be as demanding in connection with the need for sufficient State practice in that area as it was in that of unilateral acts of States. If there was no practice justifying the inclusion of a specific category of legal persons in the draft articles on diplomatic protection, it would be wiser not to rush matters.

73. In conclusion, he proposed that, in article 21, the reference to *lex specialis* should be deleted and that there should be only a general reference along the lines proposed by Mr. Kamto. He also proposed that article 22 should be deleted and that the relevant rules should be derived from State practice.

74. Ms. XUE, referring to article 21, said it seemed that many members would prefer a more general provision along the lines of article 55 of the draft articles on State responsibility for internationally wrongful acts, and that point of view was certainly understandable. Human rights had been mentioned, but those provisions might also concern special rules relating to the exhaustion of local remedies, particularly if the Commission subsequently decided to transpose articles 8 to 10 to Part Four of the draft text. If some countries drafted specific rules on the need to exhaust local remedies before acceding to a procedure for the settlement of disputes, those special rules must take precedence; the provisions of the draft articles on the exhaustion of local remedies would thus not apply.

75. In his statement at the preceding meeting, Mr. Economides had raised another question which warranted consideration and related to the absolute or relative nature of special rules. If rules were absolute—if the dispute settlement procedures provided for in a bilateral investment treaty or by ICSID resulted in a definitive settlement and were binding on the parties—the matter was straightforward, and in that case draft article 21 was valid. However, if the settlement was not definitive, it could not be said that the rules of customary law relating to diplomatic protection did not apply. If one of the parties to the dispute did not comply with the decision handed down, a complaint could be lodged through diplomatic channels, as was shown by the treaty provisions referred to in the footnotes of the pages corresponding to the last sentence of paragraph 108 of the Special Rapporteur's report. It must be remembered that bilateral and multilateral investment protection treaties were concluded to prevent abuses of diplomatic protection; the proper protection of foreign investments promoted the stability of diplomatic relations.

76. That was the theory. In practice, when two parties, a State and a foreign investor, agreed on settlement procedures, that was in their own interest, and they would endeavour to settle their dispute under that procedure. That was why the Commission must either make article 21 a general provision or consider the possibility of deleting it because it stated the obvious. If the majority of the members wanted to refer the article to the Drafting Committee, however, she would not object.

77. Having read the commentaries to article 22, she now had a better understanding of why the Special Rapporteur had initially tried to limit the provisions to corporations. Unfortunately, for perfectly logical reasons, he now had in mind legal persons other than corporations, but he was neglecting an important factor, namely, the virtual absence of State practice in that regard. As the Special Rapporteur himself had acknowledged, legal persons other than corporations were extremely diverse and sometimes very complex in nature. As it stood, the article did not indicate how or according to which criteria to identify the effective link between them and the State likely to exercise diplomatic protection. The very fact that the expression *mutatis mutandis* was used showed that there was a great deal of uncertainty. As Mr. Kabatsi had pointed out at an earlier meeting, moreover, it was doubtful whether articles 18 and 19 could be applied to legal persons other than corporations and, in particular, to non-governmental organizations, foundations, partnerships and the other legal persons mentioned by the Special Rapporteur. That would be going too far, and the political uncertainties inherent in the discretionary nature of diplomatic protection raised far more serious problems which warranted careful consideration. Like other members of the Commission, she thought that it would be useful to give more in-depth consideration to relevant State practice.

78. Mr. DUGARD (Special Rapporteur) asked Ms. Xue and Mr. Momtaz whether they considered that, since there was no State practice on the protection of legal persons other than corporations, the Commission should not include a provision such as article 22 in its draft text or whether, on the contrary, it should include it with a view to the progressive development of the law.

79. Mr. MOMTAZ said that he was not in favour of the progressive development of the law in that area and agreed with Mr. Daoudi that the provision should be deleted.

80. Ms. XUE said she also thought that it would be better to delete article 22 and to bring the matter before the Sixth Committee to seek the views of States.

81. Mr. YAMADA said that when customary law relating to diplomatic protection and special rules were in conflict, it was the special regime which prevailed under customary international law and article 21 was not necessary. When rules relating to diplomatic protection and special rules were not entirely in conflict and some of them were compatible, both would be applied in parallel, in accordance with customary international law; as article 21 stood, however, the special regime would prevail. Was that the Special Rapporteur's objective?

82. Mr. DUGARD (Special Rapporteur) said that Mr. Yamada had put his finger on a weakness in article 21. It would need to be clearly stated, either in the commentary or in the article itself (if it was referred to the Drafting Committee), that when the two regimes were compatible, they both applied.

83. Mr. MANSFIELD (Rapporteur) said that he was not in favour of a very elaborate rule concerning *lex specialis* and that it was necessary to be clear if a generalized provision was decided upon. In that sense, he endorsed Mr. Economides' comment: draft article 21 should be dropped and the matter should be dealt with in the commentaries, or, if it was decided to draft a general provision, information relating to its scope should be given in the commentary.

*The meeting rose at 1 p.m.*

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## 2777th MEETING

*Friday, 18 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

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**Diplomatic protection<sup>1</sup> (concluded) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631**

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

1. Mr. SEPÚLVEDA said that there had been much debate on draft article 21, contained in the Special Rapporteur's fourth report (A/CN.4/530 and Add.1), in connection with the nature and scope of the *lex specialis* provision and where it should be placed in the set of draft articles. A different yet related matter was the special, autonomous regime with specific characteristics provided for in bilateral and multilateral investment guarantee treaties. The invocation of dispute settlement procedures under such treaties excluded the possibility of applying customary law rules relating to diplomatic protection. However, it was interesting to note which subjects were protected by those treaties or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In their definitions the terms "investment" and "investor" were described, but not the rights and obligations of corporations and shareholders as referred to in article 21. For the Commission's purposes such definitions ultimately constituted *lex specialis*, although in some instances the scope was broader and might include intellectual property rights. In general, the term "investor" was taken to mean any natural or legal person that made or had made an investment, a natural person being a national of one of the contracting parties, a legal person having been established in accordance with the legislation of one of the contracting parties and having its registered office on its territory. That was a conceptually different term from the one set out in article 21 and must be duly taken into account. Since the specific rule applicable in the circumstances defined the subject of the regulations differently, the provisions of the draft would not apply when investors were protected by special rules of international law. That included the settlement of disputes between investors and the States having subscribed to such special rules. For those reasons, he suggested that the text of the article be more closely aligned with that of the terminology of investment treaties. He nonetheless endorsed the basic thrust of article 21: the injured party must first of all exhaust all domestic remedies, and, if that did not prove satisfactory, the dispute could be submitted for international arbitration, where appropriate. At that stage, the party could not additionally claim diplomatic protection, for it was expressly prohibited by treaty law, as could be seen from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as cited in a footnote in paragraph 108 of the report. Again, as the Special Rapporteur had pointed out, the rights and duties under customary international law whereby a State could, at its discretion, extend diplomatic protection to a corporation were inconsistent with a treaty system that granted jurisdiction to an international

arbitration tribunal in order to settle a dispute between a foreign investor and the host State.

2. As to draft article 22, the reference to article 21 should be deleted, as it concerned a special regime under which it would be difficult to extend protection *inter alia* to universities, municipalities or non-profit-making associations. He endorsed Ms. Escameia's remarks in that connection. Since it would be impossible to draw up separate provisions on diplomatic protection for the different types of legal persons concerned, an approach whereby the decision should be incumbent on the State that was competent to extend diplomatic protection seemed appropriate, along the lines suggested by Mr. Gaja. The State had discretionary power to provide diplomatic protection, and therefore it might also be competent to extend it to legal persons besides those that were essentially profit-making or with economic interests, provided they had been established in conformity with domestic legislation and had suffered injury as a result of an internationally wrongful act by another State. Those comments were intended to clarify and strengthen the text of the two draft articles, which could be useful for a proper interpretation of the nature and of the contemporary modalities of diplomatic protection.

3. Reverting to the subject of the debate on *lex specialis*, which had been conducted in two forums, he wished to express appreciation of Mr. Koskenniemi's very useful report in connection with the Working Group on the Fragmentation of International Law. Despite all the arguments put forward on the nature of *lex specialis*, a different approach to the problems raised by article 21 should probably be adopted. In fact, it was not a case of *lex specialis*, but simply a special legal formula or alternative mechanism to diplomatic protection for the peaceful settlement of a dispute arising from an injury caused to the national of one State through an internationally wrongful act by another State.

4. On the assumption that diplomatic protection and the procedures for the settlement of disputes outlined in investment treaties came under the general legal framework of State responsibility, both legal regimes would constitute *lex specialis*. As Mr. Koskenniemi had posited, the two special mechanisms would represent the development or application, in a particular situation, of general law. However, there was no exception to that general law, nor any conflict between the principles of State responsibility and the two optional but mutually exclusive methods for reparation of harm caused by another State.

5. What was surprising was that the draft articles should make no reference to the alternative mechanism to diplomatic protection found in investment agreements, a mechanism or institution about which one should have no reservations in view of its significant development in the last 25 years. Accepting that institution and codifying rules on the links between the two methods of resolving problems stemming from State responsibility was a task the Commission must undertake without further delay. Finally, while the title of article 21, "*Lex specialis*", should be deleted, the basic rule outlined in the article should be retained.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

6. Mr. Sreenivasa RAO said that the discussion had been both constructive and instructive. Draft article 21 required careful review, and the desirability of including a provision on *lex specialis*, its scope and its place in the structure of the article must be considered. As many members had already observed, there did not seem to be a case for the application of *lex specialis*: it would rule out the possibility of extending diplomatic protection to natural persons, whenever other remedies under separate regimes became available, even if there was no direct conflict between such regimes and that of diplomatic protection. The Commission thus had three options: (a) to delete the article, while acknowledging in the commentary that there were other regimes for the protection of foreign investment and natural persons, applicable as appropriate; (b) to redraft the article and incorporate it as a general clause in the final provisions of the set of articles; and (c) to establish a working group to consider the matter in greater depth. He shared the view that the Commission should not attempt to define the nature and scope of *lex specialis*—a task extraneous to the subject of diplomatic protection and already being done in connection with another agenda item. He was therefore in favour of the first option, namely to delete the article.

7. As for draft article 22, if an article along the lines of article 17 was desired, then it should incorporate a formal legal connection between a legal person and the State espousing its claim. Furthermore, he agreed with other members that it was difficult to cover in one provision the various categories of legal persons on a *mutatis mutandis* basis without first identifying the differing circumstances and legal principles involved. He also endorsed suggestions to delete references to articles 18 and 19.

8. Still referring to article 22, he questioned the appropriateness of the third sentence of paragraph 120 of the report, which read: “Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created.” Taken at face value, that sentence might give the impression that diplomatic protection could be extended as soon as an internationally wrongful act had been committed against a person by a host State. It should be made clear, that under normal circumstances, such wrongful acts would first of all have to be submitted to arbitration, and only when there was some discrimination or denial of justice with respect to the seeking of proper remedies would the question of diplomatic protection arise. Given the number of problems in connection with the article, he, like some other members, would go so far as to suggest deleting it, particularly on account of the absence of relevant State practice. He would rely on the guidance of the Special Rapporteur and collective wisdom of the Commission to find a suitable solution.

9. Mr. RODRÍGUEZ CEDEÑO, referring to draft article 22, said that paragraph 117 mentioned some legal persons, including associations, universities, municipalities and non-governmental organizations, which in some respects could be likened to corporations. Such legal persons were in general established in conformity with domestic legislation, but on account of their widely differing characteristics and objectives, it was difficult to draw up a set of common rules for them. More importantly, it was

not as easy to establish a clear link between those legal persons and their State of nationality, as it was for corporations. In the event of injury caused by a host State, it was difficult to know whether it could be considered as injury to the State of nationality and thus sufficient grounds for extending diplomatic protection.

10. He wished to focus attention on non-governmental organizations, which played an increasingly important role in international relations, although his remarks might also apply to other legal persons established under domestic law and thus not subject to the provisions of international law. Non-governmental organizations were generally national in character and scope. Any injury to them or violation of their rights would be dealt with in the same way as for any other natural or legal person belonging to that State, including through recourse to international human rights mechanisms. However, transnational non-governmental organizations, namely organizations set up in one State, with interests and activities at the international level, could only operate in the host State which accepted them as such either through special procedures or through broader legislation. In most cases, the activities of such non-governmental organizations were conducted through offices in States other than the ones in which they had originally been established, and any claim, procedure or reparation relating to injury or violation of their rights would be dealt with under the legislation of the State concerned, although there was nothing to prevent protection being sought under domestic legislation and international agreements to which the State was party. While some States recognized the transnational legal personality of such non-governmental organizations, the principle was far from being universally accepted. For that reason, he considered that comparing other legal persons to corporations was untenable. Moreover, given the absence of practice and general uniform criteria allowing such a comparison to be drawn, the codification of a rule, even on the basis of progressive development, did not seem viable. He therefore agreed that article 22 should be deleted. The topic should nevertheless be given further consideration to seek a way of extending the scope of article 17 to cover the case of States which had accepted the transnational or non-governmental character of such organizations.

11. Mr. MANSFIELD said that Mr. Momtaz had sought clarification regarding the *Rainbow Warrior* case, in particular as to whether the compensation paid to Greenpeace was an example of a State exercising diplomatic protection in respect of a non-governmental organization. According to the memorandum sent by the New Zealand Government to the Secretary-General of the United Nations under its agreement with France to submit all problems relating to the case to the United Nations for a binding ruling, New Zealand sought *inter alia* an apology for the violation of its sovereignty. The memorandum also specified that, as the vessel had not been flying the New Zealand flag and the deceased crew member had been a Netherlands citizen, it was unable to assert any formal standing to claim on their behalf. It had, however, expressed concern that both Greenpeace and the family of the deceased should receive adequate compensation and that settlement of the

case would depend on that or reasonable and binding arrangements to that effect.<sup>3</sup>

12. In his ruling, the Secretary-General, as well as ordering an apology and compensation for New Zealand, had said that there was no need to rule specifically on compensation to Greenpeace and the crew member's family because the statement submitted by France had contained an account of the arrangements that it had made for such compensation and the assurances had constituted the response that New Zealand had been seeking.<sup>4</sup>

13. Mr. BROWNLIE said that, although he could see the argument for deleting article 22, there was also a case for signalling that such cases did exist. It was not true to say there was no State practice; that was to disregard the jurisprudence as shown, for example, in the *Peter Pázmány University* case). The draft article was all the more valuable since it usually related to municipal law which gave rise to various "unincorporated associations", as they were known in English law. The Special Rapporteur could not be expected to come up with a list of all the social entities that might be involved. He was therefore in favour of retaining the *mutatis mutandis* formula.

14. As for the *Rainbow Warrior* case, the arrangement had been that the Secretary-General's requirements had been met because France had admitted responsibility. A period had been allowed for negotiation—for valuation of the vessel and other issues—and, in the event of failure, arbitration should take place in Geneva. He recalled that Greenpeace International had personality (*stichting*) in the Netherlands but was also recognized in England as an unincorporated association, having a *siège social* in Lewes. The arbitration court had decided that the applicable law should be English law, since most of the affecting factors were in England; but the applicable law had in fact been a mixture of English and public international law. It was therefore dangerous to generalize. Non-governmental organizations might have a reality under more than one national law.

15. Mr. DUGARD (Special Rapporteur) said that article 21 had been included, first, in order to follow the example of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>5</sup> and, second, to take account of the fact that bilateral investment treaties deliberately aimed to avoid the regime of diplomatic protection, because States had discretion as to whether to intervene diplomatically and, moreover, the diplomatic protection regime failed to confer a right to claim on the State of nationality of shareholders. He had, however, been persuaded by the debate within the Commission that he had been wrong on both counts: there was no need to blindly follow the draft articles on State responsibility, and Mr. Brownlie and Mr. Matheson had rightly pointed out that bilateral investment treaties did not completely exclude customary international law, to which the parties often had recourse in interpreting their treaties. The two regimes therefore complemented each other. Article 21, insofar as it suggested that bilateral investment treaties excluded customary rules, was therefore

inaccurate and possibly dangerous. If retained, it should be substantially amended—for example, by deleting the *lex specialis* element, as suggested by Mr. Sepúlveda. Mr. Matheson, meanwhile, had suggested a clause reading: "These articles do not supersede or modify the provisions of any applicable special international legal rules or regimes relating to the protection of investment."

16. Another criticism had been that there was no reason to confine the provisions of the article to bilateral investment treaties. There were, after all, other special regimes, such as treaties excluding the exhaustion of local remedies rule or human rights treaties, that might complement or replace diplomatic protection. It had therefore been suggested the Commission should add a general provision at the end of the text, as it had in the draft articles on State responsibility. While having its attractions, that approach was dangerous, since it might give rise to arguments that diplomatic protection might be excluded by a human rights treaty, even though the former might offer a more effective remedy. If individuals were to receive the maximum protection, they should be able to invoke all regimes. He drew attention to the situation in the occupied Palestinian territories, where Israel claimed that international humanitarian law was the applicable *lex specialis*, to the exclusion of international human rights rules. His considered suggestion was therefore that draft article 21 should be deleted.

17. According to his calculations, nine members of the Commission were against including the draft article and four, while indicating no particular enthusiasm, believed that it could be included *ex abundanti cautela* or else as a general provision at the end of the draft. Perhaps the Chair might wish to take a tentative vote. If the draft article was deleted, he would deal with the question of bilateral investment treaties in the commentary.

18. With regard to article 22, there was little State practice regarding the circumstances in which a State would protect legal persons other than corporations, for the simple reason that corporations were the legal persons that engaged in international commerce and therefore featured most prominently in international litigation. He had, in response to a suggestion by Mr. Brownlie, examined the pleadings in two cases, the *Peter Pázmány University* case and the *Certain German Interests in Polish Upper Silesia* case, but could find no evidence of State practice. In the first of those cases, the university had based its claim on article 250 of the Treaty of Peace between the Allied and Associated Powers and Hungary (Treaty of Trianon), under which the property of a Hungarian national should not be subject to retention, but the debate had really revolved around the question of whether the university was a juridical person separate from the Hungarian State. The second case, again, had turned almost entirely on the interpretation of the German-Polish Convention concerning Upper Silesia.<sup>6</sup> Despite the paucity of State practice, however, there was a real need to provide guidance on legal persons other than corporations. The article could not therefore be deleted simply because there was inadequate State practice or uncertainty over the status of non-governmental organizations. It should be retained either

<sup>3</sup> See UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 202–203.

<sup>4</sup> *Ibid.*, pp. 213 and 215.

<sup>5</sup> See 2751st meeting, footnote 3.

<sup>6</sup> See G. Kaackenbeeck, *The International Experiment of Upper Silesia* (London, Oxford University Press, 1942), p. 572.



because it dealt with general principles of the kind contained in the *Barcelona Traction* case, by way of analogy, or for the sake of progressive development. A majority of the Commission appeared to be in favour of retaining it, but changes were obviously necessary. Mr. Kateka had made the helpful suggestion that, in the title, the word “other” should be deleted and that reference should be made only to articles 17 and 20, since articles 18 and 19 clearly related to shareholders. As for the words *mutatis mutandis*, most members seemed to be in favour of keeping them. The Drafting Committee could make the final decision in that and other cases.

19. The Commission might need to examine the status of non-governmental organizations in a separate study.

20. Mr. ECONOMIDES said he would be reluctant to see total deletion of article 21. He therefore suggested that a clause should be added at the end of the draft articles, to the effect that such a provision was without prejudice to human rights treaties or others offering protection of patrimonial or personal rights. He himself would prefer a provision giving priority to human rights or investment protection regimes; diplomatic protection involved a cumbersome political procedure that States were often reluctant to set in motion, whereas human rights and other regimes were easier to implement.

21. Mr. BROWNLIE said that the two cases that had come before PCIJ—or, at least, the *Peter Pázmány University* case—had related to important multilateral treaties and established significant precedents. If not actually State practice, they could be said to be analogous to it.

22. Mr. SEPÚLVEDA said he agreed with Mr. Economides that the article should not be deleted altogether. It would be strange if draft articles on diplomatic protection did not take account of investment treaty regimes. The Commission should not lose sight of the real world. Moreover, there was a wealth of State practice to be found in many decisions by arbitral tribunals, either those exclusively concerned with bilateral investment treaties or special tribunals. The matter warranted more detailed consideration. Second, he noted that the commentary to article 22 contained no reference to the possibility that it was for the State to determine whether there were grounds for granting diplomatic protection.

23. Ms. XUE said that deletion of article 21 would send the wrong political signal. The Commission had drafted the article because State practice included over 2,000 investment protection agreements, which had an important impact on the exercise of diplomatic protection and, as Mr. Matheson had said, should be given priority rather than being played down. To restrict guidance to the commentary would be a grave mistake.

24. As to article 22, she could see little evidence of State practice in the matter. In most of the existing cases, the State would not exercise diplomatic protection. It was, in any case, difficult to establish a legal basis for such protection being extended to schools, churches or foundations. The Asia Foundation, for example, annually got funding from the United States Congress, but, according to the Special Rapporteur, it was questionable whether the United States could extend diplomatic protection to

it. The human rights element in the article was important, but diplomatic protection was not all about human rights. The two regimes, although different, were complementary. That complementarity would break down if article 21 were deleted and article 22 retained. No hasty decision should be reached. The issue was one not of drafting but of policy.

25. Mr. MELESCANU said that the issue would not be resolved by reverting to a general debate. He therefore suggested that the Special Rapporteur’s suggestion should be adopted, on the clear understanding that, in future debates, the relationship that might exist between special regimes and general rules governing diplomatic protection would be given due attention. An article covering the concerns expressed by Ms. Xue and Mr. Economides could then be drafted. It would thus be possible for the Drafting Committee to move ahead without reaching a final decision.

26. Mr. GALICKI said that he still favoured retaining the substance of article 21, including the *lex specialis* element, but, as he had previously said, application might not be limited to the diplomatic protection of corporations: it might also apply to other legal persons or even to natural persons. He therefore suggested that the article should be located outside the third part to give it wider application. It was an approach that tallied with Mr. Melascanu’s suggestion. *Lex specialis* must appear at some point in the draft articles, but not necessarily in the part dealing with corporations and shareholders.

27. Mr. DAOUDI, after expressing support for the view expressed by Ms. Xue, said that his impression of the debate on article 21 differed from that of the Special Rapporteur. Some reservations had been expressed, but it had been generally agreed that *lex specialis* should be reflected. On article 22, the general feeling had been that, since there was a shortage of State practice, the provision should be retained, but placed elsewhere in the draft articles.

28. Ms. ESCARAMEIA said that article 21 did not really deal with *lex specialis* but with complementary regimes, even though some bilateral investment treaties did introduce special rules which purported to reject the general rule.

29. The title of the article was, however, less important than the question whether reference should be made to bilateral investment regimes, since they frequently precluded the exercise of diplomatic protection. The other crucial issue was human rights regimes, which could not be given priority because there were no legal precedents for doing so. Yet the existence of those regimes must be acknowledged, and so she supported the proposals by Mr. Economides and Mr. Melescanu. Placing a general “without prejudice” clause at the end of the section would do no harm and would demonstrate an awareness of the existence of investment and human rights treaties.

30. As to article 22, she queried assertions that there was a total absence of State practice, for it was highly improbable that in the modern world there had not been even an exchange of letters on the subject of diplomatic protection for foundations or local authorities. For that reason,

she was in favour of referring article 22, together with the amendments proposed by Mr. Kateka, to the Drafting Committee.

31. Mr. CHEE said that the chief purpose of article 21 was to protect corporations and their shareholders. Paragraph 70 taken with paragraph 90 of the *Barcelona Traction* judgment confirmed that ICJ had been fully aware of the lack of shareholder protection, a lack which had prompted the development of a network of bilateral investment treaties. He therefore urged the retention of the *lex specialis* rule. If it were to be deleted, the Commission would have to devise some kind of provision to protect shareholders of corporations, because paragraph 90 of the judgment in question made it clear that hitherto diplomatic protection for them had been contingent upon the conclusion of individual international agreements.

32. He supported article 22, in the belief that there might well be a need to protect entities that were not corporations, although caution was needed when speaking of "legal persons" since it was a very broad, ill-defined term. Moreover the distinction drawn between "business corporation" and "non-business corporation" was unclear. International law was primarily interstate law and did not normally relate to corporations, universities and similar entities, which probably explained why there were few examples of State practice in which those entities had been granted diplomatic protection. For that reason, article 22 should be omitted, since there was no point in promoting an inapplicable rule.

33. The CHAIR, speaking as a member of the Commission, suggested a compromise in respect of article 21. The Drafting Committee could be requested to draw up a text which could then be placed among the final provisions. It should be flexible enough to take account of the existence of human rights treaties, which might arguably take precedence over other agreements. A general, broadly applicable clause might satisfy the wish expressed by the majority of members that the reality of those treaties should be acknowledged. Article 22 should be a "without prejudice" clause that was sufficiently elastic to allow for any developments in State practice which might extend diplomatic protection to a wider circle of legal persons.

34. Mr. DUGARD (Special Rapporteur) submitted that his recommendations had reflected the view of the majority of Commission members. Even if there was no State practice in the matter, some provision on the subject of legal persons other than corporations had to be included in the draft articles. What would have happened in the *Rainbow Warrior* case if the Netherlands had attempted to give diplomatic protection to Greenpeace? What principles would have applied? Surely a tribunal confronted with that issue would have regarded the general principles of law that had emerged from the protection of corporations. It would have turned to the *Barcelona Traction* case and reasoned by analogy. If it had had before it draft article 17 proposed by the Commission, the court would have been guided by that provision and would have tried to ascertain whether the non-governmental organization was formed in the territory of the State which wished to exercise diplomatic protection on its behalf, whether it had its registered office there, or whether there was some other similar connection. It was therefore incumbent upon

the Commission to give courts guidance in that respect. In that spirit, article 22 should be referred to the Drafting Committee.

35. The change of course in the debate made it more difficult to make a firm recommendation about article 21. Nevertheless he concurred with the Chair's suggestion that it should be referred to the Drafting Committee, which should be given a broad mandate to draw up a "without prejudice" clause. That topic should be considered at the meeting with ILA on 29 July 2003. Although a slim majority of members had wished to drop article 21, he would prefer to retain it as a general provision at the end of the set of draft articles to ensure that account was taken of both bilateral investment treaties and human rights regimes, but without damaging either of them.

36. The CHAIR suggested, by way of a compromise, that article 21 should be referred to the Drafting Committee so that the Committee could draw up a general "without prejudice" clause to be placed at the end of that section. That provision should take account of other special regimes and the fact that they might derogate from the general rule. Article 22 and the proposed amendments to it should also be referred to the Drafting Committee.

*It was so agreed.*

### Cooperation with other bodies (*continued*)\*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR  
THE COUNCIL OF EUROPE

37. The CHAIR welcomed Mr. Guy de Vel, Director-General of Legal Affairs of the Council of Europe, and invited him to address the Commission.

38. Mr. de VEL (Observer for the Council of Europe) said the Commission was a point of reference for all who were interested in international law. The participation of Commission members in meetings of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the information the Council secretariat regularly provided about developments in areas of interest to the Commission had strengthened cooperation between both institutions. In that connection, he particularly welcomed General Assembly resolution 57/156 of 16 December 2002 on cooperation between the United Nations and the Council of Europe, and for that reason he had been keen to attend the Commission's session in person.

39. Serbia and Montenegro had become the forty-fifth member of the Council of Europe in April 2003, which meant that almost all the countries of Europe had joined the Council, with the exception of Monaco and Belarus. The examination of Monaco's application was making progress, whereas the Parliamentary Assembly had suspended consideration of the candidature of Belarus. The Holy See, Canada, Japan, Mexico and the United States of America, which were observers to the Parliamentary

\* Resumed from the 2775th meeting.

Assembly, had requested enhancement of that status to allow them to participate in Committee of Ministers meetings at the ambassadorial or ministerial level.

40. The Committee of Ministers had decided to convene a summit of member States at the end of 2004 and the beginning of 2005. It would be an important juncture for the European continent because, after the Convention on the Future of Europe and the Intergovernmental Conference, it would be easier to determine the role played by the various European institutions. The Council of Europe had contributed to the Convention by submitting a memorandum on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and a memorandum on cooperation in the fields of justice and home affairs and by organizing an international conference on the Council's Contribution to the European Union's *acquis*, since some 20 Council of Europe conventions formed part of that *acquis*. Those moves had been rewarded by the inclusion in the draft European constitution of a provision stipulating that the European Union should seek accession to the European Convention on Human Rights. There were already some precedents for such a major political step, in that the European Union was a party to eight Council of Europe conventions. Some further provisions of the draft European constitution concerning cooperation between the Union and the Council would cement the good relations which existed as a result of his six-monthly meetings with the justice and home affairs troika and with the directors-general of the European Commission's legal services.

41. Another important area of general policy was the reform of the European Court of Human Rights, which was likely to be deluged with applications following the accession of the new member States to the European Convention on Human Rights. The Steering Committee for Human Rights had submitted a number of proposals concerning procedural reform, and the Court itself had made several suggestions. Consequently, the measures under consideration were aimed at reducing the number of applications by heightening the effectiveness of domestic remedies, screening and speeding up applications, expanding the system of friendly settlement, revising the conditions of admissibility and improving the enforceability of the Court's judgements. A protocol embodying those reforms was being drafted.

42. The intergovernmental activities of the Council of Europe gave priority to combating terrorism in the wake of the events of 11 September 2001. The Protocol amending the European Convention on the Suppression of Terrorism, opened for signature in May 2003, had considerably widened the purview of the Convention. To date, the Protocol had been signed by 34 member States, and it was hoped that the number would increase rapidly, because the entry into force of the Protocol would signify that the 1977 Convention could be opened to non-Members. The Directorate General of Legal Affairs had also drawn up Guidelines on Human Rights and the Fight against Terrorism, and, in pursuance of the terms of reference it had received from the Committee of Ministers, it had proposed other activities in the sphere of counter-terrorism.

43. In that context, it had turned its attention to the question of the financing of terrorism, and it had taken as a basis the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. In addition, the Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures (MONEYVAL/PC-R-EV) had been set up to appraise measures to prevent money laundering taken by member States which were not part of the Financial Action Task Force on Money Laundering. To date, the Committee had held two meetings at which it had discussed the drafting of legal instruments on special investigation techniques and examined ways of protecting witnesses and persons repenting of acts of terrorism. Several years ago, the Committee of Ministers had adopted Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence, and it was therefore hoped that a binding legal instrument would be produced shortly.

44. A report on identity documents and the fight against terrorism had led the MONEYVAL Committee to consider what activities should be launched in that respect. Incitement to terrorism would also be scrutinized by the Committee, which would take as its starting point not only the Convention on the Suppression of Terrorism and the Protocol amending it but also the *travaux préparatoires* to the Convention on Cybercrime.

45. The Council of Europe could, however, play an absolutely crucial role in the fight against terrorism by virtue of more than 50 years' experience in the field of protecting human rights while fighting crime. In view of the difficulties encountered in the drafting of a general United Nations convention on the subject, the Council had been encouraged to draw up a pan-European convention by its Parliamentary Assembly, which was optimistic that such a text would lend impetus to the drafting of the United Nations convention, on account of the momentum that would be built up at the regional level by the introduction of treaty-monitoring machinery. The Committee of Ministers had welcomed that idea, and the next stage would be the holding of a conference of European ministers of justice in Sofia in October. The Committee of Experts on Terrorism would then meet at the end of October to discuss the conference's findings and propose follow-up action.

46. The Council of Europe was likewise seriously concerned about trafficking in human beings. The Committee of Ministers had long ago issued a recommendation to the member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults (Recommendation No. R (91) 11), and more recently it had set up a Committee of Experts to draft a European convention on trafficking in human beings, which would meet for the first time in September. The Council had received strong support for that step from the United Nations and OSCE.

47. In regard to family law, in May 2003 the Committee of Ministers had opened for signature the Convention on Contact concerning Children, which dealt with transfrontier parental access. The European Commission had requested authorization to accede to that Convention. In the domain of bioethics, an Additional Protocol to the Convention on Human Rights and Biomedicine concerning



Transplantation of Organs and Tissues of Human Origin had just been opened for signature, and an additional protocol on biomedical research was being finalized.

48. Anti-corruption measures also received much attention from the Council of Europe. It had issued 20 guidelines on how to combat corruption, and, what was more important, its Criminal Law Convention on Corruption and Civil Law Convention on Corruption had both entered into force and an Additional Protocol to the Criminal Law Convention on Corruption had been adopted in 2003. In addition, the Council had adopted a European Code of Conduct for Public Officials as well as Recommendation Rec(2003)4 of the Committee of Ministers on common rules against corruption in the funding of political parties and electoral campaigns. All those legal instruments were monitored by the Group of States against Corruption (GRECO), which comprised most of the Council's member States plus the United States. Moreover, the European Union had expressed a desire to join the Group. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime was to be revised in the near future. The Convention on Cybercrime had been supplemented by an Additional Protocol concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, which had been signed by six States so far.

49. Another of the Council's vital concerns was the functioning of judicial systems in member States, since the best way to stem the rising tide of applications to the European Court of Human Rights was to improve the course of justice at the national level. To that end, the Committee of Ministers had set up the European Commission for the Efficiency of Justice (CEPEJ), which was not a monitoring body but a forum where the member States could exchange ideas on good practice and receive assistance in that respect. It would initially concentrate on investigating the quantitative and qualitative indicators for evaluating the functioning of judicial systems and on the length of judicial proceedings in member States. The Consultative Council of European Judges (CCJE), the first regional body consisting of legal practitioners and judges, was strongly backing that initiative.

50. The main beneficiaries of Council of Europe Cooperation Programmes had been the countries in transition, but long-standing member States had also been able to take advantage of them. While great importance was attached to those bilateral programmes, which had served many countries well and had covered a multitude of subjects, it had been decided that in the future they should focus on countries in South-Eastern Europe and in the Commonwealth of Independent States. Accordingly, in 2002 the Council had assisted with the reform of the Russian Federation's judicial system, which had been completed in under a year. Several of the dozens of laws on which the Council had provided expert advice were currently before the Duma. In many other countries, the Council was offering counselling in constitutional matters, a field where the European Commission for Democracy through Law (Venice Commission) was active. The Venice Commission likewise helped with the drafting and revising of penal codes, codes of criminal procedure, civil codes, codes of civil procedure, laws on defence lawyers and public

prosecutors, as well as legislation on bioethics and data protection.

51. As to cooperation in international law, at the initiative of CAHDI, a meeting was to be organized on 17 September 2003 to exchange views on the implications of the Rome Statute of the International Criminal Court. The President of the Court would participate in the meeting. Through two previous exchanges of views, the Council of Europe had contributed to ratification of the Rome Statute by its Member States.

52. At CAHDI's most recent meeting in March 2003, it had been briefed on the Morgan case, in which an American citizen had brought proceedings against the Council of Europe before a New York District Court. In dismissing the application, the judge had indicated that the Council of Europe was an "agent or instrumentality" of a foreign State. Since the deadline for appeal had been 3 February 2003, the case could be considered closed.

53. The case had some bearing on the immunities of States and international organizations, and he wished in that connection to mention CAHDI's pilot project on State practice concerning State immunities. A great many contributions had been received from States, and the Committee had decided on follow-up measures including the joint preparation by three research institutes of an analytical report. That effort was a practical contribution to the work of the United Nations which Mr. Hafner had shepherded to success.

54. CAHDI's most recent meeting had been attended by Mr. Mikulka, who had described the codification efforts of the United Nations and had an exchange of views on the subject with the Committee's members. Mr. Gil Robles, Commissioner for Human Rights of the Council of Europe, had also attended the meeting and had described the activities of his office, a young institution but one which already had a remarkable record, attested to by its reports on Chechnya and the Basque region.

55. Another of CAHDI's activities that deserved mention was its operation as a European observatory of reservations to international treaties. That activity, which, he understood, had been mentioned in the Commission's reports, had steadily intensified and was becoming increasingly useful, as was demonstrated by extending it to cover reservations to international treaties on the struggle against terrorism. Many such reservations were no longer open to objection but needed to be studied closely with a view to contributing to the Council's efforts to combat international terrorism.

56. Mr. MOMTAZ thanked Mr. de Vel for the very useful information provided and said that article 1 of the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003 gave no definition of terrorism, referring instead to offences within the scope of 10 other international instruments. What was the reason for that? Had the Council experienced difficulties in developing a comprehensive definition of terrorism, and was anything being done to produce one now? Article 5 of the amended Convention referred to exceptions to the obligation to extradite, and an explanatory report on that article indicated that the list

of exceptions given was not exhaustive. Did that mean that the corresponding article in the European Convention on Extradition should be interpreted in the same way, namely, as not giving an exhaustive listing of exceptions?

57. Mr. SEPÚLVEDA asked about the Council of Europe's experience in putting into effect regulations against financing and money laundering for both terrorism and drug trafficking. Had intelligence services found links or common denominators in terms of the financial controls that must be adopted?

58. Mr. DUGARD noted that in 2002 the European Union had adopted a framework resolution attempting to define terrorism in the most all-embracing, indeed frightening, terms, and said that the Council was to be congratulated for not following that example. Was its cautious approach motivated by fear that a comprehensive definition of terrorism might interfere drastically with human rights? As to the International Criminal Court, the European Union had actively discouraged its members from entering into agreements with the United States under article 98, paragraph 2, of the Rome Statute of the International Criminal Court. Had the Council attempted to do likewise?

59. Mr. ECONOMIDES asked whether the expansion of the membership of the Council of Europe to 45 members had resulted in additional ratifications of conventions on international law, specifically the European Convention for the Peaceful Settlement of Disputes and the European Convention on Consular Functions. Had there been any progress in the implementation of decisions of the European Court of Human Rights, notably in the *Loizidou* case?

60. Mr. GALICKI, noting that the Council of Europe had made real achievements in the legal field, said that the revision of the European Convention on the Suppression of Terrorism had involved a very difficult and delicate process of reaching consensus, and that that was one of the reasons why article 1 included no definition of terrorism. Especially after the difficulties encountered in the United Nations, a decision had intentionally been taken not to define terrorism but to prepare an instrument that could be applied in practice as quickly as possible. It was to be hoped that work in the United Nations on a comprehensive convention would continue, however, and that the Council's efforts would contribute to it.

61. Another of the Council's achievements was the finalizing of work on an additional protocol to the European Convention on Nationality, which would deal with a matter familiar to the Commission: how to prevent statelessness in the event of succession of States. Having chaired the committee responsible for those efforts, he could say that the efforts of the Commission in the same field had been extremely helpful.

62. Mr. YAMADA said he had attended CAHDI's meeting in September 2002 as an observer and had been impressed by its serious work on a wide range of subjects. One of the subjects extensively discussed at the meeting had been immunities of States and their property. A number of substantive issues had been solved, but what had remained open was the form of the future instrument on that subject. At a meeting of the Asian-African Legal

Consultative Organization in June 2003, views had been exchanged on that subject, and he wondered if CAHDI was also going to coordinate the positions of its members.

63. Mr. de VEL (Observer for the Council of Europe) said that there was no definition of terrorism in the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003, because the 1977 Convention, which itself had contained no definition of terrorism, had had to be rapidly adapted to make it functional in contemporary conditions. It was not that obstacles had been encountered, and indeed in the European context the problems were not the same as in the United Nations, but instead, there had been no desire to take up the question at the time. The issue would come up, however, in the context of the comprehensive convention criminalizing the offence of terrorism that was being developed by the United Nations. The members of the European Union had adopted a definition in 2002, but it had been aimed at instituting a European arrest warrant, and it would be difficult to get the 45 members of the Council of Europe to go so far as to agree on such a measure.

64. Drug trafficking always lay in the background in the fight against money laundering and would undoubtedly come up during the revision of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The MONEYVAL Committee of the Council of Europe was responsible for reviewing measures to combat money laundering and financing of terrorism adopted by members of the Council that were not members of the Financial Action Task Force on Money Laundering: it used the same methods as did the Task Force and had in fact been set up at the latter's behest.

65. The Council of Europe had indeed taken a position on bilateral agreements under the Rome Statute of the International Criminal Court: two recommendations had been made by the Parliamentary Assembly to the Committee of Ministers establishing clear parameters for this. The Chair of the Committee of Ministers and the Secretary-General had also made their views known on the subject.

66. With the recent expansion in the membership of the Council of Europe, a campaign had been launched to promote ratification of its conventions. In response, the number of signatories to conventions, particularly in the areas of crime and terrorism, had significantly increased. He did not at present have the figures on ratifications of specific conventions, but would provide them later in writing.

67. Implementation of the decisions of the European Court of Human Rights was one of the central issues in the discussions about reform of the Court and its functioning. The problem, though important, should not be overemphasized: according to his statistics, the implementation of only 2 per cent of the decisions had been problematic. He was not at liberty to speak about the *Loizidou* case except to say that new proposals had recently been formulated, holding out hope for a solution to the current impasse.

68. The importance of the work of the Committee on Nationality could not be overemphasized. The Council of Europe had been involved in the issue for a great many years: the Convention adopted in the 1960s had become somewhat out of date, and a new convention had been opened for signature several years ago. A protocol to that Convention was now being drafted, an effort to which Mr. Mikulka had made a very useful contribution.

69. As a representative of the Council of Europe, it was not his place to comment on the relations between the Council and the European Union. The draft European Convention was certainly a welcome initiative, however.

70. Mr. BENÍTEZ (Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe, Observer for the Council of Europe), replying to the question about the Council's work on immunities of States, said that CAHDI would be considering the outstanding issues in mid-September 2003 as a practical contribution to the preparations for the discussions at the Sixth Committee of the General Assembly. The pilot project on State immunities was in the second stage of implementation.

71. The European Convention for the Peaceful Settlement of Disputes provided a well-regulated framework for inter-State dispute settlement. As had just been pointed out, there had been an increase in the number of signatories to certain specific conventions as a result of the enlargement of the Council of Europe. CAHDI, like other steering committees and *ad hoc* committees of the Council, had been asked to review the operation of the international instruments under its responsibility. Accordingly, for the past five years it had been systematically reviewing the impact of European conventions in the field of public international law with a view to recommending to new member States of the Council whether to accede to them or not, the ultimate objective being the efficient functioning of the conventions. CAHDI had been receiving progress reports by countries that were working out bilateral agreements under the Rome Statute of the International Criminal Court, enabling it to review the situation periodically. The exercise had been extremely useful in that the legal advisers who were members of CAHDI were able to speak very frankly about their concerns.

72. The European Convention on the Suppression of Terrorism had not criminalized the act of terrorism but sought to depoliticize it for the purposes of extradition. The review committee had been asked, not to develop a new instrument, but rather to review the existing one. It had decided first of all not to change the nature of the Convention, which the introduction of a definition of terrorism would certainly have done. It had borne in mind the definition adopted by the European Union, on the understanding that that could not be incorporated at that time as it was part of a criminalizing exercise. The definition would certainly be included now as part of the development of a comprehensive convention on terrorism.

73. As for article 5 of the European Convention on the Suppression of Terrorism and possible exceptions to the obligation to extradite, the list was not exhaustive. At the request of the Parliamentary Assembly, for the purpose of highlighting the grounds for refusal to extradite, the

Council of Europe had decided explicitly to enlarge the list of such grounds. As a result of the entry into force of the amending protocol, the original Convention would be open to the signature of non-member States of the Council, which were not bound by the provisions of the European Convention on Human Rights or of its Protocols. Since the list was not exhaustive, however, a State party could refuse extradition on other human rights grounds.

74. The CHAIR thanked the representatives of the Council of Europe for the very important information provided and reiterated the Commission's interest in continuing dialogue with that institution.

*The meeting rose at 1.10 p.m.*

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## 2778th MEETING

*Tuesday, 22 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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### Shared natural resources (A/CN.4/529, sect. G, A/CN.4/533 and Add.1<sup>1</sup>)

[Agenda item 9]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. YAMADA (Special Rapporteur), introducing his first report on shared natural resources (A/CN.4/533 and Add.1), explained that it was a preliminary report that was intended to provide background on the topic and seek guidance from the Commission on the future course of the study.

2. The topic of shared natural resources had been included in the Commission's programme of work in 2002.<sup>2</sup>

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 11, para. 20, and p. 100, para. 518 (a).



He had prepared a discussion paper<sup>3</sup> for consideration in informal consultations during the second part of the fifty-fourth session, in 2002. The paper had been based on the syllabus prepared by Mr. Rosenstock and included in the report of the Commission to the General Assembly on the work of its fifty-second session.<sup>4</sup> He had proposed to cover three kinds of natural resources under the topic: confined groundwater, oil and gas. They had the common features of being underground resources, moving across borders—and thus falling into the category of “shared” resources—and usually being non-renewable. He had excluded other resources such as minerals, which were not usually considered shared resources, and marine fauna and flora, land animals and birds, which were already subject to many global and regional arrangements and would be more appropriately dealt with in other contexts. He had also proposed adopting a step-by-step approach, first taking up groundwater and later proceeding to oil and gas after at least a preliminary stage of work on groundwater. The decision whether to adopt a separate set of rules for oil and gas could be taken at a later stage. He had proposed the timetable of work contained in paragraph 4 of his first report.

3. Members who had taken part in the informal consultations had generally supported the approach he had suggested in his discussion paper. No discussion had been held in plenary on the topic itself, aside from the adoption of the work programme contained in the report of the Commission to the General Assembly on the work of its fifty-fourth session.<sup>5</sup> During the debate in the Sixth Committee in 2002, very few delegations had commented on the topic. Those who had done so had generally supported its study. Two critical views had been expressed, however. According to the first, it was open to question whether the title was appropriate. The concept of “shared” resources was a matter of concern to some delegations in connection with the concept of permanent sovereignty over natural resources, and all the more so in the case of oil and gas. The title had nevertheless been officially approved by the General Assembly.<sup>6</sup> The second view was that the topic should be limited to the study of groundwater as a complement to the work already done on international watercourses. According to that view, expressed by the delegation of the United States, oil and gas were not ripe for consideration, and an effort to extrapolate customary law from divergent practices with respect to those resources would not be productive. Since he was taking a step-by-step approach, starting with groundwater, he saw no need to alter the work programme at the current stage.

4. The Commission had first dealt with the problem of shared natural resources when codifying the law of the non-navigational uses of international watercourses. Although its main focus had been on surface waters, the fourth Special Rapporteur on the topic, Mr. McCaffrey, had included in his seventh report a detailed study on groundwaters, emphasizing their large quantity, their mobility and their relations with surface waters.<sup>7</sup> He had

been in favour of including groundwater in the scope of the draft convention, but, after discussing that idea, the Commission had finally agreed to include only those groundwaters which were related to surface waters. The previous Special Rapporteur, Mr. Rosenstock, had reopened the issue of groundwater on second reading. He had contended that confined groundwater should be included in the scope of the draft convention because of the recent trend towards the adoption of an integrated approach to the management of water resources. He had been convinced that the principles and norms applicable to surface waters and related groundwaters were equally applicable to unrelated confined groundwaters. In his view, a few minor changes to the draft would have achieved the wider scope. The proposal had been the subject of extensive discussions in 1993 and 1994 that had indicated that the views of members were sharply divided. Those who had not supported the proposal had said that they did not see how “unrelated” groundwaters could be envisaged as part of a system of waters that constituted a unitary whole. In the end, the Commission had decided not to include unrelated confined groundwaters in the scope of the draft convention and had adopted draft article 2,<sup>8</sup> as formulated in the text adopted on first reading,<sup>9</sup> with one minor change. The definition of “watercourse” contained in draft article 2, subparagraph (b), was now article 2, subparagraph (a), of the Convention on the Law of the Non-navigational Uses of International Watercourses. Those members who had not accepted Mr. Rosenstock’s proposal had nevertheless agreed that a separate study was warranted in view of the fact that groundwaters were of great importance in some parts of the world and that the law relating to confined groundwater was akin to that governing the exploitation of natural resources, particularly oil and gas. The Commission had also adopted at its forty-sixth session and submitted to the General Assembly a resolution on confined transboundary groundwater,<sup>10</sup> reproduced in paragraph 15 of the first report, in which it recognized the need for continuing efforts to draft rules pertaining to confined transboundary groundwater and commending States to be guided by the principles contained in the draft articles, where appropriate.

5. It was against that background that he proposed to cover the topic. He had the impression that Mr. Rosenstock had thought that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would be mostly applicable to confined transboundary groundwaters. To ascertain whether that was so or whether a new set of rules or adjustments would be required, it was necessary to find out what exactly those groundwaters were. Their uses, State practice in their management, contamination, conflicts and existing domestic and international legal norms would have to be examined. The work of Mr. Sreenivasa Rao on the topic of international liability for injurious consequences arising out of acts not prohibited by international law,

<sup>3</sup> ILC (LIV)/IC/SNR/WP.1.

<sup>4</sup> *Yearbook ... 2000*, vol. II (Part Two), annex, pp. 141–142.

<sup>5</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 520, pp. 100–102.

<sup>6</sup> General Assembly resolution 57/21, para. 2.

<sup>7</sup> *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/436, paras. 8–58.

<sup>8</sup> The final text of the draft articles on the law of the non-navigational uses of international watercourses appears in *Yearbook ... 1994*, vol. II (Part Two), pp. 89–135, para. 222.

<sup>9</sup> *Yearbook ... 1991*, vol. II (Part Two), para. 59, p. 66.

<sup>10</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 135.

particularly the prevention aspect,<sup>11</sup> was very relevant to the study of the topic.

6. It was precisely to gain knowledge of confined transboundary groundwaters that he had prepared an addendum to his first report which was intended as a technical and reference paper. It was based on the contributions of several groundwater experts who were involved in the international efforts now being organized to manage that important resource, principally within the framework of the Internationally Shared Aquifer Resources Management Programme. In retrospect, he felt that the Commission had taken a wise decision to conduct a separate study of confined groundwaters as opposed to surface waters. He now believed that the understanding that Mr. McCaffrey and Mr. Rosenstock had had of groundwaters had not been entirely correct. Groundwaters and surface waters both originated in precipitation, but that was where their similarity ended. Ninety-nine per cent of all fresh water on earth was underground, so Mr. McCaffrey had been right to say that groundwaters were more important than surface waters. Groundwaters were the world's most commonly extracted raw material. Since hydrogeology was still a young science, little was known of the hidden treasure that was groundwater resources except that it took years to recharge them when depleted and that most, but not all (as was erroneously stated in paragraph 20 of the report), were not renewable. When groundwater was contaminated, it remained so for much longer than surface water. Another difference was that a great many human activities that took place on the surface could have adverse effects on groundwater. That might mean that the Commission must consider regulating activities other than uses in the case of groundwater.

7. The Commission was supposed to be dealing with groundwater not covered by the Convention on the Law of the Non-navigational Uses of International Watercourses. He had decided to use the phrase "confined transboundary groundwater" for the time being, as that was the terminology used by the Commission in its 1994 resolution. The word "confined" was used to mean "unrelated" to surface waters. While that concept was perfectly understandable in the abstract, it was quite difficult to know in practice which aquifers were related to surface waters. One must also note that hydrogeologists used the term "confined" in the sense of a pressurized aquifer. For them, a shallow aquifer was not confined, whereas a fossil or deep underground aquifer was confined. The Commission might have to find terminology that could be readily understood by groundwater experts and administrators. The definition of the scope also called for more detailed study. Even though it might be difficult for members to comment on the report because of its preliminary nature, he would greatly appreciate their providing him with guidance for pursuing his study.

8. Mr. MANSFIELD thanked the Special Rapporteur for his first report, which he had found very informative. He supported the decision to proceed along the lines suggested in paragraph 4 of the report, including the time-

table contained therein. The only reservation he had in that regard was that, as the Special Rapporteur himself suggested at the end of paragraph 5, the study on groundwater might take longer than initially envisaged.

9. In reading the addendum to the first report, he had come to the recognition that the subject was much more complicated than it seemed. He had little doubt, however, that the subject of confined groundwater resources was of the greatest importance, not just for States that shared such resources, but more generally for the international community as a whole because of the long-term implications for international peace and security. He supported the Special Rapporteur's view that it was important to understand exactly what was and what was not covered by the phrase "groundwater resources" before trying to develop legal norms that could be understood and implemented by experts and managers. He had found it interesting, for example, that the definition of the word "confined" given by the Commission in the past, namely, as meaning groundwater that was "unrelated" to surface water, differed from the definition used by hydrogeologists, who considered a "confined aquifer" to be an aquifer stored under pressure. The terminological clarifications provided by the Special Rapporteur in the addendum to the report justified his careful approach of gathering the necessary technical information and expert assistance before proceeding to define the scope of the subject and proposing a number of approaches to it.

10. It might well be the case, as was suggested in paragraph 20 of the first report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would prove to be applicable to confined transboundary groundwater, but that did not mean that the Commission should not first gain a full understanding of the differences between such groundwaters and other types of water bodies. The Special Rapporteur had pointed out at least two such differences: the fact that confined transboundary groundwaters were generally not renewable in the same way as surface waters and the fact that it was not just the use of groundwaters that needed regulating, but also any activities that might adversely affect their quality. The addendum to the report, however, suggested that it might prove necessary to make further distinctions within the category of confined transboundary groundwater and that special standards might be appropriate in the case of fossil aquifers, for example.

11. The truly appalling statistics quoted by the Special Rapporteur in paragraph 21 of the report, especially the number of infants who died every day as a result of unsafe water in developing countries, showed that the world was moving towards a water crisis, which both enhanced the importance of transboundary water resources and increased the potential for harm as a result of the mismanagement or pollution of such resources. The Special Rapporteur's preliminary analysis of shared aquifers under pressure from cross-border pumping or pollution in the addendum indicated that there might be significant differences between the factors that needed to be taken into account in different areas, which would tend to confirm that, as was stated in paragraph 24 of the report, the Commission needed, in order to formulate rules regulating confined transboundary groundwater, an inventory of such

<sup>11</sup> For the text of the draft preamble and 19 draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, see *Yearbook ... 2001*, vol. II (Part Two), pp. 146–148, para. 97.

resources worldwide and some analysis of their different regional characteristics. It was obviously difficult and, in any case, premature to make any firm recommendations about the standards that the Commission should seek to develop. Two general points could be made, however. First, the information contained in the addendum clearly showed that, owing to their vulnerability, groundwaters should be regulated by stricter international standards of use and pollution prevention than those applying to surface waters. Second, the situation was likely to have no legal solution as such. The “solution” would involve, rather, a complex mix of political, social and economic considerations and processes, the success of which would largely depend on the depth and breadth of understanding by peoples and their leaders of the vulnerability of such resources and the interrelationship between all actions taken in respect of them. The Commission’s role was therefore not to create some prescriptive set of rules, but to endeavour to construct a regime to encourage States to recognize their interdependence with regard to groundwater and to work together to identify ways in which they could obtain the appropriate assistance and techniques for resolving any disagreements that might arise as they worked through the complex process of managing and using such resources.

12. Mr. OPERTTI BADAN said he agreed with the Special Rapporteur that the Commission had been right to decide that transboundary groundwater should be the subject of a separate regime. The topic should be considered as being a subject in its own right, in terms both of regulation and of principles. He greatly doubted that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses could apply to groundwater. He was also doubtful about the title, which raised the question of who the parties to the shared resources were, as well as the question whether the topic included oil and gas or was restricted to water resources. It was all the more important to settle the problem of terminology since hydrogeology, as a science, was barely 50 years old.

13. At the end of the report, the Special Rapporteur recommended that the Commission should study the socio-economic importance of groundwater, State practice with regard to use and management, contamination and measures to prevent it, cases of conflicts and, last, domestic legislation and international agreements on managing such resources. Existing international agreements, however, related only to management and contained no binding provisions that would affect the ownership or exploitation of such resources. It might therefore be wiser to avoid an excessively all-embracing, universalist approach that failed to take sufficient account of the basic sources found in regional practice.

14. Article 2, subparagraph (*d*), of the Convention on the Law of the Non-navigational Uses of International Watercourses, which acted as a point of reference, recognized the role of regional economic integration organizations. The provision lent legal support to the transfer to such organizations of competence in various areas, including the legal aspects, at the regional level, of prospecting and using groundwater.

15. The world water crisis mentioned in paragraph 21 of the report raised the question of whose responsibility it should be to establish the institutional, legal and technical framework required to ensure the good management and maintenance of water resources. In the case of oil and gas, the responsibility belonged to the State in whose territory the resources were found, and there was no reason why the same should not be true of groundwater, which the water crisis made increasingly valuable. The guiding principles and standards that the Commission would formulate for worldwide application would have to be restricted to rules relating to cooperation on all natural resources, either for marketing purposes or for planning by the States in the subsoil of which the resources were located. Otherwise, the regional approach should be adopted, taking as a model, perhaps, the mechanism set up as part of a joint project between the World Bank and the States Parties to MERCOSUR, which covered an area of 1.2 million km<sup>2</sup> containing 160 million km<sup>3</sup> of water and 15 million beneficiaries. The project document contained seven main points, including the need to improve understanding of the scientific and technical aspects of aquifers and to establish a common management framework combining the public and private sectors. The project did not involve any kind of permanent institutional elements, but its operational components were to be found in the management and administration mechanism that the implementation of the project would involve.

16. Ms. ESCARAMEIA said that she wished to highlight the link between the subject of shared natural resources and that of liability; the link should be institutionalized, at least to the extent that the two Special Rapporteurs should both participate in the meetings of any working groups that might be set up on each of their subjects.

17. With regard to the title, the use of the word “shared” was less of a problem than the excessively broad nature of the current title. It might be preferable to add, in brackets, at the end of the title, the words “groundwater, oil and gas”. That would indicate the natural resources involved and would guarantee that the three resources were covered by the same regime. The scope of the subject would also be determined by the definition given to the expression “confined groundwater”. The Commission’s definition not only differed from that adopted by hydrogeologists but also lacked clarity in itself. In the resolution in which the Commission had recommended for adoption by the General Assembly various principles to be applied to transboundary groundwater, confined groundwater had been defined as “groundwater not related to an international watercourse”.<sup>12</sup> The resolution had not been adopted, whereas article 2 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which had, spoke of “ground waters constituting ... a unitary whole and normally flowing into a common terminus”. The question thus arose as to whether confined groundwaters, in the sense of the topic under consideration, included those that flowed into a lake or a spring or whether lakes and springs came under the Convention. There was also the question of confined groundwaters that were fed, sometimes on a massive scale, by rainwater. There was an obvious need to clarify the relationship be-

<sup>12</sup> See footnote 10 above.



tween the definition to be adopted by the Commission and that contained in article 2 of the Convention.

18. In the addendum, the Special Rapporteur described the differences between groundwaters and surface waters, concluding that the former required periodic assessment and monitoring on a more constant and accurate basis than the latter, particularly since they were subject to depletion and contamination. They therefore required standards that were not only stricter than those applying to surface waters, but also stricter than general standards of liability, such as standards of significant harm or standards of prevention. It might therefore be dangerous to take the Convention on the Law of the Non-navigational Uses of International Watercourses as a model. It would, however, be possible to draw up some general principles which would be of a peremptory nature, but would by no means preclude the existence—or even the priority status—of regional arrangements.

19. Mr. KATEKA said he doubted that it was wise to limit the scope of the topic to groundwater, gas and oil. In paragraph 4 of the report, the Special Rapporteur excluded from the scope of the study such shared natural resources as mineral deposits, marine living resources or birds and land animals, on the grounds that they were dealt with more appropriately elsewhere. He wondered, however, what regime governed the massive migrations of animals between Tanzania and Kenya, which could be counted in millions, and which, if not regulated, could lead to complications that could ultimately jeopardize international peace and security.

20. Mr. CHEE, referring to Ms. Escameia's comments on dispute settlement, said that, to his knowledge, there were very few cases dealing with that topic, since inter-State disputes concerning water resources were most often settled by negotiation. More generally, the criterion applied to shared resources was equitable utilization. Account was also taken of the precautionary principle, the aim of which was to prevent the contamination of the resources in question. Disputes could also follow the diversion of a watercourse by an upstream State.

### Cooperation with other bodies (*concluded*)

[Agenda item 11]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

21. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization, hereafter AALCO) said that, at its forty-second session, held in Seoul from 16 to 20 June 2003, AALCO had considered an agenda item entitled "Report on the matters related to the work of the International Law Commission at its fifty-fourth session", all items on the agenda of the Commission being of immense interest to member States of AALCO and to AALCO itself. During the deliberations on the Commission's work, many representatives had made elaborate comments on the general thrust of such work on various topics and had presented their country positions on individual draft articles.

22. Most representatives had been in favour of the codification of the topic of diplomatic protection by the Commission. One had stressed that it could advance the promotion of human rights. With regard to scope, one delegation had supported the Special Rapporteur's conclusion that the draft articles<sup>13</sup> should be confined to issues relating to the nationality of claims and the exhaustion of local remedies, while, for another, the Commission's work should be limited to precedents and practice. As to the extension of the draft articles to other specific situations, representatives had been against including provisions in the draft articles on the diplomatic protection of crew members and passengers on ships because it was already covered by articles 94 and 292 of the United Nations Convention on the Law of the Sea. One representative had stated that, as there was no nationality link involved, the issue of the protection exercised by international organizations in respect of their officials did not fall within the domain of diplomatic protection. It had also been considered that the question of a State exercising diplomatic protection on behalf of the inhabitants of a territory other than its own which it occupied, administered, or controlled should not be included in the draft articles, as such an occupation of territory was illegitimate under international law. As to the possibility of the exercise of diplomatic protection by an international organization administering a territory, such situations were temporary in nature and should be considered instead in connection with the topic of the responsibility of international organizations.

23. It had been pointed out that the Calvo clause<sup>14</sup> was simply a contractual device and that no individual could waive the protection of his or her State of nationality, since the right to exercise diplomatic protection belonged to the State. As the Calvo clause had increasingly been losing its practical usefulness in the global economy, there was no reason to deal with it in the draft articles.

24. Most representatives had welcomed the general thrust of draft article 3 and recalled that diplomatic protection was a discretionary right of a State. As it was becoming increasingly possible for individuals to submit their claims directly to different forums, concern for their interests should not be such that it became obligatory for the State of nationality to espouse their claims. On the individual draft articles, one representative had felt that they reflected the rules of customary international law, namely, that diplomatic protection was a right of a State and depended on a nationality link between the individual and the State concerned. Another representative had welcomed the commentary to draft article 7, which stated that the term "refugee" was not limited to refugees as defined in the Convention relating to the Status of Refugees and its Protocol relating to the Status of Refugees, but also covered persons who did not strictly conform to that definition, thereby leaving the scope of the definition open for further expansion. Diplomatic protection through "peaceful settlement", as stipulated in draft article 1, had also been welcomed. Diplomatic protection should not be abused to justify the use of force against a State, and, according to one representative, exceptional cases of diplomatic protection must be sanctioned by the

<sup>13</sup> See 2756th meeting, footnote 3.

<sup>14</sup> See 2757th meeting, footnote 5.

Security Council under Chapter VII of the Charter of the United Nations. There had been general support for the rule of continuous nationality in draft article 4. Delegations had welcomed the formulation of draft article 12 on the exhaustion of local remedies, presented by the Special Rapporteur in his second report.<sup>15</sup> With regard to draft articles 12 and 13,<sup>16</sup> it had been felt that, since the principle of exhaustion of local remedies was part of customary international law and played an essential role in the implementation of diplomatic protection, it must be stated as clearly and unambiguously as possible. Second, to ask whether an available remedy was effective or not would raise questions about the standards of justice employed in the State concerned. As long as those remedies were in conformity with the principles of natural justice, variations in standards should not allow for their effectiveness to be called into question. Third, greater caution was required when dealing with exceptions to the exhaustion of local remedies rule, as any tilt in the balance would undermine the domestic jurisdiction of the State where the alien was located.

25. Representatives who had commented on draft article 14 relating to the futility of local remedies, presented by the Special Rapporteur in his third report,<sup>17</sup> had stated their preference for the third option proposed by the Special Rapporteur. According to one delegation, subparagraphs (e) (Undue delay) and (f) (Denial of justice) should be considered along with the question of the futility of local remedies. As to draft article 15 on the burden of proof,<sup>18</sup> it had been felt that, as a principle of evidence, it came under the rules of procedure and need not be elaborated on in a separate article. With respect to implied waiver, caution had been called for, as it was difficult to devise any objective criteria in that regard.

26. The Commission had sought the views of States on the issue of the diplomatic protection of shareholders. In that connection, the representative of the Republic of Korea had supported the basic rule laid down by ICJ in the *Barcelona Traction* case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. He had said that his country did not wish to grant a right of diplomatic protection to the State of nationality of the majority of shareholders, as that could result in the discriminatory treatment of small shareholders and it would be difficult to establish a quantitative standard for such a distinction. It would also be difficult to recognize that the State of nationality of the majority of shareholders in a company had a “secondary” right to exercise diplomatic protection if the State where the company had been set up had failed to do so.

27. As far as reservations to treaties<sup>19</sup> were concerned, delegations had considered the guidelines as useful and practical recommendations for States to bear in mind when formulating, modifying and withdrawing their reservations to treaties. According to one delegation, the guidelines should be assessed in the light of their com-

patibility with the 1969 Vienna Convention. Furthermore, they would be more useful if they were accompanied by model clauses. One representative had suggested that the Commission should shorten some of its commentaries since lengthy commentaries on non-controversial matters might give the impression that the law regarding reservations to treaties was less clear or more complex than it really was. As to late reservations, one representative had stated that, in order to ensure stability and predictability in treaty relations, such reservations should be avoided as far as possible; they were permissible only if none of the contracting parties objected to them.

28. On individual draft guidelines, one delegation had considered that guidelines 2.1.1, 2.1.2, 2.1.5 and 2.1.7 were acceptable, while for another delegation interpretive declarations, whether simple or conditional, needed to be formulated in writing, something which had not been stipulated in guideline 2.4.1. With regard to the role of the depositary in the light of draft guideline 2.1.8 [2.1.7 *bis*], many delegations had felt strongly that the depositary should play a strictly procedural role, in accordance with the relevant provisions of the 1969 and 1986 Vienna Conventions. Many delegations had considered that draft guideline 2.1.8 [2.1.7 *bis*] went beyond the 1969 Vienna Convention: if the depositary were to intervene on the question of the compatibility of a reservation with the object and purpose of the treaty, as the guideline in question proposed, it might prompt the State to react, but that would not help to solve the problem. It was unlikely that a more active role of the depositary would lead to the withdrawal of the reservation.

29. Since the Commission had sought the views of States on draft guideline 2.1.6 [2.1.6, 2.1.8], which provided for the communication of a reservation by electronic mail and its subsequent confirmation in writing, one delegation had stressed that reservations were generally made at the time of ratification or accession and were thus communicated at the same time as the instrument of ratification or accession. The question of the communication of reservations by electronic mail or facsimile did not therefore seem to arise. The representative of the Republic of Korea had stated that such forms of communication were not normal practice in his country, but had acknowledged that under certain circumstances they might be useful.

30. In response to the Commission’s request for clarification on draft guideline 2.5.X pertaining to withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, presented by the Special Rapporteur in his seventh report,<sup>20</sup> two delegations had made comments. Asserting that the withdrawal of reservations was a sovereign prerogative of the State, one delegation had said that recent developments where some monitoring bodies were assigned the role of assessing reservations to a treaty were exceptional and should thus not be covered by the guidelines. According to the representative of the Republic of Korea, the expression “body monitoring the implementation of the treaty” required clarification, since the competence of monitoring bodies to pronounce on the validity of a reservation depended on the powers assigned to them by the treaty in question.

<sup>15</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1.

<sup>18</sup> *Ibid.*

<sup>19</sup> See 2760th meeting, footnote 4.

<sup>20</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

Otherwise, only the States or international organizations that were parties to those treaties had that power.

31. Referring to unilateral acts of States, some delegations had underlined that it was possible to codify and progressively develop the law in that area and that it would be useful for States to know the risk they ran in formulating such acts. For others, the topic involved progressive development rather than codification. One delegation had pointed out that unilateral acts could have extraterritorial effects and negatively affect international peace and security, thereby warranting further examination of the topic. As to methodology, one delegation had said that it would be useful to study each type of act, such as promise, recognition, waiver or protest, before drawing up general rules. According to another delegation, the Special Rapporteur should first study unilateral acts which, on the basis of international practice, gave rise to obligations. On the classification of unilateral acts, one representative had stressed the need to use the "legal effects" criterion. Consequently, there would be two major categories of acts, those whereby a State undertook obligations and others whereby a State reaffirmed a right. One representative had contested the Special Rapporteur's proposal that, by analogy with the expression *pacta sunt servanda*, which formed the basis of treaty relations, the binding nature of unilateral acts could be based on a new expression, *acta sunt servanda*; that analogy was unacceptable, as there was no basis for it in international law.

32. In connection with the question of international liability for injurious consequences arising out of acts not prohibited by international law, most representatives had referred to the close links between prevention and liability and had welcomed the Commission's decision to begin work on the latter. One delegation had underscored the fact that it was not easy to codify and progressively develop rules in that area because the existing treaty regimes had been developed primarily at the regional and sectoral levels and involved profound interests of States parties. The Special Rapporteur's decision to refer to "allocation of loss" in the title of the topic had been deemed constructive, as, in the final analysis, the allocation of loss concerned the relationship between economic development and environmental protection. As to the scope of the Commission's work, one representative had stressed that it should be the same as for the work on prevention, while, for another, the Commission should draw up general rules so as to ensure that States had enough options to handle each case on the basis of its specific circumstances. That would reflect the general principle of the peaceful settlement of international disputes.

33. On allocation of loss, delegations had taken the view that it was not the State but the operator who benefited from the activity and should bear the primary responsibility in that regard. As for the role of the State under the liability regime, international jurisprudence would need to be carefully studied. In particular, it had been felt that liability regimes established under sectoral conventions could provide some guidance.

34. AALCO member States had generally welcomed the inclusion of other new topics in the Commission's work programme. With a view to keeping the Commission informed about the law and State practice of Asian

and African States, AALCO had adopted a resolution at its forty-second session committing its member States to respond to the Commission's request for comments.

35. In 2002, he had mentioned that, owing to the lack of time, it was becoming more difficult for AALCO to discuss, during its annual sessions, important legal aspects of topics studied by the Commission. In that connection, he had proposed considering the feasibility of the Commission and AALCO jointly organizing a seminar on one of the topics recently included in the Commission's work programme. The Commission had approved that idea, and it had been agreed that the seminar might take place at the meeting of legal advisers of AALCO member States, usually held in New York during the regular session of the United Nations General Assembly. However, the proposal had not materialized in 2002. The idea had been considered during the last session of AALCO, which had stated categorically in a resolution adopted on the subject that it was in favour of such a seminar. He wished to hear the Commission's views and suggestions in that regard.

36. At its forty-second session, AALCO had considered not only the Commission's work, but also jurisdictional immunities of States and their property; the International Criminal Court; the deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in all occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War; the follow-up to the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, from 3 to 14 June 1992; cooperation in measures against trafficking in women and children; drawing up of an effective international legal instrument against corruption; human rights and Islam; and WTO as a framework agreement and code of conduct for world trade. During the session, AALCO had also organized a special one-day joint meeting with ICRC on "The relevance of international humanitarian law in today's armed conflicts".

37. Pursuant to AALCO's efforts in the past few years to rationalize its work programme, the Seoul session had been the first time it had focused its deliberations on a set of priority agenda items, which would be identified for each annual session. A full report on the forty-second session would be submitted to the Commission at the earliest possible opportunity.

38. As far as future cooperation between AALCO and the Commission was concerned, the AALCO secretariat would continue to prepare notes and comments on the substantive items considered by the Commission so as to assist the representatives of member States of AALCO in the Sixth Committee when they debated the Commission's report on the work of its fifty-fifth session. An item entitled "Report on the work of the International Law Commission at its fifty-fifth session" would thereafter be included in the agenda of AALCO's forty-third session.

39. On behalf of AALCO, he invited the members of the Commission to participate in the forty-third session of AALCO, which would be held in Indonesia in 2004.

40. Mr. KATEKA, welcoming the fact that, at its forty-second session, AALCO had spent a great deal of time on



the Commission's work, said it was nevertheless regrettable that the members of AALCO had not had before them the results of the first part of the Commission's session, and he therefore trusted that they would be able to consider them in the near future. He also thanked AALCO for encouraging its members to express opinions on matters dealt with by the Commission.

41. It would be interesting for the Commission to have more information about the items on the agenda of AALCO's sessions.

42. AALCO's rationalization of its work was a welcome step. It was to be hoped that it would not follow the example of the United Nations General Assembly, whose credibility was undermined because its agenda contained some items that had been the same for many years. Since AALCO was a legal body, its work should focus on legal matters, although the latter might have a political or economic dimension.

43. Ms. XUE thanked AALCO for its interest in the Commission's work and trusted that the dialogue between the two bodies would continue in future. AALCO's work and efficiency had improved, and the organization was looking into the latest developments in international law. Clearly, the international legal order could not progress effectively without the participation of African and Asian States.

44. Speaking as the representative of the Asian Group, she requested the Secretary-General of AALCO to provide more information on the positions adopted by AALCO's members on the problems now being encountered by international law.

45. Mr. GALICKI said that AALCO was certainly the only regional body that showed so much interest in the Commission's work, and he welcomed that interest. It was important and instructive for the Commission to hear the opinion of African and Asian lawyers, and he therefore hoped that cooperation between the two bodies would continue. In that connection, he agreed with the idea of holding joint meetings, such as the planned seminar. A meeting with the legal advisers of the AALCO member States during the session of the United Nations General Assembly in New York was bound to be enriching.

46. Mr. AL-MARRI said that he wished to know what role AALCO played with regard to human rights in the African and Asian region, where much remained to be done in that field.

47. Ms. ESCARAMEIA said that she would like to receive the report on AALCO's debates on the Commission's work. Like Mr. Galicki, she was agreeably surprised by the interest AALCO had shown in that work and hoped that the results of the first part of the Commission's session would quickly be forwarded to it.

48. She supported the idea of arranging a joint AALCO/Commission seminar, but she also wished to know whether the only people who could attend would be the members of the Commission, particularly the Special Rapporteurs, who would be in New York at that time.

49. With regard to the other items discussed at AALCO's forty-second session, she asked for more details on human

rights and Islam and on the International Criminal Court. The latter point was vital, primarily because, compared to the number of African States, few Asian countries had acceded to the Rome Statute of the International Criminal Court.

50. Mr. MOMTAZ said that he was impressed by the thematic review of the Commission's work, which did not duplicate the one by the United Nations Secretariat. Experience had often shown that States which had no opportunity in the Sixth Committee to state their opinions on matters of interest to them did so at AALCO sessions, where they felt freer to express their views.

51. He requested details of AALCO's efforts to encourage its members, which represented more than one quarter of the member States of the international community, to reply to the questionnaires prepared by Special Rapporteurs on the various topics considered by the Commission.

52. Mr. DAOUDI, noting that AALCO covered two continents with different legal civilizations, asked whether the work of that organization reflected an interest in the development of certain aspects of international law at a time when the principles and foundations of international law were being threatened. He wished to know whether a common position that reflected the opinions of those countries on the content of the rules of international law was taking shape on specific questions and what contribution to AALCO's work was being made by African and Asian legal commissions or committees.

53. Mr. RODRÍGUEZ CEDEÑO said that the statement by the Secretary-General of AALCO reflected that organization's interest in the Commission's work. The exchanges of views between the Commission and AALCO were very important and of great use to both bodies in their respective areas of endeavour.

54. Mr. KAMIL (Secretary-General of AALCO), replying to Mr. Kateka, said that, although Mr. Chee, who had represented the Commission at AALCO's forty-second session, had given an overview of the first part of the Commission's session, he was looking forward with interest to the full report on its work which would be drafted at the end of the second part of the session.

55. As to Mr. Kateka's fear that AALCO's agenda might resemble that of the United Nations General Assembly, which included too many irrelevant items, he said that AALCO made sure that the questions discussed at its sessions were topical and reflected member States' interests and concerns. AALCO had also rationalized its work: whereas there had been 15 items on the agenda the previous year, that number had been halved at the forty-second session.

56. While it was true that many Asian countries had not yet ratified the Statute of the International Criminal Court, AALCO was an advisory body and could only urge its members to accede to that instrument.

57. As far as human rights were concerned, two years earlier, his organization had signed an agreement with Mary Robinson, the then United Nations High Commissioner for Human Rights, which had been aimed at establishing closer cooperation between AALCO and OHCHR.

Moreover, at its forty-first session, held in Abuja in 2002, AALCO had held a special meeting on human rights and action to combat terrorism. Cooperation in the field of migrants' and workers' rights was continuing with IOM. One week earlier, AALCO had signed an agreement with ICRC which was designed to strengthen AALCO's work relating to international humanitarian law. The AALCO member States were therefore aware of human rights issues, a matter with which he dealt personally.

58. The planned seminar would be held after, and not during, the meeting of the legal advisers of the AALCO member States in New York. That seminar, in which the current members of the Commission would participate, would cover a topic to be chosen by the Commission. Its purpose would be to help the representatives of the AALCO member States to acquire more in-depth knowledge of the topic chosen. The topic should therefore be important both for the Commission and for the AALCO member States.

59. The CHAIR thanked the Secretary-General of AALCO for his statement and said that the topic chosen for the seminar should probably be one of the questions dealt with by one or more of the Special Rapporteurs who would be present in New York at that time.

*The meeting rose at 1.10 p.m.*

## 2779th MEETING

*Wednesday, 23 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### **Shared natural resources (concluded) (A/CN.4/529, sect. G, A/CN.4/533 and Add.1<sup>1</sup>)**

[Agenda item 9]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

1. Mr. NIEHAUS said the Special Rapporteur's excellent report was a good starting point for the Commis-

sion's work on a topic of major importance in the field of international law. Everyone was aware that access to safe drinking water was a serious problem for developing countries that threatened to grow much worse in the years ahead. The decision to deal with confined transboundary groundwater separately was a wise one, given the great variety of other types of groundwater listed in paragraph 19 of the report.

2. The objections raised to the title of the topic were unfounded, since it had already been officially approved by the General Assembly<sup>2</sup> and expressed with great clarity the focus of the study: the fact that certain natural resources were under the jurisdiction of, or shared by, two or more States. Study of the legal regime for shared natural resources was appropriate in that equitable exploitation and management of such resources required the active cooperation of the States that had jurisdiction over them and entailed considerations relating to their rational and sustainable use.

3. Not only were shared natural resources physically located within the jurisdiction of two or more States, but their exploitation in the territory of one State inevitably affected the use that the other State or States might make of them. Resources that were capable of moving through or being located in more than one jurisdiction, such as hydrological resources and hydrocarbons, were of particular interest. The report concentrated on groundwater, leaving hydrocarbons to one side, but a general report covering both oil and gas in addition to groundwater would have given a better overview of the subject. The question of what principles were applicable to all three resources and how they differed remained unanswered, and it was to be hoped that that gap would be filled in future reports.

4. When the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses,<sup>3</sup> it had expressed the view that the principles contained in the draft could be applied to confined transboundary groundwater. Unfortunately, the General Assembly had not endorsed that view, nor had the conditions governing the application of principles designed to regulate the use of surface water to the regulation of groundwater use been specified.

5. As the Special Rapporteur pointed out in paragraph 20 of the report, surface water resources were renewable, while groundwater resources usually were not, and they accordingly represented different challenges. One might also ask whether the principles incorporated in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to fossil aquifers and which principles of international environmental law could be applied to the exploitation, distribution and conservation of a resource that was non-renewable or only slowly renewable.

6. Article 5 of the Convention laid down the principle of the equitable and reasonable utilization of water resources, and of the equitable and reasonable participation in the use, development and protection of such resources, with a view to attaining optimal and sustainable utilization

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2778th meeting, footnote 6.

<sup>3</sup> *Ibid.*, footnote 8.

thereof. Unfortunately, that fundamental principle could not be automatically transposed to the management of a non-renewable and finite resource: sustainable use of a non-renewable resource was precluded by its very nature. Nor could the factors relevant to equitable and reasonable utilization outlined in article 6 of the Convention be automatically applied to a non-renewable resource. For a renewable resource, adjustments could be made according to circumstances, but for a non-renewable resource, what seemed equitable at the time might cause irreparable damage later on.

7. Hence the need to draw up a list of technical criteria that took into account the actual distribution of water resources within each national jurisdiction in order to facilitate the precise allocation of quotas for exploitation. Water was a resource that was fundamental to human life, and the fundamental right to water was upheld by a body of opinion. The Global Consultation on Safe Water and Sanitation for the 1990s held in New Delhi in September 1990 had formalized the need to provide, on a sustainable basis, access to safe water in sufficient quantities and proper sanitation for all, emphasizing the “some for all rather than more for some” approach. Accordingly, in defining what constituted equitable and reasonable utilization of confined transboundary groundwater, priority must be given to meeting basic human needs.

8. The obligation to take all appropriate measures to prevent the causing of significant harm to other States, reflected in article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, was too weak, given the vulnerability of fossil aquifers to pollution. Environmental considerations called for the adoption of strong precautionary measures to prevent the pollution of such resources. As was pointed out in chapter 18.35 of Agenda 21, adopted by the United Nations Conference on Environment and Development, a preventive approach, where appropriate, was crucial to avoiding costly subsequent measures to rehabilitate, treat and develop new water supplies.<sup>4</sup>

9. The general obligation to cooperate, as outlined in article 8 of the Convention, did seem applicable to the exploitation of confined transboundary groundwater. Since both fossil aquifers and hydrocarbon deposits were non-renewable natural resources, they could be covered by a similar legal regime. Water being fundamental to human life, however, some adjustments should be made to the legal regime for confined transboundary groundwater to permit the introduction of certain humanitarian criteria in the allocation of exploitation quotas.

10. Mr. ECONOMIDES said he welcomed the clear and concise report on shared natural resources. The Special Rapporteur had asked for advice, no doubt of a general nature at the present preliminary stage of work, on the approach to be taken.

11. He agreed with Ms. Escameia that a more restrictive wording should be adopted for the title and proposed “Shared natural resources: confined transboundary

groundwater”, which would correspond better to the content of the report. Oil and gas would, of course, be taken up at a later date.

12. Before seeking to regulate the areas covered by the topic, the Commission needed to develop a definition and to determine the significance for States, especially developing countries, of transboundary groundwater not connected to surface water. The Special Rapporteur had recognized the need for technical advice and had called in some very high-level hydrogeologists and legal experts, including Mr. McCaffrey, a former member of the Commission.

13. It was somewhat premature to state, as did paragraph 20 of the report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. That question should be treated separately, as Mr. Opetti Badan had suggested at the previous meeting, at least in the initial stage of the work. Analogies with other conventions could be made at a later stage. For the time being, the specific features of non-connected groundwater should be analysed.

14. One possible question now was whether the “significant harm” principle was applicable to confined transboundary groundwater. In paragraph 7 of the addendum to the report, the Special Rapporteur said it was not: a stricter standard should be applied to such water. He endorsed the views just outlined by Mr. Niehaus on that subject and concurred with the comments on the vulnerability of fossil groundwater, as opposed to surface water, in paragraph 40 of the addendum.

15. Finally, it was very important to deal with non-connected groundwater pollution straightaway. An analogy might be established with the work on transboundary harm, in which the question of prevention had been dealt with before responsibility.

16. Mr. KATEKA, responding to the Special Rapporteur’s request for comments on the scope of the topic, said he had already expressed his misgivings about the exclusion of shared resources such as minerals, animals and birds. There were regimes to regulate marine resources, some of which were highly migratory, and there seemed no reason not to have regimes for migratory wildlife. While he understood the Special Rapporteur’s reluctance to widen the scope of the topic, there was no reason to exclude from his background study general remarks on other shared natural resources as a way of providing additional perspective. A convention apparently existed on migratory birds, for example, and the Special Rapporteur might look into whether there were similar arrangements for other shared natural resources.

17. Paragraph 7 of the report misstated the sensitive issue of the rights of upper riparian States *vis-à-vis* lower riparian States of major river systems, giving the false impression that it was only upstream States that created environmental concerns. The remark that new uses of waters by upstream States were bound to affect in some way the historically acquired interest of the downstream States touched a raw nerve. Some river systems were still

<sup>4</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex II, p. 287.



governed by agreements concluded by colonial powers that favoured downstream States at the expense of those upstream. A case in point was the Nile Waters Agreement.<sup>5</sup> In view of the controversy between upstream and downstream States outlined in paragraph 11 of the report, caution had to be exercised. Accordingly, it was not clear why there was a reference in that paragraph to “underdeveloped upstream States”: an *a contrario* situation could arise for downstream States.

18. The Special Rapporteur said in paragraph 20 of the report that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. The principle of equitable and reasonable utilization in article 5 of that Convention was relevant, as was article 6 on the factors relevant to equitable and reasonable utilization. The requirements of addressing vital human needs and not giving priority to any State were crucial. The obligation not to cause significant harm to other watercourse States set out in article 7 of the Convention was to be found, in a different form, in the draft articles on prevention of transboundary harm.<sup>6</sup> As Ms. Escameia had pointed out at the previous meeting, the Special Rapporteurs on shared natural resources and liability should harmonize their efforts.

19. Paragraph 12 of the report indicated that groundwater constituted over 95 per cent of the earth’s freshwater, yet paragraph 21 said that the portion of freshwater available for human consumption was 1 per cent. Because of increased water usage, large populations and pollution, freshwater was becoming a scarce resource. Indeed, the Special Rapporteur said a world water crisis was imminent. That seemed incongruous, however. If only 1 per cent of the earth’s groundwater was being used, and presumably it was periodically replenished through precipitation and percolation, then 99 per cent remained untapped, and where was the crisis?

20. People in developing countries went without water, and thousands died every day, while others watered their lawns. The statistics given in the report seemed to come mainly from large waterworks and not from small-scale users. It was to be hoped that the next report would include more statistics from developing countries, which used groundwater more than did developed countries. Boreholes and wells, for example, might be worth looking into. Finally, he generally supported the Special Rapporteur’s scheme of work.

21. Mr. PAMBOU-TCHIVOUNDA said that, using a hydrogeological approach to the study of groundwater resources, the Special Rapporteur had positioned himself as a reliable guide to help the Commission cross *terra incognita* without foundering. The precautions he had taken, particularly the recruitment of expert assistance, were to be applauded.

22. The addendum to the report informed the Commission that groundwater occurred in aquifers—in other words, geological formations (para. 8); that it could move

sideways as well as up or down in response to gravity and differences in elevation and pressure (para. 9); and that certain aquifers extended over international boundaries (para. 14). That seemed to be the crux of the issue as far as establishing a legal regime was concerned. If the flow of groundwaters was to be covered by a legal regime, it would probably have to be multifaceted, for three reasons.

23. First, locating aquifers required the mobilization of major operational resources, including technical resources, which might not be available to the States concerned; if third parties had to be called in, legal problems would arise. Second, exploitation of groundwater and aquifers could be likened to an activity that was not prohibited by international law yet generated transboundary risk: What regime should be applied in such a situation? Third, such an activity might necessitate the pooling of human and technological resources, not only among the basin States but perhaps also among those external to it.

24. The structuring of all the components of the future regime would sharply highlight various elements of power, strength, time constraints and human survival, and a number of simple questions came to mind. Did groundwater fall into the territory of the State of residence of its users? Should a distinction be made, perhaps depending on the distance from the earth’s surface, between groundwater that was within a State’s jurisdiction and groundwater that was not? If so, one might be tempted to apply to underground water resources a regime comparable to the one for maritime resources—for example, the exclusive economic zone and the sea bed—although, since the seas and oceans were made of different material than dry land, an analogy would appear to be very difficult.

25. It was clear that the regime governing shared natural resources must involve above all the permanent sovereignty of States over the resources on their territory. However, the concept of sharing—the crux of the matter—was not *a priori* a norm. It was a norm that had to be developed, and this could only be done with the consent of the States concerned. Such consent must be based on a conception of the interests at stake arising from a fundamental change in the thinking of the international community. For the time being, those were but a few simple comments on what was a very complex and interesting subject. He looked forward to the second report.

26. Mr. MATHESON commended the Special Rapporteur on his first report, which provided useful background information on the consideration of the topic and the technical aspects of confined groundwaters. It was an important subject to which the Commission should make a contribution, not only with respect to the development of international law, but also for the sake of the health and welfare of large numbers of people in countries that depended on groundwater resources. The Special Rapporteur had been prudent in emphasizing the need for further study of the relevant technical and legal aspects before taking any final decision on how the Commission should proceed. It was proposed to complete the second report on confined groundwaters by 2004, but the Special Rapporteur should take whatever time was required, including to seek State views and technical input, on the basis of which the Commission could prepare its contribution. On

<sup>5</sup> Concluded between the United Kingdom and Egypt in Cairo on 7 May 1929 (League of Nations, *Treaty Series*, vol. XCIII, no. 2103, p. 43).

<sup>6</sup> See 2778th meeting, footnote 11.

the other hand, it was not clear whether the Commission could make a comparable contribution in regard to oil and gas. The debate thus far had highlighted concerns about the suitability of the topic, and it was apparent that the problems relating to confined groundwaters were quite different from those relating to oil and gas, both in technical and in legal terms. Much work had already been done by the Commission on confined groundwaters in connection with the non-navigational uses of international watercourses, and the issue presented immediate and serious concerns for human health and welfare, which was not the case for oil and gas. There was no reason to assume that States could not resolve issues concerning oil and gas through normal diplomatic and legal processes. While it was premature to decide what the ultimate scope of the shared natural resources topic would be, it was clear that confined groundwaters must take priority. The Special Rapporteur had proposed 2005 as the date for a third report, on oil and gas, but it would seem wiser to complete the report on confined groundwaters beforehand. He looked forward to the second report on confined groundwater and was confident that it would provide an excellent basis for the Commission's work.

27. Mr. OPERTTI BADAN said that, in the light of comments made so far, he had two basic concerns. First, the Commission should adhere for the time being to the subject of the specific resource of confined groundwaters; other aspects of shared natural resources such as animal migration would merely complicate matters. Second, it should not lose sight of the original proposal to include in the study of shared natural resources the three resources: water, oil and gas. Presumably, the rationale behind such a proposal was that those resources had some common features, for one the fact that they were all underground. To be sure, a legal regime governing oil and gas already existed, and in some cases was being developed. The way in which countries coordinated the exploitation and utilization of natural gas was a case in point. However, it must be remembered that the criterion on which the oil and gas regimes had been established was sovereignty, and he would strongly object to the issue of water being dealt with in a different way simply because the legal regime was being established at a later date, or on the humanitarian grounds of the necessity and usefulness of the resource to mankind. If that line of argument were followed, no one could deny the usefulness to mankind of oil and gas, albeit chiefly for commercial purposes. He therefore urged the Special Rapporteur to be very prudent in his handling of what was an enormously sensitive matter. The Commission's objective was to establish a legal regime based on cooperation for the preservation and utilization of confined groundwaters and not to turn it into a resource of mankind as a whole. Moreover, the law of the sea could not serve as a basis for discussion, since it did not cover territorial sovereignties for the purposes of regulation. He hoped that, in the second report, the Special Rapporteur would not depart from the approach adopted in the first report, which took into account the three natural resources of water, oil and gas, given the need for a legal regime for those resources based on similar criteria.

28. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his technically detailed but clear report on a very difficult and important subject in legal, political,

technical and socio-economic terms, on account of the problems of water access, use and pollution, above all for developing countries. In view of the complex nature of the topic and the current progress of the debate, it was likely that the work programme for the quinquennium outlined in paragraph 4 would need to be revised. He agreed that, for the time being, the study should focus exclusively on confined groundwater, defined by the Special Rapporteur as waters that in general were not connected to a body of surface water; that aspect having been deferred, the non-navigational uses of international watercourses had been considered. The very different characteristics of other geological structures such as oil and gas as well as flora and fauna subject to transboundary movements would certainly complicate the study, not least the establishment of rules governing the protection, efficient management and equitable use of such resources. The Commission should therefore first complete its study on confined groundwaters before embarking on a study of oil and gas to see whether there were any similarities that might help in establishing common rules.

29. Aside from a detailed analysis of the different confined groundwater systems, such as the Guaraní aquifer referred to at a previous meeting by Mr. Operti Badan, the Commission must also consider doctrine, State practice, international agreements and domestic legislation relating to the protection and management of such systems. The study must be comprehensive and well-balanced and cover the rational use of confined groundwaters, the interests of States and the protection of the environment.

30. He had no wish to prejudge the outcome of the study, but an overall objective should be decided on without further delay. He would suggest the establishment of rules for the protection and better utilization of confined groundwaters, along the lines, but not necessarily strictly adhering to, the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles already adopted on prevention of transboundary damage, as well as the principles and norms applicable to objective responsibility or liability. The principles governing the permanent sovereignty of States over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962 should also be taken into account. The States with such resources on their territories would also have to adopt appropriate national legislation and to negotiate and conclude relevant agreements. In addition, it was important to define a mechanism for settlement of disputes, based on Article 33 of the Charter of the United Nations, although State practice showed that such disputes had been few in number and had generally been resolved through practical means.

31. Mr. MOMTAZ thanked the Special Rapporteur for his report, which provided a good introduction to hydrogeology and established a framework for a legislative regime governing the invisible resource of transboundary confined groundwaters. In that connection, he welcomed the fact that the Special Rapporteur had drawn on the advice of high-level experts. His comments would focus on two issues: the scope of the study, and possible links between the topic under study and the Convention on the Law of the Non-navigational Uses of International Watercourses.

32. He endorsed the work programme proposed in the report and the decision to treat confined groundwaters separately from other underground resources such as oil and gas. That gradual approach would expedite the progress of the Commission's work. Both those categories of resources should be governed by the principle of permanent sovereignty, but there were a number of differences between them. For instance, confined groundwaters were vulnerable to agriculture and industrial activities, whereas the same could not be said of oil and gas. States on whose territory water resources were located must adopt measures to avoid their contamination. Moreover, the work being carried out by the Study Group on International Liability was of relevance to the subject of transboundary confined groundwaters. Such risks were not involved for oil and gas, as the principles governing the management of relevant transboundary structures were already well established. The exclusion of solid minerals from the study was justified, since they were static deposits and did not present particular sharing problems for States. He understood the concerns expressed by Mr. Kateka concerning animal migration but considered that they could be dealt with under bilateral or multilateral agreements such as the Convention on the Protection of Migratory Birds.<sup>7</sup>

33. He welcomed the background information provided in the report on the Convention on the Law of the Non-navigational Uses of International Watercourses, which was designed to manage the resource shared among States on the territory through which it flowed. According to the provisions relating to equitable and reasonable State utilization of and participation in international water resources, water flowing through a river basin was not considered a resource subject to permanent sovereignty. While the principle had always been upheld by upstream States, which had never claimed sovereignty or exclusive right over those resources, it was not true of confined groundwaters, to which the principles of permanent sovereignty applied. Mr. Operti Badan was therefore fully justified in insisting that the rules to be established with respect to confined groundwaters should be identical to those relating to oil and gas. He also shared his concerns about the possibility in both cases of any reference to the resource as part of the shared heritage of mankind. For those very reasons the Commission had decided that confined groundwaters should not come under the scope of the draft of the Convention, nor, as a result, had the General Assembly followed up the Commission's compromise-based recommendation, included in its 1994 resolution on confined transboundary groundwater, that States should be guided by the principles enshrined therein in the case of confined transboundary groundwaters.<sup>8</sup> He therefore questioned the statement in paragraph 20 of the report to the effect that it was obvious that almost all of the principles embodied in the Convention were also applicable to confined transboundary groundwaters. However, he fully endorsed the statement in paragraph 24, stressing the need for an inventory of the resources worldwide and a breakdown of their different regional characteristics so as to formulate rules regulating confined transboundary groundwaters. The addendum to the report clearly showed that problems

relating to confined groundwaters differed greatly from one region to the next. It would therefore probably be necessary to establish general rules, taking into account the specific characteristics of each region.

34. Mr. KAMTO commended the Special Rapporteur's wisdom in drawing on expert advice, thus enabling the Commission to reach some understanding in a field that was generally unfamiliar to lawyers. As to the title of the topic, it would be premature to seek precision or finality. Not only had the existing title been approved by the General Assembly, but experience showed that a fully appropriate title could be established only once the whole process was completed.

35. Parts of the addendum, particularly paragraphs 7 to 9, were difficult to understand, but the problem might well lie in the French translation. He was grateful for the inclusion of the terminology list in annex I, although he hoped that in the future it could be expanded to include such expressions as "hydraulic gradients", which appeared in paragraph 9 of the addendum to the report.

36. Paragraph 9 of the addendum also contained the telling statement that groundwater moved through aquifers very slowly, with flow velocities measured in metres per year. Over decades or centuries, however, those metres built up, and a given aquifer might become a shared resource. He therefore agreed with Mr. Momtaz's suggestion that the Commission should identify the various aquifers that should be regarded as shared, so as to establish a basis for further research.

37. Such research should not be confined to practice on protecting the quality of aquifers but should be extended to practice—if any existed—on exploiting them. Thought should be given to whether the principles governing surface waters could equally apply to groundwaters. Another important question was whether the criteria for sharing a resource would be based on the needs of States, on proportionality or on fairness. In that context, he commended the Special Rapporteur's decision to consider water separately from oil and gas for the time being, as long as that approach did not become an obstacle to a more comprehensive consideration of the matter: the three were inextricably connected. Common principles must be found and a distinction must be drawn between exploitation regimes and protection regimes, which could vary according to the resource in question.

38. Mr. BROWNLIE expressed concern that the metaphor "shared resource" was too simple, as though groundwater undercutting a boundary, for example, could be regarded as a single geological structure like oil or natural gas. It was clear from the addendum that the nature of aquifers was extremely varied, so the metaphor of sharing, with which the international community was familiar in the context of oil or gas, hardly applied. He had in mind, for example, the fascinating case study in the addendum concerning the Nubian Sandstone Aquifer System, which covered an enormous area. Situations of that kind would need to be governed by sophisticated concepts of legal interests; "sharing" was too simple. It was difficult to believe that, if some event occurred in the Libyan area, the "share" of Sudan would immediately be diminished. Yet, at the same time, those two States were obviously con-

<sup>7</sup> Signed in Washington, D.C., on 16 August 1916 (United States, 39 Stat. 1702, *Treaty Series*, no. 628).

<sup>8</sup> See 2778th meeting, footnote 10.



cerned States in relation to the aquifer and, in hydrological and possibly other terms, had an interest in the welfare and integrity of the aquifer as a whole. He urged the Commission to have no truck with facile analogies with oil and natural gas.

39. Mr. KEMICHA said the report afforded an excellent basis for discussion. There was one potential difficulty, however—the title could give rise to confusion. It was not clear whether the word “shared” meant that the resource in question was exploited jointly with another State or that it would be shared in future. The question would become crucial when the Commission moved on to consider the question of oil and natural gas. Indeed, he wondered whether, in view of the specificity of legal regimes governing the exploitation of oil and gas, it was appropriate for the latter to form part of the study at all.

40. Mr. GALICKI said that, although preliminary, the report was extremely valuable, especially since it contained scientific and technical information that would be crucial in shaping the Commission’s understanding of the legal problems that might arise. He shared the doubts of some members of the Commission concerning the title of the topic, for it seemed both too wide and insufficiently precise. The terms “shared” and “natural resources” required much more consideration.

41. Similarly, the Special Rapporteur’s decision to deal with three kinds of natural resources—confined transboundary groundwaters, oil and natural gas—might also be regarded as both too narrow and too wide a choice. There were numerous other natural resources of a transboundary nature; yet, at the same time, the three chosen by the Special Rapporteur presented a very broad scope. Oil and gas had characteristics extremely different from those of groundwaters and might require different legal regulations. He would be inclined to favour restricting the topic to groundwaters, although he did not exclude the possibility of extending consideration at a later stage to other shared natural resources, such as oil and gas.

42. Limiting the scope of the topic would not, however, mean that other serious difficulties would be avoided. The very concept of “confined transboundary groundwaters” was problematic, especially in the light of the Convention on the Law of the Non-navigational Uses of International Watercourses, article 2 of which grouped surface waters and groundwaters together as “constituting by virtue of their physical relationship a unitary whole”. Moreover, the Special Rapporteur’s choice, after examining a variety of terms used in practice, of the phrase “confined transboundary groundwaters” did not diminish the difficulties arising from the need to define the term precisely from both a hydrogeological and a legal standpoint. There seemed to be differences even between various kinds of groundwaters. Further consultation with hydrogeologists might, as suggested by the Special Rapporteur, be useful.

43. As the Special Rapporteur had also stated, almost all the principles embodied in the Convention applied also to confined transboundary groundwaters. One of the Commission’s most important tasks should therefore be to identify the legal similarities and differences between groundwaters and other international watercourses, which

would enable it to draft specific rules dealing exclusively with confined transboundary groundwaters.

44. He agreed with the suggestion that, in order to formulate rules, the Commission should have an inventory of confined transboundary groundwaters worldwide and a breakdown of the different regional characteristics of such resources. As wide a knowledge as possible of the State practice with regard to the use and management of confined groundwaters, and of existing domestic legislation and international agreements, was also desirable. The serious and time-consuming nature of such tasks was yet another reason to limit the scope of the topic.

45. Ms. XUE, after commending the report, said that the very concept of shared natural resources was likely to trigger controversy, especially at a time when environmental law was developing at increasing speed. All parts of nature were interconnected but, as well as being the common heritage, natural resources were also subject to the concepts of sovereignty and security. It was therefore understandable that States tended to adopt a prudent attitude. She supported the Special Rapporteur’s approach of concentrating on just three areas—groundwater, oil and natural gas—since they shared the characteristic of flowing. At the same time, the situation of other natural resources should be borne in mind, so that the scientific and technical situation was thoroughly understood, as well as the related human activities and the impact on resources. Meanwhile, the decision to focus first on groundwater was very wise. Data on hydrogeology would be crucial, and she looked forward to hearing a hydrogeological report at a future meeting, which would place the Commission’s work on a scientific footing.

46. The heated discussion which had arisen in the Commission a few years ago as to whether confined groundwater came within the scope of the law on the non-navigational uses of international watercourses had been caused by the vague definition of the natural connection between underground water and surface water and by the lack of scientific data on the impact that one country’s use of groundwater had on the use of the same body of water by another State. Another moot point had been whether groundwater should be governed by domestic or international water law. Although the Commission’s decision to exclude confined groundwater from the Convention on the Law of the Non-navigational Uses of International Watercourses had been dictated by the principle of States’ sovereignty over their domestic resources, according to the last of the four criteria mentioned in paragraph 6 of the addendum, groundwater did fall within the scope of the Convention if the body of water in question was international in nature.

47. Since then, the Commission had adopted the stance that groundwater was a shared natural resource. She agreed with Mr. Brownlie about the need for a scientific basis in order to delimit the scope of the topic and for an explanation of why the Commission took the view that groundwater was a shared resource. One good reason for studying the issue might be that sharing had led to a variety of interrelated actions by States, which called for regulation under international law. Nevertheless the impact of groundwater use had to be precisely quantified and must not rest on general assumptions; hence more research was

needed. The Special Rapporteur should therefore pursue his investigation of the subject because, regardless of the final form taken by the Commission's study, it would enhance countries' knowledge about the depletion of natural resources and would contribute to a better understanding of the current situation in that respect.

48. While oil, natural gas and groundwater all had one common feature, namely that they flowed, their geological structure diverged. Once again, the Commission's study should be based on scientific evidence, and so consideration of oil and natural gas should be deferred.

49. Mr. YAMADA (Special Rapporteur), summing up the discussion, said that, in future reports he would take account of all the comments made in the course of the debate and endeavour to provide more scientific data.

50. Concern had been expressed about the term "shared", on the grounds that it was unclear by whom the natural resources in question were shared, and, in that connection, several members had emphasized the concept of permanent sovereignty. He understood the notion of "shared" to refer not to ownership but to responsibility for resource management. It was to be hoped that that controversy could be overcome by defining the scope of the topic in physical terms. While some members had contended that wildlife was also a shared natural resource, he, like a number of others, would prefer to concentrate on groundwater, which might become a subtopic, because he did not feel qualified to deal with the subject of migratory animals and birds. He therefore agreed with Mr. Galicki that the final decision regarding scope should be postponed.

51. He concurred with the view that groundwater involved political, social and economic factors and that legal solutions were not a panacea. For that reason, it might be a good idea to formulate certain principles and then to focus on cooperation regimes, including dispute settlement. He accepted criticism of the statement in paragraph 20 of the report that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters, because more had to be known about groundwater before it could be said with any certainty that those principles did apply.

52. Several references had been made to the great vulnerability of groundwater and to the need for stricter thresholds of transboundary harm. That area did indeed require serious consideration. It would be inadvisable to adopt a universal approach, for regional regimes might be more effective. If rules were formulated, they should resemble the articles of the Convention on the Law of the Non-navigational Uses of International Watercourses, which recognized the important role played by regional efforts.

53. In response to the question whether groundwater discharging into a spring was covered by the Convention, he drew attention to the four conditions set out in paragraph 6 of the addendum to his report and said that, in his opinion, if a spring did not satisfy those criteria, the groundwater discharging into it would not come within the purview of the Convention either.

54. The query regarding the meaning of the phrase "normally flow into a common terminus" in article 2 of the Convention was hard to answer. Usually a common terminus was an ocean. The word "normally" had, however, been included in the text at the very last minute, despite the Special Rapporteur's objections, and even the scientific community experienced difficulty with that definition. For that reason, it would be necessary to reconsider the definition of the groundwater to be dealt with in the study in hand.

**The fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded)\* (A/CN.4/529, sect. F, A/CN.4/L.644<sup>9</sup>)**

[Agenda item 8]

REPORT OF THE STUDY GROUP

55. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law), presenting the Study Group's report (A/CN.4/L.644), said that the Study Group's discussions of the *lex specialis* rule and "self-contained regimes" had taken as their point of departure the previous year's report<sup>10</sup> and the debate in the Sixth Committee (A/CN.4/529, sect. F). The current report confirmed that the Study Group's approach to fragmentation would be substantive and not institutional. An analytical distinction ought to be drawn between the different patterns of interpretation or apparent conflict. It had been decided that such differences should be treated separately, because they raised many questions relating to fragmentation. The report did not pass judgement on the merits of the cases referred to in paragraph 9 and did not imply that the interpretations placed on them were the only ones possible.

56. It was envisaged that guidelines might emerge from the Study Group's consideration of the different aspects of the topic which had been chosen by the Commission itself and endorsed by the Sixth Committee. The Study Group had been of the opinion that *lex specialis* could be understood in a variety of ways, but that there was no need to take a stand on them and that the Chair's study would try to encompass most of them. In discussing self-contained regimes, it had been emphasized that general law would intervene in a number of ways in the operation of those regimes. Finally, the necessity of dealing with regional laws in the study had been acknowledged.

57. Mr. MELESCANU said that the open-minded and flexible approach evident in the report was essential at such an early stage of work. The Romanian branch of ILA would be collaborating in the consideration of the application of successive treaties relating to the same subject matter. The fragmentation of international law was not a theoretical question, but the very real consequence of globalization and the diversification of public international

\* Resumed from the 2769th meeting.

<sup>9</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

<sup>10</sup> See 2769th meeting, footnote 8.

law. The Study Group's aim should be to produce guidelines for States; it should not become embroiled in theoretical debates that would be of no practical use.

58. Mr. MANSFIELD said that the New Zealand branch of ILA and the Law School of Victoria University of Wellington would be assisting him with his part of the study.

59. The CHAIR suggested that the Commission should take note of the report of the Study Group on the Fragmentation of International Law.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 2780th MEETING

*Friday, 25 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opetti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR said that the Commission would proceed to the official closure of the International Law Seminar and that, to that end, the meeting would be suspended.

*The meeting was suspended at 10.05 a.m. and resumed at 10.30 a.m.*

**Reservations to treaties<sup>1</sup> (*continued*)\*\* (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

\* Resumed from the 2770th meeting.

\*\* Resumed from the 2760th meeting.

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

## EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

2. Mr. PELLET (Special Rapporteur), introducing his eighth report on reservations to treaties (A/CN.4/535 and Add.1), said that the report began by outlining reactions to his seventh report,<sup>3</sup> presented at the previous session, and describing new developments relating to reservations that had taken place over the past year. With regard to the first point, the Commission should be informed that, in addition to the information contained in the report, the draft guidelines appearing in the seventh report had been examined during the first part of the session by the Drafting Committee, which had improved them before their adoption by the Commission. He had drafted the corresponding commentaries, which the Commission would consider when it adopted its report on the current session, in accordance with the usual practice. Moreover, with the exception of draft guideline 2.1.8 [2.1.7 *bis*] on the procedure in case of manifestly [impermissible] reservations, the Sixth Committee had given a good reception to the draft guidelines adopted at the preceding session. Some of the comments made on that occasion had been interesting, but they could be taken into account only when the Commission had considered the draft Guide to Practice on second reading. It should be recalled, meanwhile, that draft guideline 2.5.X, on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, had been withdrawn until the consequences of the impermissibility of a reservation had been considered. The reactions to the text and to its withdrawal were contained in paragraph 12 of the report, but it did not seem that any particularly enlightening conclusions could be drawn.

3. With regard to the second point, the most interesting new element was a document dated 13 March 2003, entitled “Preliminary opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights”,<sup>4</sup> whose totally undogmatic approach contrasted strikingly with that of General Comment No. 24 of the Human Rights Committee.<sup>5</sup> Rather than adopting a combative attitude towards States and ordaining that a given reservation was impermissible, the Committee on the Elimination of Racial Discrimination endeavoured to set up a dialogue with them so as to encourage as complete an implementation of the International Convention on the Elimination of All Forms of Racial Discrimination as possible. That was also the position of the Committee on the Elimination of Discrimination against Women,<sup>6</sup> as was stated in paragraph 21 of the report. It was also the main lesson that he had drawn from the meeting between members of the Commission and members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights during the first part of the session. Similar meetings with members of the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights were to take place during the second part. The introductory sec-

<sup>3</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

<sup>4</sup> CERD/C/62/Misc.20/Rev.3.

<sup>5</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

<sup>6</sup> See CEDAW/C/2001/II/4.



tion of the eighth report also contained a brief account of new developments as a result of the work of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the Grand Chamber of the European Court of Human Rights. Finally, it reported that the legal service of the European Commission had finally replied to section I of the questionnaire on reservations.<sup>7</sup>

4. Turning to the structure of the report, he explained, first of all, that, after the introduction and the first chapter, which would conclude the chapter on the withdrawal and modification of reservations and interpretative declarations held over from the report of the preceding year, he had intended, as was indicated in paragraph 31 of the eighth report, to devote a second chapter to the procedure for formulating acceptances of reservations and a third to the formulation of objections. While drafting the chapter on acceptances, however, he had realized that it would be more logical to reverse the order of the two chapters, since an acceptance was ultimately most often simply an absence of objection. That was why addendum 1 to the eighth report contained the beginning of the new chapter II concerning the procedure for formulating objections, while the report itself contained the introduction and chapter I.

5. Chapter I dealt with two points that he had not had time to include in his seventh report concerning the withdrawal and modification of reservations, namely, the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations. At the preceding session, the Commission had considered the question of modifications that sought to lessen the scope of reservations and concluded that they were, rather, partial withdrawals and, as such, ought to be encouraged; that had been the aim of draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12], adopted on first reading at the current session (see 2760th meeting, para. 76). The situation in which a State sought, in modifying its reservation, to enlarge its scope was quite different. In that case, it was no longer a partial withdrawal, but a kind of late formulation of a reservation; that situation was covered by draft guidelines 2.3.1 to 2.3.3, which had been adopted by the Commission at its fifty-third session, in 2001,<sup>8</sup> and certainly did not seek to encourage such action. By analogy, it would seem that the restrictions adopted in cases where the scope of a reservation was lessened should be transposed to the enlargement of such scope, without anything being added or removed. Without anything being added, because it was illogical that a State that had made a reservation to a provision of a treaty should be placed at a disadvantage in modifying that reservation in comparison with a State which had made no reservation, but which could nevertheless formulate a late reservation, provided that all the other parties were in agreement (draft guideline 2.3.1). With nothing removed, either, however, since such modifications should surely not be encouraged, for the same reasons for which the late formulation of reservations had been hedged about with extremely strict conditions. Moreover, that approach corresponded with the

practice, or at least with that of the “principal” depositary of multilateral agreements, the Secretary-General of the United Nations, as was described in paragraphs 41 to 45 of the report. He was therefore proposing a draft guideline 2.3.5 to deal with that point by simply referring to the rules applying to the late formulation of reservations, while leaving two aspects undecided. The first, less important and rather of an editorial nature, was whether those rules should be referred to explicitly or whether that was unnecessary. The second, which was mentioned in paragraph 48 of the report, was whether the “enlargement of the scope of a reservation” should be defined. He himself had not been in favour of that course of action, unless it was dealt with in the commentary, but the Drafting Committee, and then the Commission, had subsequently adopted draft guideline 2.5.10 [2.5.11], concerning the partial withdrawal of a reservation, the first paragraph of which defined what was meant by the term. If only for the sake of symmetry, it would seem sensible to proceed in the same way in dealing with the enlargement of the scope of a reservation and model draft guideline 2.3.5 directly on draft guideline 2.5.10 [2.5.11] by including in it a first paragraph that would define “enlargement”. The text of the definition would be that proposed in paragraph 48, which he had originally intended for the commentary, but could be simplified along the lines of paragraph 1 of draft guideline 2.5.10 [2.5.11], with the following text:

“Enlargement of the scope of a reservation has the purpose of excluding or modifying the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.”

The two situations were not entirely analogous in that, while the first case could be restricted to the effects (partial withdrawal lessened the legal effect of the reservation), in the second case there could be legal effects only if all the other parties were in agreement, and that was why it was necessary to include the phrase “has the purpose of” excluding or modifying the legal effect. The eighth report was fairly brief as far as the withdrawal of interpretative declarations was concerned, first because there was very little State practice in that regard (para. 51 of the report). States could nevertheless withdraw “simple” interpretative declarations whenever they wished, since the withdrawal was carried out by a competent authority. That was what draft guideline 2.5.12 said, and the only question to be asked was whether to refer explicitly to the rules which were applicable to the formulation of such declarations and which were the subject of draft guidelines 2.4.1 and 2.4.2. The modification of “simple” interpretative declarations did not pose a problem either. Since draft guidelines 2.4.3 and 2.4.6 provided that such declarations could be formulated at any time unless the treaty provided otherwise, those declarations could also be modified at any time in the same way. The very little practice he had been able to find (paras. 66 and 67) bore that out, as was stated in draft guideline 2.4.9, which raised the technical question whether mention should be made of the case where a treaty expressly prohibited the modification of an interpretative declaration. Since that was rather a moot point, perhaps it should be included in the commentary. Referring to paragraph 65 of the report, he noted that, as

<sup>7</sup> The questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

<sup>8</sup> *Yearbook ... 2001*, vol. II (Part One), para. 157.

the rules relating to the modification of simple interpretative declaration were exactly the same as those relating to their formulation, it might be enough to make a very minor amendment to the text of draft guidelines 2.4.3 and 2.4.6 and the commentaries thereto in order to combine them into one single rule on the formulation and modification of interpretative declarations. He acknowledged that was a rather unorthodox proposal, since the draft guidelines in question had already been adopted, but it would provide a more elegant solution.

6. There remained the problem of the withdrawal and modification of conditional interpretative declarations, and he was aware that several members were sceptical about whether the Commission should continue to take a particular interest in that category of interpretative declarations, on the grounds that they were most probably subject to the same legal regime as reservations and it would be enough to say so once and for all. He recalled that, as he indicated in paragraph 55 of his report, he did not oppose such a solution in principle, provided that the intuition on which it was based turned out to be correct. The Commission would not find that out until 2004, when he would submit a report on the validity of reservations and interpretative declarations and, possibly, on their effects. Until then, however, the Commission had agreed to accept the *status quo* and he sincerely hoped that that compromise would not be called into question when considering draft guidelines 2.5.13 and 2.4.10 dealing with the withdrawal and the modification of conditional interpretative declarations, respectively. It seemed to him that it would be difficult to simply transfer the rules applicable to the modification of reservations to conditional interpretative declarations. While it was relatively simple to decide whether the modification of a reservation was tantamount to partial withdrawal or enlargement of scope, it was very difficult to do so with respect to modifications of conditional interpretative declarations, as specified in paragraphs 59 and 60 of the report. He had therefore decided not to propose that the Commission should transpose the distinction drawn in draft guidelines 2.3.5 and 2.3.10 to conditional interpretative declarations. It had seemed reasonable to consider that any modification of a conditional interpretative declaration, which must, by virtue of guidelines 1.2.1 [1.2.4] and 2.4.5 [2.4.4], be made at the time the party concerned expressed its consent to be bound, must always follow the regime applicable to the late formulation or enlargement of the scope of a reservation. In other words, any modification of a conditional interpretative declaration must be subject to the absence of objection by one of the other contracting parties. That was what was proposed in draft guideline 2.4.10, as contained in paragraph 61 of the report. A more elegant solution would be to take draft guideline 2.4.8, adopted in 2001, and combine in one single draft guideline the principles applicable to the late formulation and modification of conditional interpretative declarations. However, he would not insist on such a solution if it was pointed out that the Commission's practice was not to go back on rules it had already adopted, even if, in the circumstances, it would actually be making them more complete.

7. With regard to the withdrawal of conditional interpretative declarations, of which no clear example had been found, it seemed that there was no choice but to follow

the rules relating to the withdrawal of reservations as, like them, conditional interpretative declarations limited the scope of the commitment by their authors unilaterally, and it was therefore in their interest to withdraw them; guideline 2.5.13 was worded along those lines, namely, in such a way that States would not hesitate to withdraw those declarations.

8. Addendum 1 to the report, containing paragraphs 69 to 105, was the beginning of the study on the formulation of objections to reservations; chapter II, which was just the start of the study, also dealt with the “reservations dialogue”—the trend that had developed in recent years of establishing a dialogue, instead of raising formal objections to a reservation, with a view to convincing the author of the reservation either not to make the reservation or to formulate it differently. The rest of the chapter would be submitted in 2004 along with chapter III dealing with the procedure for the acceptance of reservations. Before taking up certain aspects of the issue of objections to reservations, he pointed out that objections were not defined anywhere, while reservations were defined in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions—a provision which was reproduced in guideline 1.1 of the Guide to Practice—and it therefore seemed essential to fill the gap. The Guide to Practice would indeed be incomplete if it did not provide a reasonably accurate definition of what was meant by an objection to a reservation. Paragraphs 75 to 105 of the report endeavoured to do that, on the understanding that the more specific question of “enlarged” objections, namely, those whereby a State made known not only that it objected to the reservation, but also that it understood that it was consequently no longer bound to the reserving State, would be examined at the next session in addendum 2 to the report.

9. With regard to “simple” objections, he saw no reason, as he had stated in paragraph 76, why the moment when such objections must be formulated should be specified in the definition. Article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions indirectly dealt with the question of the time at which an objection could be formulated, but it did not solve the problem under consideration, and that was why he treated it in some length in paragraph 2, which would come later, of section 1 of that chapter. However, there appeared to be no doubt that an objection, like a reservation, was a unilateral statement, and he had merely made that clear in paragraph 78. He had not considered it wise to belabour the point, but had left the possibility of a joint objection open for later consideration. It was just as obvious, as was indicated in paragraph 79, that, regardless of the phrasing or designation of that unilateral statement, it was the underlying intention that counted, just as it did in the definition of the term “treaty”. The question of what a State's intention must be in order for its unilateral statement to be termed an objection called for a much more complex answer, which he had tried to provide in paragraphs 82 to 105 of his report.

10. An objection to a reservation was obviously a negative reaction to that reservation, but the intention behind it was crucial, as was illustrated by the decision handed down on 30 June 1977 by the court of arbitration responsible for settling the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Continental Shelf between the United*

*Kingdom and France* case, which was cited in paragraph 83 of the report. Several of the examples quoted in paragraphs 84 to 88 of the report showed that, in a reservations dialogue, it could and increasingly frequently did happen that States or international organizations, the European Union being one example, reacted negatively to a reservation without formally objecting to it. He was not sure that it was in the interests of either the author of the reservation or the objector to perpetuate such uncertainty. It would be wiser for States to say clearly that they objected to the reservation. He would come back to that point when he submitted his study of the reservations dialogue. Given the lack of clarity, it had to be emphasized that, if a State or international organization deliberately placed itself in that grey zone, it ran the risk that its reaction would not be deemed an objection and would not therefore produce the effects attaching to such a unilateral declaration.

11. The position was quite different if the objector, no matter what terminology it used, clearly indicated that it rejected or was opposed to the reservation or that it considered it to be invalid for some reason. Nevertheless, as was stated in paragraph 94, no reasons had to be given for an objection, and States did not necessarily have to specify the intended effects of their objection unless those effects departed from ordinary law. He was personally highly sceptical about the effects that certain States, modelling themselves on the bodies monitoring certain human rights treaties, intended their objections to have, and in paragraph 95 he provided some examples of cases where they expected too much. He did not, however, intend to adopt a final stance on that matter at present and would say only that, when a State formulated an objection, it could indicate what effects it intended the objection to have, and that it was even required to do so under article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, if its intention was to prevent the treaty from entering into force in its relations with the author of the reservation. That hypothesis and a study of practice had led him to propose, in paragraph 98 of his report, draft guideline 2.6.1 containing a definition of objections to reservations.

12. That rather unwieldy definition left out a number of points and was silent on the question whether the State or international organization formulating the objection must be a contracting party, since the definition of reservations itself did not shed light on the matter and, in his opinion, the nature of the objection, on which much had already been written, should form the subject of a separate study and draft guideline. Dealing with that question in the proposed definition would have made the definition incomprehensible. Intention had been mentioned, as it had been in the definition of reservations itself, but without adopting a stance on the validity of that intention. In paragraph 103 of his report he drew attention to the fact that, just as there could be impermissible reservations, there could be impermissible objections, which would not therefore produce their intended effect. That was a problem not of definition but of the validity of objections. In paragraph 101 of his report, he again referred to a problem which was dear to his heart, that of objections not to a reservation but to the late formulation of a reservation. He deeply regretted the fact that the Commission had used the term "objection" to refer to two operations which were in fact

totally different in intellectual terms. He did not suggest that a debate on that very questionable syncretism should be reopened, for that would call into question the wording of draft guidelines 2.3.1 to 2.3.3, which had already been adopted, but, for the sake of consistency, the Commission should specify somewhere that the same word was being used to refer to two separate legal operations. That could be done in draft guideline 2.6.1 *bis*, which he proposed at the end of paragraph 101, or at least in the commentary to draft guideline 2.6.1. He did not have any set ideas on the matter, although he did think that a separate draft guideline would be the best solution because the problem should be clearly flagged. He would like to know the Commission's preferences in that regard.

13. The proposed definition echoed the definition of reservations contained in draft guideline 1.1 in that it did no more than state the usual purpose of an objection, which was to prevent the application of the provisions of the treaty to which the reservation related in relations between the author of the reservation and the author of the objection. That definition was, however, incomplete and did not take account of draft guideline 1.1, which had already been adopted and which embodied the practice of across-the-board reservations, which purported to exclude or modify the legal effect of the treaty as a whole with respect to certain specific aspects. That point could be made clear either by means of an addition to draft guideline 2.6.1 or in a separate draft guideline, 2.6.1 *ter*, which he proposed in paragraph 104 of his report. The advantage of the second solution was that it followed the procedure used in draft guidelines 1.1 and 1.1.1 [1.1.4] on the definition of reservations themselves. The disadvantage was that it was less economical than the first solution, which would provide that explanation in the definition of objections given in draft guideline 2.6.1. Either solution was possible, but, one way or another, the Commission had to deal with the problem when it debated the draft guidelines. In conclusion, he suggested that the draft guidelines he proposed in his report should be referred to the Drafting Committee.

14. Mr. GAJA said that he endorsed the definition of the enlargement of the scope of reservations proposed by the Special Rapporteur, as well as his argument that a "simple" interpretative declaration could be withdrawn or modified at any time, unless the treaty provided otherwise. However, he believed that it would be better not to follow the suggestion in paragraph 65 of the report that two of the draft guidelines already adopted should be revised, since the only advantage was that it might be possible to do without one draft guideline.

15. The main problem was with draft guideline 2.6.1 in paragraph 98 of the report, concerning the definition of objections to reservations, which was not entirely satisfactory. It adapted to objections the definition of reservations contained in the 1969 and 1986 Vienna Conventions, indicating that objections were statements which purported "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection". Objections were thus aimed at one or another of the effects attributed to them by the 1969 and



1986 Vienna Conventions. It was true that, according to article 21, paragraph 3, of the Conventions, the normal effect of an objection was that the provisions to which the reservation related did not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation. The ambiguity of that wording had given rise to discussions at the 1969 United Nations Conference on the Law of Treaties. It was nevertheless clear that, according to the Vienna Conventions, if a reservation was intended to exclude the application of one of the provisions of a treaty, that had to be the result, regardless of whether the reservation had been accepted or whether an objection to the reservation had been formulated. In both cases, the provision that was the subject of the reservation did not apply.

16. With regard to a reservation aimed at excluding a provision, the 1969 and 1986 Vienna Conventions assimilated the legal effect of an objection to the legal effect of acceptance. It did not necessarily follow that the objecting State was pursuing the same goal as the State that accepted the reservation. The objecting State probably did not intend to accept the reservation; at the very least, that State intended to encourage the reserving State to withdraw it.

17. The definition of objections should therefore reflect the normal attitude of the objecting State and not link it to the effects that were attributed to objections under the 1969 and 1986 Vienna Conventions. State practice also showed that States that made objections often intended different effects from those provided for in articles 20 and 21 of the Conventions. Paragraph 95 indicated that the Special Rapporteur viewed as an objection the attitude of a State which, in objecting to a reservation, intended to exclude not only the provision to which the reservation applied but also a whole portion of a treaty. That type of objection should, regardless of its legal effects, also be included in the definition of objections.

18. The same should be true of objections which stated that a reservation was incompatible with the object and purpose of a treaty, but which, in a somewhat contradictory manner, indicated that treaty relations were nevertheless established between the reserving State and the objecting State. He gave the example of the declaration by the Government of the Federal Republic of Germany on some reservations made by Sudan to the Vienna Convention on Diplomatic Relations. The German Government had considered those reservations to be incompatible with the object and purpose of the treaty, yet had declared that that would not have prevented the treaty from entering into force between Sudan and the Federal Republic of Germany.<sup>9</sup>

19. The alternative version of draft guideline 2.6.1 contained in paragraph 105 of the report and draft guideline 2.6.1 *ter* contained in paragraph 104 dealt with cases when legal effects not provided for in the 1969 and 1986 Vienna Conventions were produced. Those guidelines covered the fairly rare case of an across-the-board reser-

vation whose purpose was to prevent the application of a treaty as a whole with respect to certain specific aspects “to the extent of the reservation”. An objection to such a reservation should be included in the definition; however, the aim pursued by the author of the objection and the legal effects attributed by the Convention to objections did not have to be identical.

20. The definition of an objection contained in draft guideline 2.6.1 should be broadened. That task could be given to the Drafting Committee, which could also decide whether or not the future definition obviated the need for draft guideline 2.6.1 *bis* on objections to late formulation of reservations.

21. With regard to the definition of the objecting State, the Special Rapporteur was correct to say that article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions must not be taken to mean that the objecting State must be a contracting State or a contracting international organization. In his view, the definition should be based on article 23, paragraph 1, of the Conventions: a State entitled to become a party to the treaty must be mentioned in addition to the contracting State or contracting international organization.

22. Mr. PELLET (Special Rapporteur) said that the definition of an objection raised a problem of principle. The definition he had proposed was faithful to the 1969 and 1986 Vienna Conventions, whereas Mr. Gaja’s position was different, more intuitive. In his view, a case could be made for both positions.

23. He called on the members of the Commission to comment on the two positions and to indicate whether it was better to adopt a definition which remained as faithful as possible to the 1969 and 1986 Vienna Conventions or a broader definition which was less faithful to the Vienna spirit, but undoubtedly clearer.

24. Mr. ECONOMIDES said that he was quite surprised by draft guideline 2.3.5 on the enlargement of the scope of reservations. According to the Special Rapporteur, a modification of a reservation that aimed at enlarging its scope should be viewed as a late formulation of a reservation. In his own view, that was only ostensibly true, and in fact there was a fundamental difference between the two. A reservation formulated late was one which a State had in good faith forgotten to attach to its instrument of ratification. That had happened twice in Greece. The late formulation of a reservation thus aimed to remedy an oversight. On the other hand, draft guideline 2.3.5 was outside the realm of good faith and opened up very dangerous prospects for treaties and international law in general. To enlarge the scope of a reservation was to enlarge the opposition to a treaty. In his view, the sort of provision which authorized the State to modify its reservations in order to enlarge their scope could not be equated with a late reservation; it was a new reservation which undermined the treaty. The provision should not be included in the draft guideline, since it represented a threat to international legal security. He favoured prohibiting such types of reservation and proposed the following wording: “The modification of an existing reservation in such a way as to enlarge its scope shall be prohibited.”

<sup>9</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002*, vol. I (United Nations publication, Sales No. E.03.V.3), pp. 89 (reservation by Sudan) and 91 (objection by the Government of Germany).

25. In paragraph 39 of his report, the Special Rapporteur pointed out that the Head of the Legal Advice Department and the Treaty Office of the Council of Europe had noted that, in some instances, States had requested the Secretariat of the Council of Europe to provide information on whether and how reservations could be modified. The Secretariat's response to such questions had always been the same: modifications which would result in an extension of the scope of existing reservations were not acceptable. He believed that the practice of the Council of Europe should be followed, even though the United Nations had used the opposite practice, which, in his view, was very dangerous.

26. During the second reading of the draft guideline, the possibility of formulating a late reservation should be restricted. The State must prove that it had already formulated the reservation prior to depositing its instrument of ratification in order for such a reservation to be accepted.

*The meeting rose at 11.45 a.m.*

## 2781st MEETING

*Tuesday, 29 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that the eighth report (A/CN.4/535 and Add.1) was rich and useful. The conclusions drawn by the Special Rapporteur in Chapter I, on

the withdrawal and modification of reservations and interpretative declarations, were quite correct, and the draft guidelines contained there could therefore be referred to the Drafting Committee. The logic underlying them was sound, and he endorsed the view, expressed in paragraph 36 of the report, that the rules applying to a late formulation of a reservation also held good for "enlargement" of the scope of a reservation, a term that could be interpreted in the commentary.

2. He could also subscribe to the Special Rapporteur's opinion that an interpretative declaration could be withdrawn at any time since, according to the general rule, it could be formulated at any time, although it was not clear why partial withdrawal was impossible. Draft guideline 2.4.9 was acceptable, and the new variants of guidelines 2.4.3 and 2.4.6 were, as the Special Rapporteur had said, more elegant. Personally he, like several other members of the Commission, would prefer to extend the provisions on reservations to conditional interpretative declarations as well.

3. The definition of objections to reservations, dealt with in paragraphs 98 and 105, was of central importance. The principal element of the definition was the intention of the objecting State "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection" (para. 98). That element was consonant with article 21, paragraph 3, and with article 20, paragraph 4 (b), of the 1969 Vienna Convention, the latter provision being the only one in the Convention that referred to the intention of the objecting State. Nevertheless, there was nothing in the Convention or in State practice to indicate that that was the sole possible intention of States objecting to reservations. It was possible to discern the intention of the objecting State above all by analysing the text of the objection.

4. While the Special Rapporteur had done much research into State practice, he had held that only reactions to reservations that evidenced their authors' intentions could be termed objections. Accordingly, he had doubted whether Sweden's reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>3</sup> qualified as an objection to that reservation. In fact, the text of the objections of Sweden and Norway<sup>4</sup> to that reservation did show that their aims had been quite different, as the quotation in paragraph 96 of the report made plain, namely, to secure the application of the treaty to the objecting State and to persuade that State to withdraw its objection.

5. Recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe to member States on responses to inadmissible reservations to international treaties was pertinent to an analysis of the intentions of

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 316 (reservation by Qatar) and 318 (objection by Sweden).

<sup>4</sup> *Ibid.*, p. 317.

objecting States, and greater attention should therefore be devoted to it. Although it was only a recommendation of a regional organization, it testified to the existence and acceptance of a practice that was spreading in the domain of objections to reservations. First, the model responses set out in the recommendation were models of objections to reservations and not of any other kinds of reactions. Second, the reactions of Sweden and Norway, which he had just mentioned, had been fully in line with one of those model responses. Moreover, those countries had reacted in a similar manner to the reservation entered by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism.<sup>5</sup> Consideration of those objections by the Council of Europe's Ad Hoc Committee of Legal Advisers on Public International Law had led to the finding that, at least as far as the member States of that organization were concerned, they were indubitably objections to reservations.

6. Third, only 2 of the 11 model responses in the recommendation said that such an objection prevented the entry into force of the treaty between the objecting State and the State acceding to the treaty. That showed that the member States of the Council of Europe regarded the intention that was central to the definition of an objection proposed by the Special Rapporteur to be only one of several possible intentions.

7. Fourth, paragraph 88 of the report suggested that Austria's reaction to Malaysia's reservation to the Convention on the Rights of the Child<sup>6</sup> could be deemed either conditional acceptance or a conditional objection, yet one of the model responses in the recommendation of the Council of Europe reproduced almost word for word the final clauses of the Austrian reaction and termed it an objection. If the view were taken that, in that case, the objecting State was reserving the right to make a final appraisal of the reservation after it had received further explanations, it would be possible to call that a conditional objection or, better, a preliminary objection, but certainly not a conditional acceptance. The intention of the objecting State was clearly, as the Special Rapporteur had admitted, to prompt the State making the reservation to withdraw or modify it. The Council's recommendation had shown that very often the intention of objecting States was not to prevent the entry into force of a treaty between them and States entering reservations but, on the contrary, to secure the integrity of the treaty regime by persuading those States to withdraw their reservation. That was especially important in the context of universal international treaties establishing *erga omnes* obligations.

8. Apart from that, the intention of the objecting State was frequently to ensure that a reservation could not subsequently be made opposable to it, or to preclude the possibility of a customary norm based on the reservation being made opposable to it.

9. He therefore suggested that, if it was considered expedient to include the intention of the objecting State in the definition of objections, that intention should not be

restricted in the manner proposed by the Special Rapporteur, since it was often quite different. Naturally, the question arose whether it was necessary to link the intention of the objecting State with the legal effects of the objection, which were provided for in the 1969 Vienna Convention. If those issues were interrelated—and he was not certain that they were—then possibly the adoption of the definition of objections to reservations should be postponed until the legal effects of objections had been studied.

10. Ms. ESCARAMEIA thanked the Special Rapporteur for a clearly structured, highly informative report. His summary of the seventh report<sup>7</sup> and its follow-up had also been most useful. The efforts of the Special Rapporteur to secure the cooperation of a number of other important legal bodies were commendable.

11. The Special Rapporteur had drawn an analogy between enlargement of the scope of existing reservations and late formulation of reservations, to which draft guidelines 2.3.1 to 2.3.3 referred, and suggested that such enlargement was fine if all the parties accepted it. The reasons given were that, while no encouragement should be given to such a widening of the scope of reservations, legitimate grounds for doing so might exist and so some allowance had to be made for that eventuality. Similarly, a parallel was drawn with article 39 of the 1969 Vienna Convention, which required unanimous agreement among the parties whenever a treaty was amended, even though enlargement of the scope of a reservation entailed less modification than a treaty amendment.

12. The Special Rapporteur had, however, mentioned two contradictory practices: that followed by the Directorate General of Legal Affairs of the Council of Europe, which related more to human rights treaties, where no enlargement of the scope of reservations was accepted because it would jeopardize both the certainty of the treaty and its uniform application, and that followed by the Secretary-General of the United Nations, where enlargement of the scope of reservations was treated in the same way as late reservations.

13. Mr. Economides had raised the issue of bad faith and good faith, but in her opinion late reservations, or enlargement of the scope of a previous reservation could be prompted by either, although bad faith was a more likely motive for enlargement. The 1969 and 1986 Vienna Conventions provided a basis for adopting a more rigid position with regard to both the definition of reservations and their formulation and did not even allow late reservations. The principle of the integrity of treaties, particularly important in human rights treaties, deserved some consideration, and it was also necessary to remember that later interpretations of reservations to exclude the legal effects of treaty provisions were totally forbidden. For all those reasons, she believed that modification of a reservation by broadening its scope would affect the integrity of a treaty, and draft guideline 2.3.5 should either be deleted or limits should be placed on the extent to which the scope of a reservation could be enlarged. If that draft guideline was retained, a second paragraph should be added to define what was meant by "enlargement of the scope of a reservation". On the other hand, she agreed with the Special Rapporteur

<sup>5</sup> *Ibid.*, vol. II, p. 141.

<sup>6</sup> *Ibid.*, vol. I, pp. 289 (reservation by Malaysia) and 294 (objection by Austria).

<sup>7</sup> See 2780th meeting, footnote 3.



teur that a distinction should be established between an objection to a process and an objection to the contents of a reservation, and that different wording should be used to describe dissimilar situations.

14. As to the question of the withdrawal and modification of interpretative declarations, guideline 2.2.12 was acceptable and the sentence in brackets should be included for the sake of clarity. She was against dealing with conditional interpretative declarations as if they were different from reservations, but if the Commission was intent on doing so, she agreed with guideline 2.5.13 and also guideline 2.4.10, on the modification of conditional interpretative declaration, and guideline 2.4.9, on the modification of interpretative declarations.

15. As far as the reservations dialogue was concerned, undue weight seemed to have been given to the 1969 Vienna Convention in the Special Rapporteur's efforts to find a firm basis for a definition of objections to a reservation, although he then went on to mention circumstances in which a reservation dialogue could centre on quasi-objections, or in which States merely wished to give their reasons for withdrawing a reservation, or wanted to engage in a dialogue which would not necessarily culminate in an objection, but in which they would press another country to modify its position. Those situations, for which no provision was made in the 1969 and 1986 Vienna Conventions, did not really involve objections, but were encountered in practice. As the Conventions did not, in fact, define objections to reservations, the draft guideline rested on an analogy with the contents of article 21, paragraph 3, of the Conventions. Article 21, paragraph 3, offered scope for great flexibility, in that it implied that reservations could have a very wide ambit and were not necessarily restricted to situations making it impossible for treaties to enter into force, or for the particular provisions to apply between the two parties. The Conventions might allow for more elasticity than that offered by the addendum to the report. At all events, the definition proposed in guideline 2.6.1 closely followed the relevant articles of the 1969 Vienna Convention and was the most rigorous interpretation, but State practice needed to be taken into account, and allowance must also be made for many other situations which would not produce the effects mentioned in the guideline. For that reason, the definition of objections to reservations should be more flexible and guideline 2.6.1 *bis* should be included in the Guide to Practice. Finally, the Commission should make a recommendation to the effect that, as far as possible, the reasons for the objection should be stated.

16. Mr. KOSKENNIEMI said that the character and effects of objections to reservations were significant and perhaps controversial aspects of the regime of the 1969 and 1986 Vienna Conventions. The Special Rapporteur's definition of objections was too limitative and did not reflect ongoing discussions of the topic. He therefore agreed with Mr. Kolodkin that it was strange to define objections by reference to their actual or intended effects.

17. No doubt the regime of objections to reservations left much to be desired. The fact that few States took the opportunity to raise such objections might be indicative of a somewhat cavalier attitude to the way in which other States acceded to treaties, or it might simply stem from

a lack of time and resources for engaging in systematic reservation-watching. Not that making an objection was merely a matter of bureaucratic routine, since the "reservations dialogue" might well affect the relations of parties to the dialogue and give rise to some unease about individual States making judgements about others' reservations, because such judgements conflicted with the principle of sovereign equality.

18. That unease and the unsatisfactory character of the regime of objections under the 1969 and 1986 Vienna Conventions were caused by the decentralized and open-ended nature of the reservations regime. In the best of all worlds, judgements as to the permissibility of reservations would be made by law-applying organs that were not dependent on the political preferences of States parties and unaffected by the needs of diplomatic courtesy. Such a development had already occurred in some areas. The European Court of Human Rights and the Inter-American Court of Human Rights had determined that their jurisdiction extended to the scrutiny of the permissibility of particular reservations to the relevant conventions, and the European Court of Human Rights had found that it also had the competence to declare some reservations invalid, but to hold a State party bound irrespective of such a reservation. The doctrine of severability was, however, controversial.

19. The practice of individual States filing objections that applied to the severability doctrine was even more controversial. Nevertheless a number of States insisted that, in some situations, a State must be bound by a treaty as a whole, irrespective of a reservation it had made, when that reservation was contrary to the object and purpose of a treaty and undermined its integrity and the basis upon which it had been agreed. Such a view had been taken particularly with regard to multilateral treaties which gave rights and powers to third parties, human rights treaties being a case in point. The Special Rapporteur was aware of that practice since he had quoted an example of it in paragraph 96 of the report.

20. When a State made such an objection, it was principally motivated by a concern to maintain the integrity and effectiveness of the treaty and less by a concern to protect the consent of the reserving State. Whether or not the objection achieved that effect was a moot point, but the practice was gaining acceptance, as was shown by the fact that 33 objections made by States to reservations to the Convention on the Elimination of All Forms of Discrimination against Women<sup>8</sup> and to the Convention on the Rights of the Child<sup>9</sup> had applied the severability doctrine.

21. The best arguments in defence of the severability practice, which many States regarded as legally dubious, could be found in considerations that transcended the language of article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 Vienna Convention. Although a distinction should be made between *ab initio* impermissible reservations and permissible objections that entailed the reciprocal functioning of the Vienna regime, the Special

<sup>8</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 225 *et seq.*

<sup>9</sup> *Ibid.*, pp. 282 *et seq.*

Rapporteur, instead of dealing with that question in connection with the effects of objections to reservations, had made the unprecedented suggestion that such objections were not real objections.

22. His point was that the definition of an objection was one thing, and the definition of the effects of particular types of objection was another. Nothing was gained by mixing the two: on the contrary, that merely produced counterintuitive language that failed to reflect the usage and understandings that actually prevailed in the *dialogue réservataire* among States.

23. The suggestion that an objection that applied the severability doctrine—what the Special Rapporteur called the “super-maximum effect”—might not qualify as an objection under the 1969 Vienna Convention conflicted with one of the Convention’s most obvious principles, referred to by the Special Rapporteur in paragraph 79 of the report, namely that the intentions of States took precedence over the terminology they used to express them. The Special Rapporteur went on to say that the same should apply to objections. Whatever one might say about the legal effects of an objection like the Swedish one<sup>10</sup> reported in paragraph 96 of the report, one thing was clear: it was intended as an objection, and it was intended to fall under the Convention. If what the Special Rapporteur said about the relevance of intent was true, it must follow that such acts were objections. Nobody had ever suggested otherwise, nor did the Special Rapporteur show any authority in support of the opposing view.

24. The Committee of Ministers of the Council of Europe had adopted a recommendation on responses to inadmissible reservations to international treaties containing model clauses for responses to non-specific reservations, sweeping reservations that, for example, proclaimed primacy of national law over the treaty. He went on to cite one of the responses set out in a model clause, pointing out that it was worded as an objection and intended as one; indeed, the Committee of Ministers might be surprised to learn that it was something quite different from an objection.

25. Additional aspects of the *dialogue réservataire* showed that even controversial objections were intended as objections, worded as objections and always treated as objections. The Special Rapporteur stated in paragraph 97 that it was contrary to its very essence for an objection to challenge the rule advocated by the reserving State, instead of the position adopted by that State. Such an objection actually consisted of two parts. The first was a reaction to the reserving State’s position: its reservation was contrary to the object and purpose of the treaty, and as such was inadmissible. The second part was the consequences as seen by the objecting State, namely, that the reservation was invalid and the treaty entered into force between the two States, unaffected by the reservation. Many States often made the first point without the second. In cases like that, there would seem to be no problem. The consequences would be those, unclear as they might be, laid out in the 1969 Vienna Convention. Surely, the fact that an objecting State saw particular consequences in its reaction to the reserving State’s position and that those

consequences might be controversial did not nullify or extinguish its reaction. Just as a reservation did not cease to be a reservation even if it was inadmissible, an objection did not cease to be one merely because there was controversy about its legal consequences. A will remained a will under domestic inheritance law even if it was partly invalid because the testator had violated the right of the offspring to a specified portion of the inheritance.

26. He had dwelt on his point extensively for two reasons. First, he did not think that the Special Rapporteur’s ingenious effort to use definitional fiat to avoid dealing with one of the most difficult questions about the *dialogue réservataire* was a successful codification strategy. Perhaps that was not his intention, however. Perhaps, following the practice he had suggested in paragraph 101 of his report, the Special Rapporteur intended to distinguish between objections under articles 20 and 21 of the 1969 Vienna Convention and what he wished to call “opposition”. Even in that case, however, it was hard to see how “opposition” could be defined as anything other than a species in the genus of objection, the type of objection that deemed the reservation invalid and the State bound irrespective of it. Such a redefinition would deal with the substantive problem—perhaps inelegantly, but still clearly—and would be acceptable, but a more economical approach would be to define objections on the basis of the Special Rapporteur’s reasoning in paragraph 101 regarding objections to the late formulation of a reservation. He could propose wording for a new guideline 2.6.1 *bis* to the effect that an objection might also mean a unilateral statement whereby a State or an international organization purported to prevent the application of an inadmissible reservation while holding that the treaty would enter into force between itself and the author of the reservation without the latter benefiting from its reservation. Yet ultimately, the best technique might be to widen the language of guideline 2.6.1 so as to cover all types of unilateral reactions to reservations in which the objecting State put forward its view as to the permissibility and legal effects of the reservation, and then to deal with such effects in a separate provision.

27. The second reason he had emphasized the need to codify aspects of the *dialogue réservataire* was that in State practice a distinction was evolving between various types of treaties and the various ways in which reservations and objections operated in them. In the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, which the Commission had adopted at its forty-ninth session,<sup>11</sup> it had refused to make that distinction or to recognize the *de facto* development of a regime of objections. However, many States now objected to reservations that seemed inadmissible because they went against the fundamental object and purpose of a treaty, holding that such reservations were null and void. In their view, if a State wished to join the treaty community, it must do so on the basis of broad equality of treaty burdens and a good-faith commitment to the realization of the treaty’s aims. No one should be able to pick and choose—not where key aspects of the treaty relationship were at stake, at any rate. To hold such reservations invalid might be controversial, but it was re-

<sup>10</sup> See footnote 3 above.

<sup>11</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

ceiving increasing support from States and international bodies. The argument that that went against the consensual basis of treaty law was weak, for real consent must surely encompass the object of the treaty relationship and entail what ICJ in the *Nuclear Tests* cases had referred to as good faith, trust and confidence in international relations. The Commission could surely do worse than to face up to some of the real difficulties in applying existing law so as to strike a balance between sovereign consent and the effectiveness of treaty regimes. It should be open to the argument that if developments that went beyond the language of the 1969 Vienna Convention were taken into account, the underlying ideas of that instrument would only be better reflected.

28. Mr. MELESCANU thanked the Special Rapporteur for his eighth report and welcomed the efforts he was making to open up a dialogue with other United Nations bodies which were also dealing with reservations, with a view to developing a set of rules that would be general in scope, not reserved to specific domains. He looked forward to the forthcoming dialogue on reservations to human rights treaties with the Committee on the Elimination of Racial Discrimination, *inter alia*.

29. The Special Rapporteur had a judicious position on enlargement of the scope of reservations, namely, that it should be dealt with as a late formulation of a reservation to which the rules in guidelines 2.3.1 to 2.3.3 applied. Mr. Economides' objections on that point were not entirely convincing. The rules were formulated in such a way as to dissuade States from making late reservations, and in practice it would be difficult to distinguish between a late reservation and enlargement of the scope of a reservation. The State practice cited by the Special Rapporteur in paragraph 43 of his report—the Finnish reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1986 (with annexes),<sup>12</sup> and the modification by the Government of the Maldives of its reservations to the Convention on the Elimination of All Forms of Discrimination against Women<sup>13</sup>—while not extensive or decisive, nevertheless supported his approach. He himself endorsed the idea of treating enlargement of the scope of a reservation as late formulation of a reservation, as long as all the restrictions on late formulation applied. He could agree to the adoption of a text like the one proposed for guideline 2.3.5, with the addition of a paragraph to explain the scope of the provision. Putting the explanation in the commentary would not be a good idea, since the staff of ministries of legal affairs worked under time constraints which often prevented them from reading such additional material.

30. The matter of withdrawal and modification of interpretative declarations did not raise major difficulties. The Commission had already decided that a “simple” interpretative declaration could be formulated at any time, and he therefore assumed that it could be withdrawn at any time. Accordingly, guideline 2.5.12 could be accepted with the inclusion of the words in brackets with a view to simplifying the use of the Guide to Practice.

31. Like other members of the Commission, he had some doubts about withdrawal of a conditional interpretative declaration. A final decision should be taken only after the entire subject had been studied. He could go along with guideline 2.5.13, on the understanding that the bracketed words would be retained.

32. Given the lack or even non-existence of State practice, the Special Rapporteur was proposing a logic-based approach to the modification of “simple” interpretative declarations or of conditional interpretative declarations. He endorsed the inclusion of the draft guidelines proposed but felt that the Special Rapporteur had posed a dilemma as to their placement, forcing the Commission to choose between elegance and the legal logic of the Guide. He favoured logic and accordingly endorsed guidelines 2.4.10 and 2.4.9 as proposed in paragraphs 61 and 63 of the report. A final decision on placement should be postponed until the draft was completed, since, if there were other areas where the presentation could be improved, a solution could be applied to the entire draft.

33. The formulation of objections to reservations—the “reservations dialogue”—was of special practical importance to the States. It was an area that involved not codification but progressive development of international law, since objections as such had not yet been clearly defined, not even in the Vienna Convention. In paragraphs 83 *et seq.* and the introductory remarks of his report, the Special Rapporteur had given a good idea of the complexity of the subject, which was to be taken up in earnest next year.

34. He supported the approach proposed by the Special Rapporteur and did not agree with some of his colleagues that the State's objective in formulating an objection should not be included in the definition of an objection. As the court of arbitration in the *Continental Shelf between the United Kingdom and France* case had stated, whether a reaction by a State amounted to a mere comment, a mere reserving of its position, a rejection of a particular reservation or a wholesale rejection of relations with the reserving State depended on the intention of the State concerned. One could not define an objection to a reservation without reference to the State's intention. On the other hand, a practical or useful definition could not be developed without reference to the effects which the act might produce at the international level. The very purpose of the Guide to Practice was to provide States with the requisite tools to make full use of the fundamental institution of the multilateral treaty. For that reason, he favoured including both aspects—intention and effects—either in the definition of the reservation, as proposed by Mr. Gaja, or in some other part of the draft, as Mr. Koskenniemi had suggested. If such elements were added to the definition of the reservation, which was already quite complex, the result might be somewhat cumbersome. A choice would have to be made, and some elements might have to be omitted—for example, the status that the person representing a State or international organization must have in order to formulate a reservation.

35. The discussion launched by Mr. Kolodkin's comments on the recommendation by the Committee of Ministers of the Council of Europe seemed to be based on a misunderstanding. Mr. Kolodkin's reasoning was impec-

<sup>12</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 793.

<sup>13</sup> *Ibid.*, p. 231.



cable, but his premise was false. The Council of Europe had been dealing solely with inadmissible reservations, and the intention of all objections thereto was to prevent the application of such reservations in relations between States. It was thus a very limited and specific instance of reservations. Unlike Mr. Koskenniemi, he thought it was not a good idea to draft special provisions for certain types of objections—to human rights treaties, for example. The main objective should be to find the most general rules possible and then to look at whether exceptions should be envisaged for certain specific cases. The Commission should resist the temptation to do the opposite: to take exceptions as the basis for building rules. If it did so, it might provide arguments to those who thought there were two separate strains in international law: general, relating to inter-State relations, and specific, creating rights and obligations not for States but for individuals. The Commission's main concern should be to develop general rules.

36. Mr. KOSKENNIEMI, responding to Mr. Melescanu, said that, first, he had not formulated his arguments on the basis of the proposition that international law was divided into two parts—general international law and human rights law. He would certainly not wish to endorse such a division. Second, the recommendation by the Committee of Ministers of the Council of Europe was not limited to human rights treaties, as was borne out by its title, which referred to responses to inadmissible reservations to international treaties. Third, it was important to draw a distinction between reservations which were inadmissible and prompted States to raise objections along the lines of Sweden<sup>14</sup> and others which, although admissible, were still subject to the regime of objections for various reasons. If that was a meaningful distinction then it surely must follow that the States concerned would recognize it. He endorsed Mr. Melescanu's suggestion that the definition should be broad enough to encompass the wide variety of statements that might be made, as in the case of Sweden. However, he recognized that, irrespective of whether the objection had the consequences it purported to have, it was controversial, and that controversy should be dealt with separately in the part of the text dealing with effects and not that relating to the definition itself.

37. Mr. MOMTAZ said that, as usual, the Special Rapporteur had submitted a very high-quality report, with ample illustrations of State practice and a very useful analysis of doctrine. Those compliments were not made merely for the sake of it, as he endorsed most of the conclusions and affirmations contained in the report.

38. In general, he failed to understand why the Commission need stick so closely to the 1969 Vienna Convention, especially where its provisions were ambiguous. There was nothing to prevent it from showing some flexibility and disregarding the spirit of Vienna in some cases. Indeed, that was the very purpose of the Guide to Practice and the guidelines on reservations now being drafted. That remark clearly applied to the thrust of guideline 2.6.1 relating to the definition of objections to reservations. If he had understood correctly, the wording proposed departed from the 1969 and 1986 Vienna Conventions, which reserved the right to object to a reservation to the State or

international organization that was already party to the instrument concerned. He believed that such a right should also be granted to the State or international organization which was signatory to the instrument in recognition of the obligation undertaken in signing it.

39. As to the “super-maximum effect” that some writers wished to attribute to an objection to a reservation, he welcomed the example cited in paragraph 96 of the report on Sweden's statement in reaction to Qatar's reservation when acceding to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Yet the Special Rapporteur seemed to adopt a negative position *vis-à-vis* the “super-maximum effect” by subsequently stating (para. 97) that the effect of such a statement was to render the reservation null and void without the consent of the author. Regrettably, he himself had not taken the trouble to examine the contents of Qatar's reservation. However, if it had dealt with a provision of the Optional Protocol that was generally considered as being a well-established customary rule, could it not be deemed as a “super-maximum effect” of the objection to the reservation? Admittedly, it was not possible to enter a reservation relating to a provision that had acquired the status of customary law. Nevertheless, one could imagine a situation in which, although the provision had not been a well-established customary rule at the time the treaty had been drawn up, it had subsequently acquired such status when the reservation in question had been entered. He wondered whether Imbert's view that an expressly authorized reservation could be objected to,<sup>15</sup> mentioned in a footnote in paragraph 94 of the report, referred to that type of situation.

40. It was gratifying to note that special attention would be paid to one of the most notable recent developments in the procedure for formulating reservations, described by the Special Rapporteur as the “reservations dialogue”. The report showed clearly that the treaty-monitoring bodies were already moving in that direction. The Human Rights Committee's General Comment No. 24,<sup>16</sup> which had prompted the drafting of guideline 2.5.X, had caused problems both in the Commission and the Sixth Committee. It seemed to contradict the “reservations dialogue” and was at the opposite extreme of the position adopted by many other treaty bodies, including the Committee on the Elimination of All Forms of Racial Discrimination. He therefore wondered whether it would be wise to revert to the issues raised by proposed guideline 2.5.X.

41. The Special Rapporteur's analysis of recent developments with respect to reservations was very useful in identifying relevant State practice. In that connection, he questioned whether the declaration made by the Republic of Moldova relating to the European Convention on Human Rights,<sup>17</sup> mentioned in paragraph 24 of the report, could be qualified as a reservation. In his view, it was a declaration whereby the Republic of Moldova sought to deny all responsibility for possible violations of the Convention on the part of its territory where it had ceased to have effective control. The Moldovan Government would

<sup>15</sup> See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 151–152.

<sup>16</sup> See 2780th meeting, footnote 5.

<sup>17</sup> United Nations, *Treaty Series*, vol. 2045, pp. 28 *et seq.*

<sup>14</sup> See footnote 3 above.

nonetheless be held responsible for such violations on that part of the territory over which it had sovereignty, unless the rebel forces managed to overthrow it. That was the concept enshrined in article 8 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>18</sup> He was in favour of the Commission making a recommendation to States and international organizations, inviting them to give reasons for their objections to reservations, as was proposed in the report (para. 106), since such an approach would undeniably encourage and facilitate the “reservations dialogue”.

42. Finally, he endorsed the Special Rapporteur’s proposal to deal with enlargement of the scope of reservations in the same way as late formulation of reservations. The cases cited by Mr. Economides at an earlier meeting were very exceptional and would be more appropriately termed “forgotten” reservations.

43. Mr. PELLET (Special Rapporteur) said he totally disagreed with the remark by Mr. Momtaz that it was not possible to object to a reservation to a treaty provision based on a customary rule. It was indeed perfectly possible to enter such a reservation. The rule could not become treaty law, but its customary nature was in no way undermined.

44. Ms. XUE thanked the Special Rapporteur for his eighth report, which provided an in-depth analysis of the practice of States and international organizations and useful information on new approaches. The Special Rapporteur had likened late formulation of reservations to enlargement of the scope of reservations. Logically that was acceptable, since the two forms of reservations produced the same legal effects. However, some members held that late formulation of reservations was not acceptable unless the reserving State could fully demonstrate that the reservation had been made at an earlier stage. Although in theory such a strict approach was conducive to maintaining treaty regimes, in practice it was excessively rigid. As long as its object and purpose were upheld, a treaty’s implementation would be ensured if no other contracting parties objected to it. Thus a degree of flexibility could be allowed. A good illustration was the reservation by Finland in acceding to the Protocol on Road Markings Additional to the European Agreement Supplementing the Convention on Road Signs and Signals.<sup>19</sup> The highly technical nature of such treaties was likely to give rise to reservations, but it was not appropriate to impose universally the practice followed in one particular region. Her conclusion was that guideline 2.3.5, on enlargement of the scope of a reservation, should be referred to the Drafting Committee.

45. The withdrawal of an interpretative declaration had little impact on a treaty, so there was no need to be particularly demanding about the form that guideline 2.2.12 should take. She could agree to including the additional phrase in square brackets for the sake of consistency with the rest of the guidelines. The modification of interpretative declarations was a common occurrence in international diplomacy. As the report explained, some modifications

were straightforward, but other, more complicated situations occurred. For instance, if one contracting party attached the condition of continuously honouring the treaty and another party opposed that condition, the State party concerned would have no choice but to withdraw from the treaty, which was clearly not in the interests of the international community. Such conditional interpretative declarations did not necessarily deal with provisions of the treaty, but could take the form of a political statement. She hoped that the Commission might consider the matter of whether it was necessary to impose strict conditions. Views still diverged on whether such statements should be divided into two categories—simple interpretative declarations and conditional interpretative declarations. Once that matter was resolved, then perhaps the Commission could accommodate her concern. With the exception of that point, she endorsed the report for referral to the Drafting Committee.

46. The addendum provided a brief outline of matters pertaining to the formulation of objections (para. 73 of the report) and five elements on the definition of objection (para. 75) as contained in the 1969 and 1986 Vienna Conventions. The Special Rapporteur correctly observed that the most important aspect of objection was intention. Information was also provided on significant developments in State practice, particularly in the field of human rights. Behind the “reservations dialogue” was a political dialogue on human rights. Objections to reservations might not always be accompanied by explanatory statements, but even when they were, they would not necessarily have any legal force. In practice, the State could object to the reservation of another State but not to the entry into force of a specific treaty or article thereof. The State concerned must explicitly express its intention in the declaration. She endorsed the Special Rapporteur’s explanation regarding Sweden’s statement in reaction to the reservation by Qatar (paras. 97 and 98) and consequently the proposed text for guideline 2.6.1, on the definition of objections. Nevertheless, there was still cause for concern. In paragraph 100 the Special Rapporteur implied that article 2, subparagraph (f), of the 1986 Vienna Convention was not made use of and in fact enlarged the scope of objections to reservations. That did not make any legal sense. Perhaps what was being referred to was the inclusion of signatory States. According to article 18 of the 1969 and 1986 Vienna Conventions, if the signatory State agreed to be bound by a treaty, it would also be a State within the meaning of article 2, subparagraph (f). Moreover, the State as referred to under article 20, paragraph 4 (b), would make legal sense only if the State was a contracting party.

47. She had no strong views on the question raised in paragraph 101 of the report. Drawing a distinction between an objection to a reservation and an objection to a late formulation was difficult in the Chinese language and in practice would make only a minor difference in legal effects. Thus, any of the formulations proposed could be referred to the Drafting Committee.

48. With reference to paragraph 106 of the report, it was not necessary for the Commission to invite States and international organizations to explain to reserving States the reasons for their objections to a reservation. Such matters should be decided among the parties concerned. It was well known that in the field of human rights such dia-

<sup>18</sup> See 2751st meeting, footnote 3.

<sup>19</sup> See footnote 12 above.

logue often took the form of criticism rather than positive assessment, even though the explanatory statement had been submitted in good faith.

49. The views of many members of the Commission seemed to be based on the practice of member States of the Council of Europe. She wondered, however, how far such practice really reflected the situation at the global level. It would be very interesting to hear in more detail about the 35 cases, referred to earlier, that were based on studies by the Finnish Ministry for Foreign Affairs. In that context, she questioned the force of the statement, quoted in paragraph 96 of the report, that Qatar would not benefit from its reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography *vis-à-vis* Sweden, which had objected to the reservation. The reserving State was surely not expected to amend its own law or practice; if not impossible, such a course of action would be by no means easy. Once a State had made a reservation, it was acting in bad faith or saying that it was unwilling to assume its obligations; it was hardly likely to change in response to an objection. To assume otherwise was a simplistic approach that did not bode well for dialogue between States, since it was for the reserving State itself to decide whether or when to withdraw its reservation. If the objecting State was merely making its position clear, its objection had no legal effect. Although that position should be respected, the law of treaties should not apply to an objection to which the State concerned had no intention of giving legal effect, since that would mean reopening negotiations. Further serious thought should also be given to the question of whether a definition of the effect of objections to reservations was required. In any case, any action should be taken not through the law of treaties but through treaty negotiation.

50. All in all, the report comprehensively reflected the practice of States and the proposed texts should be referred to the Drafting Committee. As for objections to reservations, guideline 2.6.1 could form the basis of discussion.

51. Mr. AL-BAHARNA, after commending the Special Rapporteur on a thorough and well-researched report, recalled that, although the progress achieved to date had been generally welcomed by the Sixth Committee, many delegations had expressed the hope that the project would be completed during the current quinquennium. It had also been suggested that the commentaries should be shortened, since lengthy commentaries on non-controversial matters might give the impression that the law was less clear or more complex than it really was.

52. He welcomed the account, in section B of the report, of the contacts and exchanges of views between the Commission and the human rights bodies but regretted that those contacts had been unjustifiably slow and few in number, as was stated in a footnote in paragraph 17 of the report and in paragraph 18. He requested the Special Rapporteur to keep the Commission informed of any progress and, in particular, how many of the human rights bodies had so far responded positively to the request contained in the model letter appearing in the annex to the report.

53. As for the draft guidelines themselves, the Special Rapporteur seemed to equate the enlargement of the scope of reservations, as far as its legal effects were concerned, with the late formulation of reservations and, on that basis, proposed a text for guideline 2.3.5. However, even with the suggested addition of paragraph 2 of the draft guideline as contained in paragraph 48 of the report, the proposed guideline did not provide a sufficient solution to the question of enlargement of the scope of a reservation, which called for separate, independent treatment. Modifications of reservations fell into two categories: in some cases they were intended to lessen and in others to enlarge—and not merely to strengthen—the scope of the reservation. There might be no problem in principle with regard to the first category, as was stated in paragraph 34 of the report. On the other hand, it could not be said with certainty that guideline 2.3.1, 2.3.2 or 2.3.3 could be applicable to a situation which amounted to limiting the legal effect of the modified reservation with a view to ensuring more completely the application of the provisions of the treaty to the reserving State. In such a case, guideline 2.5.11 should be applicable, but it should be redrafted in a manner that emphasized the limitation of the legal effect of the initial reservation—for example, by stating that modification of a reservation for the purpose of limiting its legal effect amounted to partial withdrawal of that reservation.

54. As for cases in which the purpose of the modification was to enlarge and strengthen the legal effect of the treaty in favour of the reserving State, it might not be accurate to equate such a situation with late formulation of a reservation. Clarification was required, and indeed the permissibility of modifying the reservation should be considered. Article 39 of the 1969 Vienna Convention concerned amendments to treaties, which was quite different from going to the lengths of authorizing one of the parties to modify the treaty using the unwarranted process of an enlarged reservation. Yet, despite the practice and literature he himself quoted, the Special Rapporteur called objections to the process “too rigid”. Invoking the practice of depositaries, the Special Rapporteur called for an alignment of practice in the matter of enlarging the scope of reservation with that regarding late formulation of reservations. State practice, however, was varied and hardly consistent. The issue should be treated on its own. The definition contained in paragraph 48 could be adopted as a starting point for the proposed guideline 2.3.5, but it should contain another provision that would treat enlarged reservations as impermissible.

55. Guideline 2.2.12, on withdrawal of an interpretative declaration, seemed simple and logical, and it would be useful to retain the last phrase, currently appearing in square brackets, for it provided added clarity. As for conditional interpretative declarations, the Special Rapporteur accepted the principle that the rules were necessarily identical with those applying to reservations, thus supporting the view of several delegations to the Sixth Committee and some members of the Commission that conditional interpretative declarations should not be treated as a separate category and should be equated with reservations. In paragraph 16 he nonetheless stated that a final decision should be taken after the Commission had decided on the permissibility of reservations and interpre-



tative declarations and their effects. There was no need to hurry to reverse the order of the draft guidelines adopted on first reading. The Special Rapporteur should maintain his present practice of developing the rules for conditional interpretative declarations separately from the legal regime of reservations. In that regard, draft guideline 2.5.13 was acceptable, as long as the last phrase, contained in square brackets, was retained.

56. The Special Rapporteur's position on the modification of interpretative declarations, whether conditional or not, was confusing. On the one hand, he held that modification amounted to withdrawal, to which guideline 2.5.13 should apply. On the other hand, in paragraph 59 of the report he stated that there was no question that an interpretative declaration might be modified, despite admitting that some declarations could be deemed more restrictive than others or, on the contrary, could be enlarged. At the same time, he saw no need to distinguish between those two possibilities. Since, however, he stated that conditional interpretative declarations could not be modified at will, there appeared to be a need to formulate a rule restricting, in particular, modifications of declarations that amounted to enlargement of their scope. Proposed guideline 2.4.10 did not seem sufficient. There should be a separate rule restricting the right of a State to enlarge the scope of its initial conditional interpretative declaration. If, however, the draft guideline proved acceptable to the Commission, it should remain as it was, without being combined with guideline 2.4.8—it would be unnecessary and cumbersome to revise a guideline that had already been adopted. Moreover, to retain separate guidelines for the late formulation of declarations and the modification of such declarations would be more convenient for reference and classification purposes.

57. While guideline 2.4.9 was acceptable in itself, he did not agree with the principle of modifying an interpretative declaration that had been made at the time the author expressed its consent to be bound by the treaty. Such a practice was uncommon and, in any case, should not be encouraged. If accepted, however, the guideline should not be amalgamated with guidelines 2.4.3 and 2.4.6, for the reasons he had given in respect of guideline 2.4.10.

58. Mr. MATHESON said that, if his understanding was correct, the Special Rapporteur was proposing stricter rules for conditional interpretative declarations than for reservations: the former could be modified only if no objection was made by any of the other contracting parties, whereas that was true of reservations only if the modification enlarged the scope of the reservation.

59. The definition of an objection would present difficulties if the underlying question of the consequences had not been dealt with. Indeed, as paragraph 96 of the report showed, an objecting State could not bind a reserving State in a manner contrary to the expressed terms of the reservation. The Commission had not yet reached the point of considering what the consequences of an objection would be, but he suspected that it might prove difficult. He therefore agreed with Mr. Kolodkin that, if it intended to pursue such a definition, the Commission should perhaps defer the discussion to a later stage, when it would consider the question of the consequences of a reservation. Indeed, he was not convinced that an elabo-

rate definition was required at all, as long as the State in question was clear that it was objecting.

60. Mr. PELLET (Special Rapporteur) said that, following the statements by Mr. Kolodkin, Mr. Al-Baharna and Mr. Matheson, he had to concede that paragraph 57 of his report was slightly obscure. His point had been that, once a declaration had been made, it was difficult to see how the interpretation could be "enlarged". He had made every effort to look for examples but had succeeded in finding only modifications. If any member of the Commission could point to an example of enlargement, he would gladly withdraw the paragraph.

*The meeting rose at 1 p.m.*

## 2782nd MEETING

*Wednesday, 30 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

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

### Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI said that the eighth report of the Special Rapporteur on reservations to treaties (A/CN.4/535 and Add.1) contained draft guidelines dealing with two items that were not directly connected. The first part of the report wrapped up the "leftovers" from the seventh report<sup>3</sup> that had been discussed the year before, dealing in general with the withdrawal and modification of reserva-

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> See 2780th meeting, footnote 3.

tions and interpretative declarations. In that connection, the only item left for the eighth report was the enlargement of the scope of a reservation. There was some lack of logic, however, in having the subsection on enlargement designated with the letter A, whereas, according to the seventh report, it was to have been treated as a second part, designated as “2”, of subsection B (Modification of reservations), to follow the first part contained in the seventh report and entitled “Reduction of the scope of reservations (partial withdrawal)”. Consequently, the part of the eighth report entitled “Withdrawal and modification of interpretative declarations” should be designated not as part B but as part C.

2. The addendum to the eighth report marked the start of the consideration of a new set of problems connected in general with the formulation of objections to reservations and interpretative declarations, although it was actually limited to the definition of objections to reservations based on the content of objections. Once again, the system adopted by the Special Rapporteur did not seem to be entirely clear or fully convincing. Since the analysis of the problems relating to objections had not been completed in the eighth report, the members of the Commission had only half the picture, especially with regard to the very important and interesting question of the “reservations dialogue”, which was introduced only in a very general way in paragraph 70 of the report, with a promise from the Special Rapporteur that it would be developed later. The Special Rapporteur also indicated that section 3 would deal with the withdrawal of objections to reservations, whereas the entire part II, to consist of four sections, was entitled “Formulation of objections”. The Special Rapporteur should pay more attention to the coherent systematization of his reports in order to make them more transparent and accessible.

3. Those remarks did not in any way diminish a positive evaluation of the substantial work done by the Special Rapporteur. His consideration of the enlargement of the scope of reservations was based on well-chosen examples of State practice. He agreed with him that, based on that practice, “enlarging modifications” should be treated in the same way as late reservations. Consequently, new draft guideline 2.3.5, which confirmed that analogy, seemed acceptable, perhaps with one exception. It seemed that draft guideline 2.3.3, which dealt with an objection to the late formulation of a reservation, was not to apply to the enlargement of the scope of a reservation that had already been made. An objection to such enlargement should not lead to the results provided for in that guideline, namely, that the treaty remained in force “without the reservation being established”. Although such a result might derive from an objection to the late formulation of a reservation, in the case of an objection to the enlargement of the scope of a reservation, it seemed more appropriate to retain the reservation in its original form. Its total elimination might be contrary to the intentions of both the reserving State and the objecting State.

4. With regard to “objections” to the late formulation of a reservation and, as a consequence of the proposed analogy, of the enlargement of the scope of a reservation, he fully shared the Special Rapporteur’s doubts, expressed in paragraph 45 of the report, “as to the advisability of using the term ‘objection’ to refer to the opposition of States to

the late modification of reservations” and, consequently, to opposition to “enlarging modifications”. He shared his opinion that the Commission’s earlier decision to retain the word “objection” to refer to the opposition of States to the late formulation of reservations in draft guidelines 2.3.2 and 2.3.3 was not the best of its decisions. It was never too late to make appropriate corrections to the text of the guidelines in question, where the word “objection” could be replaced by the word “opposition”, for example. The definition of objections proposed by the Special Rapporteur made that correction all the more desirable.

5. Turning to objections to reservations, the proposed definition contained in draft guideline 2.6.1 seemed acceptable and reflected the practice of States in that field. It should exclude “quasi-objections”, namely, various forms of opposition to the late formulation or modification of reservations. On the other hand, it might be considered whether the definition should be limited, as it concerned the purpose of objections, to the prevention of the application of the provisions of the treaty to which the reservation related or of the treaty as a whole. It seemed possible to include the possibility of a “modifying effect” in the definition when an objection might suggest changes in the reservation without requiring its total withdrawal or making it fully inoperative.

6. State practice showed that the institution of objections to reservations was of rather limited application and that a majority of States had no means to use it in their everyday treaty practice. Even when they were made, objections did not always follow the rules laid down in the 1969 Vienna Convention, in particular with regard to the purpose for which they should be made and the effects they could cause. As a result, as the Special Rapporteur correctly showed, there were numerous examples of uncertain situations relating to the validity of such objections and their real meaning and extent. In many cases, moreover, objections were used not for the purposes set out in their definition, but simply to force the reserving State to withdraw its reservations.

7. It therefore seemed appropriate to adopt a rather narrow definition of “objections to reservations” in order to avoid misinterpretations. It would, however, be important and helpful to identify and analyse the various forms of the “reservations dialogue”, which, as the Special Rapporteur stated in paragraph 70 of his report, “is probably the most striking innovation of modern procedure for the formulation of reservations”. He looked forward with interest to the Special Rapporteur’s next report, which was to be devoted to that subject.

8. Mr. FOMBA, referring to chapter I, section A, of the Special Rapporteur’s eighth report on “Enlargement of the scope of reservations”, said that, as was logical, he agreed with the premise stated by the Special Rapporteur in paragraph 34 that, if the effect of the modification was to strengthen an existing reservation, it would seem logical to start from the notion that one was dealing with is the late formulation of a reservation and to apply to it the rules applicable in this regard, namely, those contained in draft guidelines 2.3.1 to 2.3.3, which the Commission had adopted at its fifty-third session, in 2001.<sup>4</sup> The reasons

<sup>4</sup> *Ibid.*, footnote 8.

for that position, which were given in paragraphs 36 *et seq.*, were correct and acceptable, despite the scantness of practice, which should be further investigated.

9. The doubts the Special Rapporteur expressed in paragraph 45 of his report with regard to the advisability of using the term “objection” to refer to opposition to the late modification of reservations prompted reflection about the definition and scope of that term. Since the Commission had, however, already retained the words “objections” or “objects” in draft guidelines 2.3.2 and 2.3.3, the Special Rapporteur had wisely refrained from suggesting different terminology.

10. As to the Special Rapporteur’s conclusions and proposals contained in paragraphs 46 to 48, he agreed with the conclusion in paragraph 46 that, since enlargement of the scope of a reservation could be viewed as late formulation of a reservation, it seems inevitable that the same rules should apply. Accordingly, the Special Rapporteur suggested that reference should be made to the relevant guidelines already adopted by the Commission, hence draft guideline 2.3.5, whose wording seemed acceptable. The explanation in square brackets would not be essential if the draft guideline in question was placed in section 2.3 of the Guide to Practice, entitled “Late formulation of a reservation”. The term “enlargement” needed to be defined for at least two reasons: first, because it played an important role in the general context of reservations and, second, because of the practical and utilitarian nature of the Guide to Practice. There were two methods or options for doing so. Either the meaning of “enlargement” could be explained in the commentary or a second paragraph providing a definition could be added to draft guideline 2.3.5. The latter solution was preferable and, if it was chosen, the draft guideline should be referred to the Drafting Committee for critical analysis and possibly improvement.

11. The Special Rapporteur rightly emphasized in paragraph 49 of his report that the questions which arose in connection with the withdrawal of interpretative declarations had to be framed differently depending on whether the declaration in question was “conditional” or “simple”. As far as the latter was concerned, draft guideline 2.5.12 did not give rise to any particular problems. The words in square brackets could be retained in the article or moved to the commentary, provided that care was taken to harmonize the whole text and ensure that it was not unwieldy. The Special Rapporteur seemed to conclude, at least provisionally, that, pending a final decision on conditional interpretative declarations, a parallel should be drawn between those declarations and reservations and it should be assumed that the same legal regime applied. That might be so, but caution was required until such time as that “intuition” had been scientifically corroborated. Draft guideline 2.5.13 therefore seemed to be acceptable as a provisional draft guideline.

12. In paragraph 57, the Special Rapporteur commented that there would be little point in extending to interpretative declarations the rules applying to the partial withdrawal of reservations and that, by definition, an interpretative declaration could not be partially withdrawn; the author could, at the very most, modify it or cease to make it a condition for the entry into force of the treaty.

As the question of partial withdrawal might give rise to some doubts or even be somewhat baffling, it should be given further thought. That being so, everything in fact depended on the actual, rather than the theoretical, deciphering of the purpose of the interpretative declaration—the process of specifying or clarifying the meaning or scope of all or part of the treaty. Practice alone could enlighten the Commission on that point. In that connection, the academic hypothesis mentioned by the Special Rapporteur in paragraph 58 of his report was interesting and showed how subtle the question was. In paragraph 59, the Special Rapporteur noted that an interpretative declaration, whether conditional or not, might be modified, but that it was virtually impossible to ascertain if such modification constituted a partial withdrawal or the enlargement of the scope of the declaration. At the same time, the Special Rapporteur acknowledged that some declarations might be deemed more restrictive than others, but he emphasized that that was a very subjective assessment and concluded that it would be inappropriate to adopt a draft guideline which would transpose to interpretative declarations draft guideline 2.3.5 concerning the enlargement of the scope of reservations. While it was not necessarily a contradiction, that choice obviously reflected the problems and doubts involved in the conclusions to be drawn.

13. As for the moment, or rather the date, on which a modification could be made, the Special Rapporteur drew a distinction between conditional interpretative declarations and “simple” interpretative declarations. With regard to the former, he supported the arguments contained in paragraph 61 of the report; in that respect, draft guideline 2.4.10 did not give rise to any difficulties. As for the solution which the Special Rapporteur considered more elegant—that of amalgamating draft guidelines 2.5.10 and 2.4.8—that seemed, on the face of it, more logical and rational. With regard to “simple” interpretative declarations, draft guideline 2.4.9 also presented no difficulties. As far as the words in square brackets were concerned, of which the Special Rapporteur had given an explanation in paragraph 64 of the report, concern for the sovereignty and free will of States clearly called for caution, but, to the extent that the scenario envisaged was highly unlikely, a mention in the commentary should be sufficient. As for the option of recasting draft guidelines 2.4.3 and 2.4.6 [2.4.7], so as to accommodate modification alongside the formulation of interpretative declarations, that seemed simpler, more logical and more rational.

14. Paragraph 66 of the report stated that there were few clear examples illustrating the draft guidelines in question and that, despite the paucity of convincing examples, the proposed draft guidelines seemed to flow logically from the very definition of interpretative declarations. Despite that acknowledgement and the difficulty itself, he believed that the Special Rapporteur’s approach and the results obtained had considerable merit. He therefore considered that the draft guidelines proposed in the first part of the eighth report should be referred to the Drafting Committee.

15. Turning to chapter II of the eighth report, which was concerned with the formulation of objections to reservations and interpretative declarations—the “reservations dialogue”, he said that the order of priority in presenting the questions of acceptance of reservations and objections



to reservations proposed by the Special Rapporteur was acceptable because it was logical. The same applied to the overall scientific approach outlined by the Special Rapporteur in paragraphs 70 to 72. With regard to the second footnote corresponding to the second subparagraph of paragraph 71, even if the Special Rapporteur claimed to have resigned himself to proceeding in a less exhaustive manner than previously, overall his approach remained satisfactory, because it was cautious and reasonable.

16. With regard to the formulation of objections to reservations, it was worth bearing in mind, as the Special Rapporteur had done, the applicable positive international law, namely, the regime of the 1969 and 1986 Vienna Conventions. In paragraph 74, the Special Rapporteur pointed out—and rightly emphasized—the significant gap in the Conventions and, so far, the Guide to Practice: the fact that, unlike reservations, objections as such were not defined. It was therefore perfectly logical that he should propose to fill the gap, and extensively so, by including comments on the author and the content of objections. In paragraph 75, the Special Rapporteur listed the elements making up a reservation, reproduced in the Guide to Practice, and signalled his intention to adopt a similar approach to the definition of objections, although there was no mention of the time at which an objection could be made, a matter that might form the subject of a separate guideline. In that regard, he fully supported the Special Rapporteur, who believed that, in elaborating the definition of an objection, two elements of the definition of a reservation—the nature of the act and its name—should be reproduced, rightly, in his own view. He also supported the Special Rapporteur's proposal that the possibility of the joint formulation of an objection should be considered at the same time as the more general question of the author of the objection, as well as his idea that the question of the nature of the intention and its author should be considered at a later stage.

17. With regard to the content of objections, paragraph 80 of the report contained a useful reminder of the common meaning of the word “objection” and its meaning in terms of the 1969 and 1986 Vienna Conventions, according to the *Dictionnaire de droit international public*.<sup>5</sup> The Special Rapporteur then, in paragraph 82, characterized the “generic” object of objections as comprising two elements, namely, opposition and intention, pointing out, on the basis of case law and State practice, that any negative reaction was not necessarily an objection. Paragraph 87 drew attention to the growing proliferation of what the Special Rapporteur called “quasi-objections”, which would be considered in the chapters relating to the “reservations dialogue”. He looked forward to hearing more about such developments. The Special Rapporteur also used other expressions, such as “waiting stance” or “notifications of provisional non-acceptance”, and even “other reactions”, about which he expressed both certainty and doubt: the certainty was that such reactions were not objections in the sense of the Conventions, while the doubt was that he was uncertain about their impermissibility and their legal effects. Such a position was not surprising in a Special Rapporteur who always sought to establish scientific truth. By the same token, paragraph 92 of the

report emphasized the need for precise and unambiguous terminology in describing the reactions to a reservation and the wording and scope of the objection. With regard to the reactions, the Special Rapporteur believed that the most cautious solution was to use the noun “objection” or the verb “object”; and that seemed the right approach. At the same time, however, he mentioned a whole range of other terms or expressions, which should also be carefully considered. The “Model response clauses to reservations” annexed to Recommendation No. R (99) 13 of the Council of Europe were extremely interesting in that regard.

18. With regard to the reasons for objections, paragraph 94 of the report pointed out that there was no rule of international law requiring the author to state such reasons. That point of view could be argued, but the Special Rapporteur himself noted a recent tendency—a positive one, which should be encouraged in the context of the “reservations dialogue”—to explain and justify objections. As to the effect of an objection, paragraph 95 indicated that it was apparent from established practice that there was an intermediate stage between the “minimum” effect and the “maximum” effect and that it was important to indicate those effects clearly in the text of the objection itself; that proposal seemed to be along the right lines.

19. With regard to the definition of an objection, it was logical that the relevant draft guideline should be placed at the head of section 2.6 of the Guide to Practice. The definition proposed was modelled on the definition of reservations and reproduced all its elements, with the exception of the time element. The Special Rapporteur was not suggesting the inclusion of a detail found in the 1986 Vienna Convention, which referred to a “contracting State” and a “contracting international organization”. There were two reasons for that: first, the Convention did not deal with the question whether it was possible for a State or an international organization which was not a contracting party to make an objection; and, second, there was no information in the definition of the reservation itself regarding the status of the State or the international organization empowered to do so. In his view, it would be a mistake and even a serious one for the proper functioning of treaties to eliminate that category of States or international organizations.

20. In paragraph 101 of his report, the Special Rapporteur underlined the need to clarify the expression “in response to a reservation” or, more precisely, the distinction between the two meanings of the word “objection”, particularly since he persisted in his view that the word “objection” should be replaced by the word “opposition” in draft guidelines 2.3.1 to 2.3.3. He accepted the reasoning and logic of that proposal. As for the two alternative methods proposed, he was in favour of a separate draft guideline or, failing that, the addition of a second paragraph to draft guideline 2.6.1. He shared the view expressed by the Special Rapporteur in paragraph 102 that the objective sought by the author of an objection was at the very heart of the definition of objections proposed and that the objective could be “minimum” or “maximum”. Also important was the comment made by the Special Rapporteur in paragraph 104 that the proposed definition should only take into account the usual objective of reservations, which related to certain provisions of the treaty, and that there was thus a problem concerning “across-the-board”

<sup>5</sup> J. J. A. Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), pp. 763–764.

reservations, which were also open to objection. It was therefore logical for the Special Rapporteur to suggest the clarification of the point, whether in the commentary to draft guideline 2.6.1 or in a separate draft guideline 2.6.1 *ter* or else in draft guideline 2.6.1 itself—a solution which the Special Rapporteur considered the most “economical”, but which had the disadvantage of being very unwieldy. For that reason, he preferred the second solution proposed—in other words, a separate draft guideline 2.6.1 *ter*.

21. The last problem taken up by the Special Rapporteur in paragraph 106 of his report was that of giving reasons for an objection, in connection with which he made two points: firstly, it was purely a question of judgement; second, it was not a legal obligation, at least not at present. However, he counterbalanced his comments by saying that it was probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wished to persuade it to review its position, and also by asking whether the Commission should make a recommendation to that effect to States and international organizations, suggesting further that the matter be revisited in connection with the “reservations dialogue”. That dialogue was very important and should be encouraged by all appropriate means, including legal ones.

22. In conclusion, he considered that the current text for the definition of objections was a good basis for discussion and that it was rather too early to say whether it should be made narrow or broad in scope. However, one general comment must be made: it was necessary to strike a balance between strictness and flexibility and not to sacrifice one to the other. A marked imbalance between the study of reservations and that of objections must also be avoided. The draft guidelines contained in chapter II of the eighth report should be referred to the Drafting Committee.

23. Mr. ADDO commended the Special Rapporteur on the excellent quality of his work. However, he was troubled by the idea in paragraph 36 of the Special Rapporteur’s report that, after expressing its consent to be bound, along with a reservation, a State or international organization had the possibility of “enlarging” the reservation or, in other words, modifying in its favour the legal effect of the provisions of the treaty to which the reservation referred. He doubted whether such an “enlarged reservation” had any legal validity. A reservation could be made by a State only when it expressed its consent to be bound. Article 2, paragraph 1 (*d*), and article 19 of the 1969 Vienna Convention were very clear on that point. Consequently, a reservation made outside the regime provided for in the Convention was not acceptable. It had been said that the Commission must show flexibility; that was true, but on condition that it did not derogate from what was laid down by the Vienna.

24. He also did not believe that the rules governing the late formulation of a reservation could apply to an enlarged reservation. The late formulation of a reservation was a situation in which a State had the sovereign right to express a reservation, but had neglected to do so when expressing its consent to be bound. Such a situation was excusable, but, in the case of an enlarged reservation, the

State concerned had expressed an initial reservation and wished to go back on it to modify it to its advantage. That was an abuse of rights which should not be permitted.

25. The Special Rapporteur rightly said in paragraph 36 of his report that it was essential not to encourage the late formulation of limitations on the application of the treaty. He nonetheless added that there might be legitimate reasons why a State or an international organization would wish to modify an earlier reservation. He could not see what those legitimate reasons might be, although that did not mean they did not exist, but the Special Rapporteur himself had not given any and had recognized that such cases were rare. In that connection, he had cited only two examples, those of Finland<sup>6</sup> and Maldives.<sup>7</sup> The practice in those two States could not serve as a basis for developing a rule. Similarly, all the doctrine cited by the Special Rapporteur considered that a modification of a reservation with a view to enlarging its scope was not lawful. The Commission should follow the example of the Treaty Office of the Council of Europe, which averred that extending the scope of an existing reservation was not acceptable. Allowing such modifications would create a dangerous precedent, which might jeopardize legal certainty and impair the uniform implementation of European treaties.

26. For the Special Rapporteur, that position was too rigid on the international plane, but he himself would prefer rigidity in order to maintain the integrity of the treaty rather than too much flexibility that would lead to nothing but a fragmentation of the treaty relationship. As it stood, the regime of reservations could give rise to a great many bilateral relationships that might negate the very object and purpose of the convention or treaty in question. Like Ms. Escameia, he thought that draft guideline 2.3.5 should be deleted. The best solution would be to indicate in the commentary that only a few States had followed that practice, that its legal validity was doubtful and that it must not be encouraged. His question for the Special Rapporteur was how many times a State could be allowed to enlarge a reservation. If a State was allowed to enlarge an existing reservation, what would prevent it from asking, 10 or 20 years later, when the treaty was in force, for an enlargement of an already enlarged reservation? Where should the line be drawn?

27. With regard to addendum 1 to the eighth report, he was in agreement with much of what Mr. Koskenniemi, Mr. Kolodkin and Mr. Matheson had said with regard to objections and the definition of objections.

*Mr. Melescanu (Vice-Chair) took the Chair.*

28. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on breaking steep new ground by taking up the question of objections, or reservations to reservations. He also welcomed the Special Rapporteur’s caution in deciphering the term “objections”, which the 1969 Vienna Convention had not defined.

29. Referring to the enlargement of the scope of reservations to treaties, he said that he agreed with some of the

<sup>6</sup> See 2781st meeting, footnote 12.

<sup>7</sup> *Ibid.*, footnote 13.

proposals contained in paragraphs 46 and 47 of the report. He endorsed the Special Rapporteur's idea that a definition of what was meant by "enlargement" should come before the draft rule on the enlargement of the scope of a reservation based on "the rules applicable to the late formulation of a reservation". In order to show how relevant that definition was, it should be included in the first paragraph of draft guideline 2.3.5 rather than in the second. Although he agreed with the proposed definition that enlargement meant the modification of the treaty "in a broader manner than the initial reservation" (para. 48), a key element was missing, namely, an indication of the time when the enlarging declaration was made. That time could be guessed at: it followed the time of the expression of the consent of the State or international organization to be bound. The relevant criterion of the concept of a reservation and, in particular, a late reservation was the exception to the Vienna regime rule. However, the absence of any criterion concerning the time of the formulation of the enlarging reservation made the reservation meaningless.

30. With regard to the regime, he was aware that the Special Rapporteur had wanted to include State practice in his draft and that might explain why he had deliberately tried to avoid such an indication. He nevertheless considered that, unless the Special Rapporteur had included a specific indication of the time of the enlarging declaration, he could not propose an enlargement regime based on that of late reservations, as he suggested in paragraph 46 of his report. That was a question that the Commission would not be able to dispatch quickly by referring draft guideline 2.3.5 to the Drafting Committee.

31. As to the question of objections to reservations and their definition, in particular, he said that the Special Rapporteur was right to use the Vienna regime, if only to point out that it did not define the concept of an objection and that it was Janus's other face. Everything should therefore be based on Janus's visible face, namely the reservation, something the Special Rapporteur was determined to do when he stated that it seemed reasonable to start with these elements in developing a definition of objections to reservations.

32. He personally was not convinced that the game was worth the candle. In his opinion, the Commission had to avoid two wrong tracks so that it would not get trapped. The first was that of quasi-objections, even though they had been on the increase in the last few years. In that connection, he was of the opinion that the fact of informing the author of a reservation of the reasons why the reservation should be withdrawn, explained or modified was definitely part of the reservations dialogue, but it was never an objection to a reservation. The second wrong track was that of a waiting stance. There was a close connection between that type of stance and an objection, since, according to paragraph 89 of the report, a State or an international organization "reserve[d] its position" regarding the validity of a reservation made by another party. He compared the reservations dialogue to a road network in which the roads were not the same, but all led to the same place. Distinctions therefore had to be drawn according to the size of the roads, their role, their functions and their levels. The purpose of an objection to the validity of a reservation was not the same as that of an objection to a reservation, even though those two types of

objections could both create a relationship of dependency or conditionality.

33. Distinctions could be drawn, as in the case of reservations, between conditional objections and ordinary objections or between permissible and impermissible objections, but they shed much more light on the regime than on the nature of objections. As far as the nature of objections was concerned, the discussions should focus on what the Special Rapporteur called "the generic object of the objection": the author of the objection was opposed to the fact that a reservation by the other party excluded or modified the legal effects of some provisions of the treaty in respect of it. An objection was thus a means of preventing the application of a reservation. However, an objection was applicable because it was admissible—in other words, permissible. The way in which an objection to a reservation was characterized thus depended less on whether it was permissible than on whether it was opposable. In those conditions, the relevant criterion for the characterization of the objection was its objective, which derived from the purpose clearly expressed by the author of the objection, and not just from the intention behind it. The claim by the author of the objection that the reservation was impermissible might well be a ground for the objection, but it would at most be a preliminary issue that would not have much of an impact on the nature of the objection and would thus never be anything more than one ground among many. He therefore agreed with the view expressed by Imbert, referred to in paragraph 97 of the report, which read: "Unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State."<sup>8</sup> The attitude or position in question could also be that of an international organization.

34. In conclusion, he supported the draft definition of objections to reservations proposed by the Special Rapporteur in paragraph 105 of the report and was in favour of referring it to the Drafting Committee.

35. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his excellent eighth report on reservations to treaties. The very interesting first part drew attention to the positions adopted in 2002 by Governments and international human rights treaty bodies, with which a very useful dialogue could be established, and thus shed light on the report as a whole. With regard to the modification of reservations and interpretative declarations, it should be borne in mind that States could modify their treaty relations at any time. Provided that the parties to the treaty so agreed in advance and that it was in keeping with international law, the treaty could be modified by various means and not only by formal revision during new negotiations. It could also be modified by the acceptance of the formulation of a reservation or the acceptance of the modification of a reservation, even if that was likely to enlarge the scope of the reservation. A modification of a reservation that lessened its scope did not require the consent of the other contracting parties, but those parties might have to complete some formalities. However, if the modification went beyond the initial reservation, the prior consent of the contracting parties was necessary, unless the treaty provided otherwise or the parties so agreed after

<sup>8</sup> Imbert, *op. cit.* (2781st meeting, footnote 15), p. 419.



the fact or remained silent. If “enlargement of the scope of the reservation” was understood according to the meaning indicated by the Special Rapporteur in paragraph 48 of the report, it could be equated with a late reservation, and it was quite normal for the applicable rules to be similar. Draft guideline 2.3.5, which had been submitted by the Special Rapporteur and which equated the enlargement of the scope of a reservation with late formulation, was thus acceptable, although the reference to draft guidelines 2.3.1, 2.3.2 and 2.3.3 was not necessary. It was also not certain that a specific guideline on the definition of enlargement was necessary; perhaps it could simply be referred to in the commentary to draft guideline 2.3.5.

36. With regard to the withdrawal and modification of interpretative declarations, a simple declaration could be formulated at any time and so could its withdrawal, which did not require any particular formality. It did not impose obligations on the other parties to the treaty, but it was designed to harmonize legal relations among them, and it must therefore be accepted. Draft guideline 2.5.12 proposed in paragraph 52 was acceptable, except that the words “Unless the treaty provides otherwise” were superfluous, but that was only a drafting question. Conditional interpretative declarations must be treated in the same way as reservations. They could be made when the State expressed its consent to be bound by the treaty, and their withdrawal must be done in the same conditions as reservations—in other words, in accordance with guidelines 2.5.1 to 2.5.9. That was why draft guideline 2.5.13, submitted in paragraph 56, was also acceptable. Diverging views had been expressed in the Commission on the partial withdrawal of an interpretative declaration, which could apparently not be partially withdrawn because that would be contrary to its very nature. Conditional interpretative declarations could, in principle, not be modified, but that, of course, depended on the will of the other parties, which was reflected in the treaty, as indicated in draft guideline 2.4.10, which was also acceptable. Interpretative declarations could be formulated at any time, unless the parties to the treaties decided otherwise.

37. As to the formulation and acceptance of objections to reservations and interpretative declarations, the meaning of the objection must be understood very broadly so that it related not only to the applicability of the treaties to the parties but also to the possibility of preserving its integrity. The purpose of the objection was simply that all or part of a treaty should enter into force as between the parties. By means of its objection, the objecting State’s aim was the withdrawal or modification of the reservation primarily in order to preserve the integrity of the treaty. As the Special Rapporteur had done, a distinction must be drawn between the objection itself and any reaction that might have other purposes. The intention was what counted in qualifying the act in a particular case and determining whether its purpose was the entry into force of part of the treaty in respect of the parties concerned. Not every reaction led to the same result as an objection *stricto sensu*, and it could be a declaration interpreting the reservation. Many terms could be used, such as rejection, challenge, opposition, and the like. Quite apart from terminology, the context determined whether what was involved was an objection *stricto sensu* or a reaction of another kind to ensure that the reserving State withdrew

its reservation for the sake of the integrity of the treaty and not only to prohibit its application in whole or in part in respect of the parties concerned. Even though there was little or no practice of arguments in respect of objections, the objecting State should be encouraged to justify its position as the only way of opening the “reservations dialogue” to which the Special Rapporteur drew attention and which was a key element of relations between the parties to the treaty, particularly with a view to maintaining the integrity of human rights instruments.

*Mr. Candioti resumed the Chair.*

38. Mr. CHEE congratulated the Special Rapporteur on his eighth report, which was just as remarkable as the preceding ones. In paragraph 36 the Special Rapporteur argued in favour of the possibility of modifying reservations, but in paragraph 37 he indicated that State practice was rare. In the third subparagraph of paragraph 36, the Special Rapporteur stated that it was always possible for the parties to a treaty to modify it anytime by unanimous agreement, and, in support of that statement, he referred to article 39 of the 1969 and 1986 Vienna Conventions. However, article 39 dealt with the amendment of treaties, not with their modification. When it had proposed articles 39 to 41 of the Conventions, the Commission had made a clear-cut distinction between the “amendment” of a treaty to alter its provisions with respect to all the parties and the “modification” of a treaty, which referred to an *inter se* agreement concluded between certain of the parties only and intended to vary provisions of the treaty between themselves alone. It was therefore questionable whether the reference in the footnote corresponding to paragraph 36 of the report in support of the modification of the reservation was warranted. The modification of a late reservation on a matter of substance or a matter relating to the existence of the treaty should not be permitted, for the reasons given by the Special Rapporteur in paragraphs 38 and 39, namely, that that would create a dangerous precedent that would jeopardize legal certainty and impair the uniform implementation of treaties. Article 19 of the Conventions did not refer to any late modification or enlargement of the scope of a reservation. However, if all the contracting parties expressed their consent to the enlargement of the scope of the treaty, such a modification might be permitted without affecting the substance of the treaty. That meant that, if a modification of a reservation was only of minor importance, it might be acceptable under the guidelines.

39. With regard to the modification or the late formulation of a conditional interpretative declaration, McRae had stated in an article published in 1978 in the *British Year Book of International Law*—and his wisdom had been adopted by the European Court of Human Rights in the *Belilos* case—that a qualified interpretative declaration which was a conditional interpretative declaration must be assimilated to a reservation.<sup>9</sup> The legal consequences that attached to reservations should therefore apply to qualified interpretative declarations. In his standard work on the 1969 Vienna Convention, Sinclair had pointed out that most reservations were of a minor nature and that there had not been a startling increase in the number of

<sup>9</sup> See D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, 1978, pp. 155 *et seq.*, especially p. 172.

reservations in the post-war period, taking account of the tremendous expansion and diversity of the international community.<sup>10</sup> There thus did not seem to be any reason to fear an enlargement of the scope of reservations.

40. He had difficulty understanding the distinction made in the Guide to Practice between “objections” and “opposition” to reservations. In the example relating to the United States given by the Special Rapporteur in paragraph 86 of addendum 1 to his eighth report, the interpretation of the word “objection” as a “conditional acceptance” rather than as an objection strictly speaking seemed to be contrary to the dictum of ICJ in the *Temple of Preah Vihear* case that words were to be interpreted according to their natural and ordinary meaning in the context in which they occurred. In stressing the need to use unambiguous terminology in the description of reactions to a reservation, the Special Rapporteur had suggested the use of the words “objection” and “object to”, but he had interpreted the words “object to” as a “conditional acceptance”.

41. He had three comments to make on the guidelines. First, it should be recalled that reservations to treaties already restricted the scope of treaties. If a reservation was modified, a reservation was made to a reservation. To the extent that a reservation was modified, either to narrow the commitment made by the State or to enlarge the scope of the treaty, the integrity of the treaty as a whole was jeopardized. The guidelines must therefore all be drafted in such a way as to remain within the limits of the treaty as a whole. Second, if the guidelines on the use of a reservation conflicted with the treaty regime in force, such as the 1969 Vienna Convention, there was a danger that the treaty might become inoperative. That should be avoided. Third, the technique of guidelines was frequently used when States could not secure the necessary majority in support of a treaty, in order to achieve certain objectives. However, the guidelines should not, for the sake of convenience, depart too much from the fundamental principles of treaty law.

42. Mr. AL-MARRI said he agreed with the members who had said that the Commission should not move too far away from the law of treaties, particularly the Vienna Conventions. Provided that a signatory State was acting in good faith, the law of treaties should be relied on, and it should be ensured that negotiations on the reservation could be held in order to find a solution. He was also in favour of merging draft guidelines 2.5.4 and 2.5.11 *bis* as a single draft guideline stating that the finding that a reservation was impermissible did not constitute the withdrawal of a reservation.

43. Mr. KEMICHA paid tribute to the Special Rapporteur for his excellent eighth report, in which he considered the assumption that the modification of a reservation had the effect of enlarging the reservation and then proposed that the rules relating to the late formulation of a reservation, as contained in draft guidelines 2.3.1 to 2.3.3, should apply to it. Not only was such an approach logical, but it was also based on instructive examples of practice. He therefore endorsed that approach and recommended that draft guideline 2.3.5 should be referred to the

Drafting Committee. However, the addition of a second subparagraph indicating what was meant by the “enlargement of the scope of a reservation” was superfluous. The proposed provision could quite naturally be included in the commentary.

44. With regard to the withdrawal of interpretative declarations, the Special Rapporteur was proposing a separate regime depending on whether such declarations were conditional or not. The withdrawal of a simple interpretative declaration could be done “at any time following the same procedure as that applicable to its formulation”. That was the meaning of draft guideline 2.5.12, which did not give rise to any problem, and draft guideline 2.5.13, according to which the withdrawal of a conditional interpretative declaration followed the regime applicable to reservations themselves.

45. Draft guidelines 2.4.9 and 2.4.10 on the modification of interpretative declarations were acceptable as they stood, despite the Special Rapporteur’s proposal that they should be combined with the provisions relating to late formulation; that proposal was appealing but, for the time being, premature.

46. The approach taken by the Special Rapporteur in the addendum to the eighth report for the preparation of a definition of objections to reservations, as contained in draft guideline 2.6.1, was exemplary in more than one respect. The Special Rapporteur had taken care to list the five relevant provisions of the 1969 and 1986 Vienna Conventions and then to include the five elements in the definition of reservations contained in draft guideline 1.1 of the Guide to Practice. The proposed definition had the advantage of covering all the elements of which the objection was composed and was a good starting point for a helpful discussion. He agreed with the Special Rapporteur on three points. First, the author of an objection to a reservation had to express its intention to prevent the reservation from being opposable to it. The examples taken from practice were significant. The inclusion of the element of intention would show whether the objective of the author of the objection was to get the reserving State to waive its reservation (case where a State reserved its position) or whether it was adopting a formal position intended to prevent the application of the provisions to which the reservation related, in accordance with article 21, paragraph 3, of the 1986 Vienna Convention. Second, although the reasons for an objection to a reservation were not required by any rule of international law, they were desirable because they promoted the “reservations dialogue”. Third, the “super-maximum” effect, which was described in paragraph 96 and involved considering not only that the reservation was not valid, but also that the treaty in question applied as a whole, rendered “the reservation null and void without the consent of its author”, as the Special Rapporteur stated in paragraph 97, and that was entirely unacceptable. Consequently, draft guideline 2.6.1, as submitted in its long version in paragraph 105, appeared to be a working basis that could be referred to the Drafting Committee.

47. Mr. MANSFIELD said that the part of the introduction to the eighth report on recent developments with regard to reservations to treaties was very useful. In chapter I, the analysis of the question of the enlargement of the scope of reservations was correct and the corresponding

<sup>10</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 77–78.

draft guideline 2.3.5 acceptable, provided that it was left to the Drafting Committee to decide whether what was meant by “enlargement of the scope” should be explained in the draft guideline itself or in the commentary. In the light of the comments by several members of the Commission, however, it might be wiser to delete the draft guideline if that turned out to be the best way of discouraging that practice. Draft guideline 2.5.12 on the withdrawal of simple interpretative declarations did not give rise to any problems. With regard to conditional interpretative declarations, which should be assimilated to reservations, draft guideline 2.5.13 was acceptable, but only provisionally, as the Special Rapporteur had proposed.

48. Chapter II on objections to reservations led straight to the interesting, difficult and important question of the effects of reservations. The introduction on the “reservations dialogue” was an interesting analysis of an important aspect of recent treaty practice, but its key element was that of the definition of objections to reservations. The Special Rapporteur gave many examples which showed that, in recent practice, a declaration could be made to a reservation without the legal effect expected of that declaration having been clearly expressed. From the viewpoint of the definition, however, if a declaration was expressly presented as an objection and intended as such, it could not be denied that qualification merely on the grounds that the expected effect went beyond that provided for in the 1969 and 1986 Vienna Conventions. Perhaps, as other members had suggested, the consideration of the definition should be postponed until after that of legal effects or the question whether a definition was necessary should be left open. In any event, the Special Rapporteur was right to think that States which formulated an objection should be encouraged to indicate the reasons for the objection, even if that could not be an obligation.

49. Mr. OPERTTI BADAN drew the Special Rapporteur’s attention to a particular problem relating to objections to interpretative declarations. At the preceding meeting, Ms. Xue had rightly pointed out that a distinction should be drawn between matters relating to the negotiation of the treaty and those relating to reservations to the treaty. An interpretative declaration could be formulated at any time, as the Special Rapporteur recalled in paragraph 50 of his report, and that included the time of the ratification of the treaty. In that case, the ratification and its content constituted one single act, and the interpretative declaration must then be considered not only from the point of view of international law but also from that of constitutional law. It could thus be asked whether some interpretative declarations were typical and others were atypical. The second question was what the procedure for objecting to those interpretative declarations was. In some cases the objection involved formulating observations, comments or explanations, and in other cases there was a much more categorical qualification equating the interpretative declaration with a reservation. That question was important in the light of section 2.6 of the Guide to Practice, in which objections to reservations were defined as unilateral statements, however phrased or named. Consequently, it could be asked whether objections related only to reservations or could also be made to interpretative declarations in general and to interpretative declarations forming part of the act of ratification in particular. If an objection was

given the power to turn an interpretative declaration into a reservation, although the treaty in question did not allow reservations, the constitutional competence of the branch of government which adopted treaties would be severely restricted. It could be considered that practical problems involving conflicts between the executive and legislative branches were governed by a country’s constitution and that the 1969 and 1986 Vienna Conventions clearly provided that rules of internal law must take account of rules of international law, but the Commission must be careful not to adopt a very strict approach to the question of objections and their legal effects in order not to jeopardize the process of ratification of some conventions if a mere objection by one or more States to a legislative interpretation could invalidate the application of the treaty.

50. Mr. KATEKA, referring to the question of conditional interpretative declarations, said he hoped that the Commission would not have to give up provisions it had spent a great deal of time drafting because the consideration of the legal effects of reservations and interpretative declarations led to the conclusion that it should do so. He agreed with the Special Rapporteur’s reasonable point of view that the dialogue between reserving States and human rights treaty-monitoring bodies should be encouraged. It was to be hoped that the Special Rapporteur would prepare specific provisions to supplement the preliminary conclusions reached in that regard.<sup>11</sup> With regard to the enlargement of the scope of reservations, he agreed with Mr. Addo that draft guideline 2.3.5 should be deleted. He would prefer more flexibility in the definition of objections contained in draft guideline 2.6.1.

51. Mr. DAOUDI said that the eighth report of the Special Rapporteur on reservations to treaties had led to an interesting discussion because it dealt with sensitive issues and also because the Special Rapporteur requested the opinion of the members of the Commission on a number of points. With regard to the problem of the enlargement of the scope of reservations, State practice was not consistent and was even contradictory, as other members had pointed out. It was therefore surprising that it could form the basis of an established principle or rule. Since an objection by only one of the States to which the modification of a reservation was communicated could lead to the rejection of the modification, moreover, it could be asked whether the context was not an offer of new negotiations rather than the reservations regime. The Special Rapporteur nevertheless considered that that type of modification should be equated with the late formulation of a reservation and, to that end, proposed a draft guideline 2.3.5 referring to guidelines 2.3.1 to 2.3.3, as already adopted by the Commission. That provision would be entirely acceptable if the square brackets were removed.

52. With regard to the withdrawal of interpretative declarations, draft guideline 2.5.12 on simple interpretative declarations would also be acceptable if the square brackets were removed. As to conditional interpretative declarations, the Special Rapporteur proposed a draft guideline 2.5.13 pending a decision by the Commission on whether that second category of declarations should be mentioned in the Guide to Practice. In his own opinion, it should not be included, but he supported the Special

<sup>11</sup> See 2781st meeting, footnote 11.



Rapporteur's proposal on that point for the reasons given in paragraph 55 of his report. With regard to the modification of interpretative declarations, since the modification of conditional interpretative declarations was equated with the late modification of reservations, draft guideline 2.4.10 proposed by the Special Rapporteur was practically based on draft guideline 2.4.8 adopted by the Commission at its fifty-third session, in 2001,<sup>12</sup> and relating to the late formulation of those declarations. In paragraph 62 of his report, the Special Rapporteur submitted a revised text of guideline 2.4.8 which would obviate the need for the proposed new provision, which should perhaps be retained until the Commission had resumed its consideration of the draft Guide to Practice as a whole when it completed its work on the topic.

53. The addendum to the eighth report, in which the Special Rapporteur began to consider the formulation of objections to reservations and interpretative declarations, gave rise to three questions. First, the element of intention was essential and must therefore be included in a definition of objections, particularly as the 1969 Vienna Convention expressly referred to intention in article 20, paragraph 4 (b). Second, the definition of objections must reflect State practice, and, if the consideration of State practice showed that the definition contained in the Convention should be departed from, that could be done, provided that care was taken not to generalize a regional practice or the practice of a particular small political group of States. The "reservations dialogue" which the Special Rapporteur intended to study in greater depth in chapter II, section 2, was a useful tool because it would help make the position of the reserving State or the objecting State more flexible, but it would have no legal effect and might sometimes be a dialogue of the deaf, particularly when the reservation related to religion or ideology. The recommendation made by the Special Rapporteur in paragraph 106 of his report was intended to promote the reservations dialogue and could only be endorsed. The draft guideline could therefore be referred to the Drafting Committee, which would certainly ensure that the content of the discussion was taken into account.

*The meeting rose at 12.30 p.m.*

<sup>12</sup> See 2780th meeting, footnote 8.

## 2783rd MEETING

*Thursday, 31 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr.

Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*concluded*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. PELLET (Special Rapporteur), summing up the debate on his eighth report (A/CN.4/535 and Add.1), said that the discussion had been interesting and often fruitful; 22 members had participated, and he trusted that for the others silence indicated agreement.

2. Some speakers, including Mr. Kolodkin, Mr. Al-Baharna, Mr. Rodríguez Cedeño, and Mr. Matheson, had found fault with paragraphs 57 and 59 of the report—which he himself had come to consider clumsy—concerning the difficulty of determining whether, when a State returned to an interpretative declaration, whether conditional or not, it intended to lessen or enlarge its scope. He had therefore not pursued the suggested distinction between the partial withdrawal and the enlargement of an interpretative declaration. He had, however, called on his critics to provide examples of practice that would contradict his position, and, to his disappointment, none had been forthcoming. He therefore took it that his position, however hesitant, had been accepted: Mr. Chee, Mr. Al-Marri, Mr. Daoudi and Mr. Melescanu had all recommended that draft guidelines 2.4.9 and 2.4.10 should be referred to the Drafting Committee.

3. Of far greater importance was what had occurred following Mr. Economides' statement at the 2780th meeting (paras. 24–26): Mr. Al-Baharna and, to a lesser extent, Ms. Escameia, Mr. Pambou-Tchivounda and Mr. Chee had vigorously contested draft guideline 2.3.5. He had been astounded—not because the content was beyond dispute but because his colleagues had not conformed to the unwritten rule that, in discussing one guideline, another that had already been adopted should not be called into question. Yet that was what had happened in connection with draft guidelines 2.3.1 to 2.3.3, concerning late formulation of reservations. Mr. Economides, Ms. Escameia and Mr. Addo had taken pains to stress the difference between such late reservations, which could be made in good faith, and late enlargement of the scope of reservations. When considering the draft guidelines on late formulation of reservations, however, the Commission had determined that a State might decide that circumstances had changed and that it could no longer accept a specific provision of a treaty that was not essential to the purpose

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of that treaty. Moreover, States should not be lightly accused of acting in bad faith. Mr. Addo had challenged him to provide an example of such a change of circumstances, and in that regard he would refer Mr. Addo to paragraphs 43 and 44 of the report. The enlarged scope of the reservation by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women<sup>3</sup> might, as Germany had claimed,<sup>4</sup> have been questionable—as might have been that of Finland in enlarging the scope of its reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1968 (with annexes)<sup>5</sup>—but neither could be accused of acting in bad faith. Both countries had considered that their initial reservation had created too many problems. Moreover, it was surely unreasonable to require a State to denounce a treaty and then to ratify it again with new reservations. That had been the Commission's position regarding late formulation of reservations.

4. He put forward a hypothetical case in which Ghana, where cars drove on the left, decided, as Sweden had done in the 1960s, to change to driving on the right. The country would need to make temporary reservations to road traffic agreements, but it would be unreasonable to ask it to denounce such agreements as a whole. He urged those of his colleagues who had taken up a rigid stance on draft guideline 2.3.5 to reread paragraphs 279–332 of his fifth report,<sup>6</sup> from which it would be clear that late formulation of reservations did not constitute an example of good or bad faith. Although negligence might be involved, more often it was due to a country's subsequent reassessment of its circumstances, and the same applied in every way to enlargement of the scope of existing reservations. States should be allowed some leeway, if the rights and interests of other States were not affected. Yet, as matters stood, an objection by just one State or international organization would prevent a late reservation from producing an effect.

5. Some opponents of his approach had cited an official of the Council of Europe, who had stated that the Council was opposed to late enlargement of the scope of reservations of which the Council Secretary-General was the depositary. In that connection, Mr. Addo had said that if the procedure was not good for Europeans, it was not good for the rest of the world. That sentiment should be turned on its head, however; if the procedure was good for the rest of the world, as attested to by the practice of the United Nations Secretary-General as depositary, why should it not be good for Europe? In his view, which had been upheld by Mr. Momtaz and Ms. Xue, draft guideline 2.3.2 fully and expressly preserved the possibility of a more restrictive practice at the regional level. In fact, the practice of the Council of Europe was less rigid than the official concerned had claimed: as recently as June 2003, South Africa had been allowed to make a reservation to the European Convention on Extradition<sup>7</sup> after it had de-

posited its instrument of accession with the Secretary-General of the Council. Moreover, the approach adopted by the Council of Europe in relation to the late formulation of reservations had not prevented the Commission from adopting a more flexible provision in that regard. It was therefore difficult to see why the same should not apply to the enlargement of the scope of reservations.

6. Apart from the specific issue, he strongly felt that a question of principle was involved; the Commission simply could not function if, in discussing one draft text, it called into question a provision that had already been adopted. He himself was not wholly in favour of all previous decisions, but he put up with them. Thus, although he had been firmly opposed to the distinction drawn between objections to reservations and opposition to the formulation of late reservations, not only had he resisted any temptation to use the eighth report as a means of reviewing what he considered an unfortunate decision, but he had drafted a guideline—2.6.1 *bis*—which followed logically on that decision. Some members of the Commission, including Ms. Escameia, Mr. Galicki and Mr. Fomba, had supported his position, but he had not suggested going back on what had been decided. For the same reason, he would not press for the amalgamation of draft guidelines 2.4.9 and 2.4.3 or of draft guidelines 2.4.10 and 2.4.8, despite support from Mr. Kolodkin and others. On the contrary, having listened to the comments made by Mr. Gaja and Mr. Al-Baharna, he had proposed a wording for draft guidelines 2.4.9 and 2.4.10, to which he had heard no opposition. As for draft guideline 2.3.5, he urged that the text should be sent to the Drafting Committee. Failure to do so would betray a lack of rigour and of continuity. Ms. Xue, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Gaja, Mr. Fomba, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Mansfield, Mr. Kemicha and Mr. Daoudi had spoken in favour of that course of action. Mr. Gaja, Mr. Koskenniemi, Mr. Matheson and Mr. Operti Badan had not spoken on the issue at all. The Drafting Committee might well make improvements, but he hoped that it would bear in mind the need for overall consistency in the Guide to Practice. A decision would be needed on whether to retain the square brackets, on which there had been conflicting views, and a number of useful suggestions should be considered, such as Mr. Rodríguez Cedeño's preference for the word *ampliación* over the word *agravación* to convey the meaning of "enlargement". Another suggestion, by Mr. Galicki, had been that guideline 2.3.3 could simply be transposed to the question of enlargement of the scope of a reservation; and the question was whether such a transposition should appear in draft guideline 2.3.5 itself or in the commentary.

7. Dissension of a quite different kind had arisen in the case of draft guideline 2.6.1. Although the Commission had been polarized, no issues of principle or methodology had been at stake, and he had therefore been anxious to listen and to accommodate as many opinions as possible, always in the hope that, once a decision had been reached, all would abide by it.

8. There had been some support for the draft guideline on the definition of an objection; Mr. Melescanu, Mr. Galicki, Mr. Fomba, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Kemicha, Mr. Daoudi and Ms. Xue had recommended that it

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 231.

<sup>4</sup> *Ibid.*, p. 240.

<sup>5</sup> *Ibid.* See 2781st meeting, footnote 12.

<sup>6</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

<sup>7</sup> United Nations, *Treaty Series*, vol. 2223, p. 193.

should be referred to the Drafting Committee, whereas Mr. Gaja, Mr. Kolodkin, Ms. Escameia, Mr. Koskenniemi, Mr. Addo, Mr. Mansfield, Mr. Kateka and—if he understood correctly—Mr. Momtaz and Mr. Chee had opposed that course of action. Although the reasons put forward by opponents of the draft guideline were diverse, he had given them considerable thought. He wished to express his disagreement with one particular aspect of the criticism: Mr. Kolodkin and Mr. Koskenniemi had criticized the analysis of negative reactions to reservations appearing in paragraphs 88, 89 and 91 of the report, which could involve a temporizing approach, a conditional objection or a *minima* interpretations. However, the “Model response clauses to reservations” appended to Recommendation No. R (99) 13 of the Council of Europe (which was not, of course, a global legislator) invariably contained the word “objection”, which was not true of the cases cited in paragraphs 88, 89 and 91. Incidentally, the wording of the Finnish statement<sup>8</sup> cited in paragraph 87 of the report left the reader in no doubt that it involved a genuine objection. It would nonetheless be a mistake to regard any negative reaction as being an objection, even if the author used vague or ambiguous language, as was shown by the 1977 Franco-British Arbitral Award in the *Continental Shelf between the United Kingdom and France* case. A State might consider that its purpose might not be best served by objecting to a reservation; withdrawal or modification of the reservation in question might be more successfully achieved by a “softly, softly” approach. The word “objection” need not be used, therefore, but the meaning must be clear. If the State had been deliberately vague, it did a disservice to legal security and honesty between States. One State should not seek to deliberately mislead another.

9. In drafting guideline 2.6.1, he had followed the letter and the spirit of the 1969 and 1986 Vienna Conventions, not out of any fetishistic respect but because the Commission and the Sixth Committee had always emphasized the need not to call into question the Vienna regime. On one point, at least, there had been fairly wide agreement: most speakers had agreed that the State’s intention was what really counted. The divergences had related to what that intention applied to. Mr. Gaja, supported by Mr. Kolodkin, Ms. Escameia, Mr. Matheson, Mr. Addo and Mr. Kateka, had said that the effect of an objection was obscure and uncertain; however, that was no reason to reject the draft text. Even if it was ambiguous, such effects were provided for under the Conventions, so there was no reason not to take account of them in the definition of an objection, as long as the Commission specified such effects at a later stage.

10. He was more shaken by another argument: Mr. Koskenniemi had referred to objections with “super-maximum” effects, consisting of statements whereby some States—very few, and only recently—assumed the right to set aside a reservation and to decide that the reserving State was bound by the treaty concerned in its entirety. Although he persisted in doubting the validity of that approach, he acknowledged that he had not been sufficiently rigorous when he had stated, in paragraph 97

of the report, that such statements were not objections, on the grounds that the authors’ clear intention had been to go beyond the effects provided for by the 1969 and 1986 Vienna Conventions. In striving not to confuse the definition of reservations with that of their permissibility, he had, it seemed, fallen into the same error where objections were concerned. What was to be done to ensure that such statements were not ignored or excluded from the definition of objections? The wait-and-see attitude preferred by some speakers was ill-advised, if only because it would be impossible to discern the effects of an institution unless the Commission plainly identified the institution in question beforehand. In fact, that overcautious stance was rather like quibbling about what came first, the chicken or the egg. Moreover, procrastination was not a good idea, and indeed another solution was possible.

11. Several members who had categorically rejected his definition had advocated a wider and more flexible definition that took account of common tendencies. The perspicacious comments of Mr. Kolodkin and Mr. Pambou-Tchivounda had helped him to identify such a tendency. Mr. Kolodkin had rightly contended that the basic criterion for an objection was the intention of its author to ensure that the reservation could not be applied to it in the future, while Mr. Pambou-Tchivounda had defined objections as reservations to reservations, or barriers to reservations. It therefore seemed that many difficulties might well be resolved by a generally acceptable definition stating: “Objection means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects.”

12. The wording would have to be discussed in detail, and some improvements might be needed, but it should answer most of the concerns and objections to his initial proposal, which admittedly had invited criticism. Since some measure of agreement did exist, it might prove possible to refer guideline 2.6.1 to the Drafting Committee, which could be instructed to direct its thoughts along the path he had just indicated. If that course of action appeared to be premature, he was prepared to give a more detailed presentation of the amended draft guideline at the next session. At all events, the fate of guidelines 2.6.1 *bis* and 2.6.1 *ter* depended on that of 2.6.1.

13. No general criticism had been levelled against the other draft guidelines, but he had noted the various improvements that had been suggested, including the inclusion in guideline 2.3.5, or in the commentary thereto, of a definition of “enlargement of a reservation”.

14. As far as conditional interpretative declarations were concerned, although Mr. Mansfield had said that if an animal looked like a horse it must be a horse, he had not yet seen the whole animal and should therefore wait before he adopted a final position. Mr. Melescanu’s qualms about conditional interpretative declarations as a legal institution were misplaced in view of guideline 1.2.1. Perusal of that guideline made it clear that the definition of conditional interpretative declarations was quite different from that of reservations. The animal in question was not a horse, but it could be treated as a horse.

<sup>8</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 557–558.



15. He did not interpret consensus within the Commission as denial of the fact that, in addition to reservations, there were declarations whereby a State or international organization subordinated its consent to be bound by a treaty to a specific interpretation thereof. On the contrary, that consensus signified that, if the Commission found that a certain legal institution was subject to the same legal regime as reservations, which was quite probable, it was unnecessary to devote specific draft guidelines to the legal regime governing that institution; reference could simply be made to the guidelines applicable to reservations. Such a finding presupposed, however, that all the requisite groundwork had been done in order to determine that the two regimes were identical.

16. His suggestion in paragraph 106 of the report that the Commission should recommend that States and international organizations should state the reasons for their objections had received strong support, and he would thus propose a draft guideline to that effect next year. He suggested that all the draft guidelines in his eighth report should be referred to the Drafting Committee, it being understood that, if the Commission so wished, he was prepared to give a more detailed presentation of his proposal for guideline 2.6.1 at the next session, in which case referral of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* could be deferred.

17. Mr. ECONOMIDES said that, while he had great respect for the patience of Penelope, he was wary of Pandora's box. He disagreed with the substance of guideline 2.3.5 because it manifestly infringed article 19 and article 2, paragraph 1 (*d*), of the 1969 Vienna Convention and he was therefore against including it in the Guide to Practice.

18. In his opinion, the Commission had made a mistake with respect to late reservations, one that should be rectified during the second reading by limiting the scope of the application of such reservations, which should be permitted only before the instrument of ratification or acceptance had been sent to the depositary.

19. Guideline 2.3.5 should not be referred to the Drafting Committee until it had been considered by the Sixth Committee.

20. Ms. ESCARAMEIA said that she agreed with Mr. Economides. The Special Rapporteur had expressed shock over the position adopted on guideline 2.3.5 by eight members of the Commission. Those members nevertheless maintained that it was a matter of principle that the 1969 Vienna Convention should be followed, especially when practice was contradictory. Why should priority be given to the practice adopted by only a few depositaries?

21. What made the Special Rapporteur's attitude all the more inconsistent was the fact that, as far as objections were concerned, he was adamantly opposed to departing from the 1969 Vienna Convention or to retracting the Commission's previous decisions. In her opinion, the issue at stake could not be treated in the same way as late reservations and should be dealt with by analogy to guideline 2.3.4, which made it clear that an earlier reservation could not be interpreted in such a way as to exclude or modify the legal effects of provisions of the treaty con-

cerned. The Special Rapporteur's proposal, by permitting enlargement of the scope of a reservation, would exclude or modify some legal effects, and hence it conflicted with guideline 2.3.4. She therefore advised against referring guideline 2.3.5 to the Drafting Committee before the guidance of States had been sought.

22. Mr. KATEKA said he trusted that the Special Rapporteur did not regard the members who were speaking after Mr. Economides as weathervanes that constantly changed direction. On the contrary, they had their principles, and their position had been one of consistent opposition to late reservations. It therefore followed that he was against the enlargement of reservations.

23. He hoped that the Special Rapporteur would show the same flexibility with regard to guideline 2.3.5 as he had displayed in respect of draft guideline 2.6.1. The views of the Sixth Committee and Member States on enlargement of the scope of a reservation should first be obtained and then the Commission should reconsider the draft guideline next year.

24. Mr. GAJA said that he was in favour of guideline 2.3.5. While guideline 2.6.1 as proposed during the present meeting went in the right direction, it might be wise to reflect further on it before it was referred to the Drafting Committee.

25. The text of the 1969 Vienna Convention made no provision for the intention to which the Special Rapporteur referred. The proposal, which had been read out, had not completely resolved the problem of defining objections. For instance, the purpose of some objections might be to exclude the application of a whole section of a treaty, as was done with regard to some reservations that had been entered to article 66 of the Convention. Since the Special Rapporteur intended to submit the question to the Sixth Committee, it would be advisable to wait and see how States reacted. It might then be possible to produce a text which might not be very different from that proposed by the Special Rapporteur, but which would not attempt to establish a formal link between intention and the effects provided for in the Convention in order to turn an objection into a unilateral act *stricto sensu*. The debate had shown that objections could be prompted by a wide variety of intentions. He therefore proposed that more information should be gathered and that the Special Rapporteur should study the question in greater depth before guideline 2.6.1 was referred to the Drafting Committee.

26. Mr. ADDO said that he stood by the position he had adopted earlier and that he endorsed the comments made by Mr. Economides.

27. Mr. CHEE said that while, on the whole, he supported the Special Rapporteur's brilliant study, he wished to take issue with just three points. In his opinion, a revision that would change the character or scope of the original reservation would not be permissible.

28. As to paragraph 86 of the report, the Commission was not engaging in an academic exercise, but was striving to codify and progressively develop international law so that it could be used by States in their diplomatic relations. The assertion that an objection to a reservation was a conditional acceptance would baffle practitioners. As

for conditional interpretative declarations, he still upheld the view he had already expressed and which was based on the decision of the European Court of Human Rights in the *Belilos* case.

29. Ms. XUE said that she fully agreed with the Special Rapporteur's summary. If he intended to amend his proposal for guideline 2.6.1 in the way he had suggested, which would make an objection a means for preventing the effect of a reservation, the Commission should postpone its discussion of the effects of an objection to a reservation until it held its substantive debate on the admissibility of reservations. When she had read the report, she had gained the impression that the Special Rapporteur intended to address the questions of form and procedure. The original draft guideline 2.6.1 had, however, touched on a fundamental element, to wit, the intentions of both parties in terms of the legal effects in their contractual relations.

30. The proposal the Special Rapporteur had just made might cause major difficulties in that such an objection would affect the contractual relations between the parties. Under international law neither the reserving State nor the objecting State was permitted to alter the terms of the treaty by a unilateral act, yet, as the new proposal stood, the objecting State, by its unilateral act, would be doing just that. She was therefore in favour of retaining the original draft and discussing the substantive issue later.

31. Mr. MANSFIELD said his main concern had been to ensure that statements like that of Sweden in reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,<sup>9</sup> referred to in paragraph 96 of the report, would not be excluded from the definition of objections. On the face of it, it was an objection, and indeed that was its purpose. That had been the point of his horse analogy. He welcomed the Special Rapporteur's redrafting because it broadened the definition appropriately. It might, however, be advisable to study it more closely before it was referred to the Drafting Committee. Formulating a definition before the Commission had scrutinized the effects of an objection was tantamount to putting the cart before the horse.

32. Mr. KOLODKIN said that he was grateful to the Special Rapporteur for his thought-provoking summary. He still failed to understand the reasoning in paragraph 57 of the report, but perhaps the difficulty lay in the Russian text, which was muddled. In any case, paragraph 59 covered and enlarged upon paragraph 57.

33. More importantly, he agreed with proposed guideline 2.4.9, which could be referred to the Drafting Committee. The new definition of an objection to a reservation that had just been proposed by the Special Rapporteur was on the right tack, but the Commission should give itself and the Special Rapporteur plenty of time to reconsider the definition and ascertain States' reaction to it in the Sixth Committee.

34. Mr. GALICKI said that, although he found some fault with specific aspects of guideline 2.3.5, he was gen-

erally in favour of including it in the Guide to Practice. During the discussion of the seventh report on the topic,<sup>10</sup> modifications which reduced the scope of the reservation had been addressed, and it was only logical now to take a position on those which enlarged the scope, especially since there was some State practice, even though it was not homogeneous. Enough analysis and information on draft guideline 2.3.5 was provided for it to be referred to the Drafting Committee, although that did not preclude addressing questions to States if the Commission so desired.

35. The rule on enlargement of the scope of reservations was closely bound up with the guidelines adopted previously on late formulation of reservations. As the Special Rapporteur had pointed out, guideline 2.3.3 was not fully applicable to enlargement, but guidelines 2.3.1 and 2.3.2 were formulated in such a way that they could be applied with no detrimental effect.

36. The definition of objections to reservations in guideline 2.6.1 was incomplete, and he therefore agreed with those who wished to postpone a final decision pending additional material from the Special Rapporteur on the effects of objections. Unlike Ms. Xue, he did not believe that the definition of an objection should be purely formal. A comprehensive definition should be developed, by analogy with the definition of a reservation in the 1969 Vienna Convention and addressing substantive aspects, particularly the question of purpose. The guideline should thus be elaborated further on the basis of all the comments made and of the next report to be submitted by the Special Rapporteur.

37. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on an excellent analysis and on his considerable efforts to offer an alternative to guideline 2.6.1. The new version added to the merits of the first by taking account of the comments made in plenary, and he would be hard put to choose between the two versions.

38. The Special Rapporteur was refusing with some obstinacy to reopen debate on guidelines 2.3.1 to 2.3.3 on late formulation of a reservation, but the fact remained that guideline 2.3.5 raised problems, as those who had spoken out against its referral to the Drafting Committee had indicated. The provision contained two elements that had to remain separate, the late formulation of a reservation and the enlargement of the scope of an earlier reservation, and it was the latter that was problematic. A late reservation could enlarge the scope of a late reservation made earlier, but who was to say that yet another late reservation might not be formulated, enlarging the scope of the former? Where would it all end? And who was entitled to enlarge the scope of a reservation? Perhaps a provision could be included indicating that a late reservation that enlarged the scope of an earlier one could not be supplemented by additional late reservations that likewise enlarged the scope, or else time limits could be envisaged instead of quantitative limits.

39. The Special Rapporteur's remark that sovereign States were incapable of acting in bad faith was faintly amusing. Alas, since time immemorial, sovereign States

<sup>9</sup> See 2781st meeting, footnote 3.

<sup>10</sup> See 2780th meeting, footnote 3.

had acted in bad faith, precisely because they were sovereign.

40. Mr. KOSKENNIEMI said he could agree with everything said by the Special Rapporteur in his summary and found his proposed reformulation of guideline 2.6.1 to be a welcome step showing remarkable flexibility. He might have been inclined to recommend that it be referred to the Drafting Committee but now agreed that the Commission needed to reflect more on the issue. It would indeed be useful to have the comments of delegations in the Sixth Committee, and the Commission should accordingly revisit the provision at its next session.

41. Mr. AL-BAHARNA said that consideration of guideline 2.6.1 should be postponed and the comments made during the discussion taken into account by the Special Rapporteur, who had already indicated that he favoured such a course of action and would submit a new text to the Commission at its next session. He himself objected to the wording of guideline 2.3.5, on enlargement of the scope of a reservation. Members of the Commission seemed to be evenly divided on that issue, and it might be best, as several had suggested, to formulate a question for submission to the Sixth Committee, and perhaps even to transmit the draft guideline itself for the Committee's consideration.

42. Mr. CHEE drew attention to the definition of a reservation in article 2, subparagraph (d), of the 1969 Vienna Convention as a statement made "when" signing, ratifying, etc. a treaty. "When" in that context meant "at the time of"; there was therefore no connection with the late formulation of a reservation mentioned in guideline 2.3.5.

43. Mr. MATHESON said that he could go along with either of the two courses of action proposed with regard to guideline 2.3.5, but, whichever was adopted, the Commission must keep in mind the close logical relationship between guidelines 2.3.5, on modifications to reservations, and 2.4.10, on modifications to conditional interpretative declarations. The need for consistency in the treatment of reservations and conditional interpretative declarations had frequently been mentioned, and the Drafting Committee's mandate should include looking into that and making the necessary adjustments. If guideline 2.3.5 was referred to States for further comment, the same should be done for guideline 2.4.10.

44. Ms. XUE suggested that in the Special Rapporteur's reformulation of draft guideline 2.6.1, after the phrase "purports to prevent the reservation from having any or some of its legal effects", the words "in their contractual relations under the treaty" should be added. That, after all, was a very important aspect, for a treaty system was a contractual framework. When one person offered to sell a black horse and another agreed to buy it, that person could not demand that a white horse be provided—not under contractual relations, in any case.

45. Mr. MELESCANU said that, on the contrary, if the parties agreed to replace the black horse with a white horse, there was no difficulty. That example illustrated the problem with the modification of late reservations: it was a very limited case in which all parties agreed that a State

could either formulate a reservation late or modify it. It would be a huge mistake not to acknowledge that there was a reasonably large amount of State practice, and he thought the Commission should look into it more closely. The positions adopted by members should be taken into account, of course, but dialogue and solutions should be sought. The guideline should be referred to the Drafting Committee, and if such was the desire of a majority of the Commission's members, the Sixth Committee could be consulted as well.

46. Mr. KEMICHA said he endorsed guideline 2.3.5 but was somewhat shaken by the discussion about it, in which legitimate apprehensions had been expressed that it might be seen by States as encouraging enlargement of the scope of a reservation. That concern could be raised, perhaps in the commentary, and States urged not to engage in that practice. As to guideline 2.6.1, he had endorsed the original version and continued to support it, although the alternative version was also acceptable. Nevertheless, it would be preferable to take a closer look at the new text at the next session, rather than to adopt it now, with some lingering doubts.

47. Mr. DAOUDI said that guideline 2.3.5 was an innovation as far as the 1969 Vienna Convention was concerned. State practice could not be ignored, even out of unshakeable loyalty to the Convention, but while it was substantial, it was somewhat contradictory. He agreed with the Special Rapporteur that guidelines 2.3.1 to 2.3.3 should not be revisited, but on the other hand they did not constitute holy writ. Nothing prevented the Drafting Committee from considering them in tandem with the new provisions, with a view to achieving a comprehensive approach. As to the definition in guideline 2.6.1, additional elements should be introduced, and he was not opposed to referring it to the Drafting Committee on the understanding that it would seek to fill in the gaps. The proposal just made by the Special Rapporteur was an excellent step towards a solution, but he would prefer to see consideration of the matter postponed.

48. Mr. PELLET (Special Rapporteur) said that, for the reasons he had already outlined, he continued to advocate the referral of guideline 2.3.5 to the Drafting Committee. Only Ms. Xue had expressed strong opposition to his alternative text for guideline 2.6.1. He understood her concerns well and wished to reassure her that his intention in proposing the new version was by no means to prejudice any solution that the Commission might adopt regarding the legal effects of objections. Indeed, he had taken Mr. Koskenniemi's remarks on that subject to heart. He was not opposed to the addition she had just suggested, emphasizing contractual relations between States. He proposed that draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* be reconsidered at the next session.

49. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to postpone until its next session the discussion of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*.

*It was so decided.*



50. The CHAIR recalled that an intensive discussion had taken place on draft guideline 2.3.5 but the majority of members seemed to favour referring it to the Drafting Committee. It had also been suggested that in Chapter III of the Commission's report to the General Assembly on the work of its fifty-fifth session, which drew attention to specific issues on which comments would be of particular interest to the Commission, a request should be made for the views of States on draft guideline 2.3.5.

51. Mr. ECONOMIDES said that, before deciding whether the draft guideline should be referred to the Drafting Committee, the Commission must take up the procedural motion to postpone its consideration and draft a question for submission to members of the Sixth Committee. That motion took precedence over any other decision, and he requested that it be decided by an informal vote.

52. Mr. PELLET (Special Rapporteur) called for a formal vote on whether or not to refer the draft guideline to the Drafting Committee. He had no objection to consulting the Sixth Committee, on the understanding that the Commission would take account of the views of States only when the draft guidelines were considered on second reading. If it were to reverse its decision on draft guideline 2.3.1, the Commission would have to find a new Special Rapporteur.

53. The CHAIR, noting that there was no consensus among members of the Commission on whether to refer draft article 2.3.5 to the Drafting Committee, suggested that the matter should be decided by a show of hands.

*The proposal to refer draft guideline 2.3.5 to the Drafting Committee was adopted by 15 votes to 7.*

54. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.4.9, 2.4.10, 2.5.12 and 2.5.13 to the Drafting Committee.

*It was so decided.*

**Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/529, sect. G, A/CN.4/L.645)**

[Agenda item 10]

**REPORT OF THE PLANNING GROUP**

55. Mr. MELESCANU (Chair of the Planning Group) introduced the report of the Planning Group (A/CN.4/L.645), which summarized the Group's discussions on seven different items. The Working Group on the long-term programme of work had made an oral recommendation to the plenary to the effect that, as of the next session, it should study not only possible agenda items but also working methods, given the difficulties in discussing such matters within the Planning Group. That oral recommendation had not been mentioned in the report since no consensus had been reached on it. With regard to the documentation of the Commission, the Planning Group

had concluded that the very strict recommendations made by the Secretary-General of the United Nations and the General Assembly regarding the length of the reports of subsidiary bodies were not acceptable. It had highlighted the fact that the work of the Commission was different from that of other United Nations bodies, as was the purpose of its documentation, which increased in importance over time, unlike that of the political bodies. Hence the request that the Commission should continue to remain exempt from page limitations, as endorsed by previous General Assembly resolutions, while bearing in mind the need to achieve economies whenever possible in the overall volume of documentation.

56. Owing to lack of time, the Planning Group had been unable to discuss procedures and methods of work, although two relevant proposals had been submitted. He suggested that the details of those proposals should be included under chapter III of the report of the Commission to the General Assembly on the work of its fifty-fifth session so as to facilitate their consideration at the fifty-sixth session. The relations of the Commission with the Sixth Committee were very important for the Commission's work. However, the relationship had to work both ways: it was not only the responsibility of the Commission to find the best way of encouraging the dialogue. Furthermore, in order to enhance the usefulness of Chapter III of the report, the Planning Group proposed that, in preparing issues on which the views of Governments were sought, Special Rapporteurs should provide sufficient background material and substantive elaboration to assist Governments in preparing their responses.

57. With respect to honoraria, the Planning Group recommended that the General Assembly should review its decision in resolution 56/272 of 27 March 2002, which had been taken without consulting the Commission. The spirit of public service with which members contributed their time to the Commission should be duly recognized. The decision affected above all Special Rapporteurs, especially those from developing countries, whose work required considerable research, which they could not conduct alone. A text along those lines would be included in the report. In conclusion, he thanked all those who had contributed to the work of the Planning Group, which had held a record number of meetings, seven in all. He looked forward to the continuation of the work of the Planning Group at the next session.

58. The CHAIR invited the Commission to take note of the report of the Planning Group. In accordance with established practice, the relevant parts of the report would be included in due course in the report of the Commission.

59. Mr. ECONOMIDES said that, in connection with the work of the Planning Group, he wished to submit a proposal drafted by eight members of the Commission. In the light of recent events, which had shaken the international legal system, he, Mr. Addo, Mr. Baena Soares, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Pambou-Tchivounda and Mr. Rodríguez Cedeño proposed that the following text should be inserted in the report of the Commission to the General Assembly:

“The International Law Commission wishes to express its deep concern in the light of certain events which have severely tested the fundamental principles of international law that are indispensable in protecting the essential interests of the international community. Recalling the peremptory and hence non-derogable nature of the principles aimed at guaranteeing peace, security, order and stability in international relations, it underlines the absolute and universal need to uphold them.”

As an independent body dealing with international law, the Commission must emphasize in its report the need to observe the fundamental principles of international law, in particular to refrain from the use of force and the threat of the use of force in international relations. The Commission must also make itself available in efforts to strengthen those principles, which were of vital importance to all States and the international community as a whole. He hoped that the Commission would agree to the proposal, with minor amendments, if necessary.

60. Mr. PELLET said he did not endorse the proposed text, as it was too weak. It merely alluded to events, when clearly a super-Power—the United States—had carried out an armed invasion of another State, thereby contravening the provisions of the Charter of the United Nations and international law. Given the situation, there was every reason to be very concerned about the future of international law. However, if the proposal was put to the vote, he would abstain. It was not for a subsidiary body of the General Assembly to take a stance on such matters—something that the General Assembly itself could and should have done on the basis of Articles 10 and 11 of the Charter. So, even though he agreed with the substance of the proposed text, he was against its adoption by the Commission.

61. Mr. KATEKA said that, while he understood the sentiments of those submitting the proposal, the Commission had no competence to deal with such an issue in that manner. If it had been a topic for study, it could have been dealt with under normal procedures. However, to submit such a statement, which on the face of it was vague, ambiguous and innocuous, would merely be counterproductive; that was the business of political bodies such as the General Assembly and the Security Council. Many events took place at the international level that were contrary to international law, and if the Commission were to pronounce itself on each and every one, it would be diverted from its mandate. He could not, therefore, endorse the proposal.

62. Mr. BROWNLIE said he agreed with Mr. Pellet and Mr. Kateka. Although he had great respect for the concern of other members for the rule of law, he did not consider it appropriate for the Commission to take up such issues. Even if the Commission were to broach such issues in some way or another, one would have expected greater consideration from the members concerned by way of notice and for preparation.

63. The CHAIR suggested that the proposal should be taken up again in connection with the report of the Commission.

64. Mr. DUGARD wished to know when exactly the matter would be discussed again, so that those members

who were deeply concerned about it could make sure they would be present.

65. The CHAIR suggested that it should be discussed in connection with chapter XI of the report of the Commission to the General Assembly, entitled “Other decisions and conclusions of the Commission”.

*It was so decided.*

**Unilateral acts of States (*concluded*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>11</sup> A/CN.4/L.646)**

[Agenda item 5]

REPORT OF THE WORKING GROUP

66. Mr. PELLET (Chair of the Working Group on Unilateral Acts of States) said that he felt ill at ease about introducing the report of the Working Group (A/CN.4/L.646) in the absence of the Special Rapporteur on the topic. The report comprised two parts: the report proper, dealing with the scope of the topic and the method of work, and an annex containing commentaries on the scope of the topic. In trying to define the scope, the Working Group, like the Commission as a whole, had been divided into two main schools of thought. Some members of the Working Group had been in favour of an extremely strict definition of a unilateral act as a statement which gave rise to obligations for the party invoking it, while others had preferred a slightly broader definition, namely that a unilateral act created not only legal obligations but also legal effects. The latter had favoured a broader definition covering conduct which, without necessarily being a formal expression of will, had similar or comparable effects to that of a strictly defined unilateral act. In the end the Working Group had decided that, even if a unilateral act was defined as a statement expressing the will or consent by which a State purported to create obligations or other legal effects under international law, there was no reason why the conduct of States should not also be studied, as was indicated in Recommendations 1 and 2 (para. 6). In relation to unilateral acts, draft articles accompanied by commentaries would be proposed, while with respect to conduct State practice would be examined and, if appropriate, guidelines might be adopted, as was indicated in Recommendation 3 (*ibid.*).

67. As far as the method of work was concerned, owing to time restrictions the Working Group had merely made suggestions which the Special Rapporteur might wish to take into account at the next session. He should submit as complete a presentation as possible of State practice on unilateral acts or equivalent conduct. The material assembled should make it possible to identify rules applicable to them with a view to the preparation of draft articles accompanied by commentaries according to an orderly classification of State practice, as was indicated in Recommendations 4 to 6 (para. 8). Later reports would deal with more specific articles, as was indicated in Recommendation 7 (*ibid.*). Recommendations 1, 2 and 3 had been adopted verbatim by the Working Group. However, due to lack of time, that had not been the case with

<sup>11</sup> See footnote 2 above.

Recommendations 4 to 7, although they did accurately reflect the views of the Working Group. The commentaries on the scope of the topic had been set out in the annex to the report for similar reasons. It would be useful for the Commission to endorse the recommendations, which should be followed by the Special Rapporteur and Commission as a whole in the future, thereby bringing an end to the unhealthy habit of continually plaguing the Special Rapporteur with the subject of working methods. Admittedly, it was a compromise solution and was not entirely satisfactory, but it was one which had been the subject of consensus within the Working Group. The Special Rapporteur had indicated to him that he lent his full support to the recommendations, for which he was largely responsible.

68. Mr. KOSKENNIEMI said that he fully understood the need to find a direction for the topic and hence the compromise solution proposed. However, before being definitively adopted such a method of work should be tried out to see what results it brought.

69. Mr. PELLET (Chair of the Working Group on Unilateral Acts) said the Special Rapporteur would need to be left in peace to work on the compromise solution until the Commission could see what results it would yield. The method of work would need to be properly defined at the next session. The Working Group had by no means completed its work, but he hoped it would be reconvened at the next session with a new chair.

70. The CHAIR said that, if he heard no objection, he would take it the Commission wished to adopt the recommendations contained in the report of the Working Group on Unilateral Acts of States.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 2784th MEETING

*Monday, 4 August 2003, at 10.15 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño.

### Draft report of the Commission on the work of its fifty-fifth session

1. The CHAIR invited the members of the Commission to consider chapter IV, sections A and B, of the draft report of the Commission on the work of its fifty-fifth session, on the responsibility of international organizations.

#### CHAPTER IV. *The responsibility of international organizations* (A/CN.4/L.636 and Add.1)

##### A. Introduction (A/CN.4/L.636)

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraphs 3 to 11

*Paragraphs 3 to 11 were adopted.*

2. Mr. GAJA (Special Rapporteur) proposed that the following new paragraph should be added:

“Bearing in mind the close relationship between this topic and the work of international organizations, the Commission, at its 2784th meeting, on 4 August 2003, requested the secretariat to annually circulate the relevant chapter of the report of the Commission to the General Assembly on the work of its session to the United Nations specialized agencies and some other international organizations for their comments.”

3. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*The new paragraph 12 was adopted.*

*Section B, as amended, was adopted.*

4. The CHAIR invited the members of the Commission to consider chapter IV, section C, of the draft report.

##### C. Draft articles on the responsibility of international organizations provisionally adopted so far by the Commission

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.636 Add.1)

*Commentary to article 1* (Scope of the present draft articles)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*



Paragraph (4)

5. Mr. ECONOMIDES said that the last sentence was complicated and could be simplified to read: "In yet another case, an international organization may be held responsible for a wrongful act committed by another international organization of which it is a member."

6. Mr. GAJA (Special Rapporteur) said that he had no objection to that amendment and suggested the following wording: "Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member."

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

7. Mr. ECONOMIDES said that the third sentence referred to "an obligation under international law", whereas the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>1</sup> used the standard term "an international obligation". He asked whether that change was deliberate and was intended to introduce a shade of meaning. He also found that the last sentence in French was very difficult to understand and that it should be improved.

8. Mr. GAJA (Special Rapporteur), referring to the first comment by Mr. Economides, said that that wording did not reflect any intention to change the meaning of the term habitually used, but specified what was meant by an "international obligation", namely, an obligation under international law.

*Paragraph (5) was adopted, subject to the amendment Mr. Economides would propose for the French text.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

9. Mr. BROWNLIE said that a definite article should be added before the word "organ" in the fourth sentence, which would then read: "However, article 4 does not consider the status of the organ under internal law as a necessary requirement."

10. Mr. GAJA (Special Rapporteur) said that the inclusion of a definite article might change the meaning of the sentence. The English text could certainly be improved, without, however, using the definite article. The question was what an organ of the State was, and the definition contained in article 4, paragraph 2, on the responsibility of States indicated that in principle it was the internal law of the State which decided.

11. Mr. AL-BAHARNA proposed that the definite article should be replaced by an indefinite article and that reference should thus be made to the status of "an organ" under internal law.

12. Mr. BROWNLIE proposed the wording "the status of such organs in internal law", it being understood that the decision should be taken by the Special Rapporteur.

13. Mr. GAJA (Special Rapporteur) said that he opted for Mr. Brownlie's proposal. The sentence would thus read: "However, article 4 does not consider the status of such organs under internal law as a necessary requirement."

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

14. Mr. PELLET said that the commentary to article 1 should indicate what the Commission intended to do about responsibility arising out of a breach of the internal law of an organization. Paragraph (10) of the commentary to article 3 dealt with the internal law of an international organization, but it did not answer the question whether the draft articles related to the organization's responsibility in the event of a breach of its internal law. In his opinion, it would be reasonable to exclude that question, but that must be stated from the beginning, in the commentary to article 1, so that it would be clear whether a breach of internal law was covered or not.

15. Mr. GAJA (Special Rapporteur) said that that proposal gave rise to a problem because the Commission had not yet discussed what was meant by the internal law of an international organization. For some members, all the internal law of international organizations was part of international law, while for others that was true for certain elements only, such as the constituent instrument. That question should therefore be set aside for the time being, and the Commission could come back to it when discussing the objective element.

16. Mr. PELLET said it would be much wiser to say that the Commission had decided not to deal with breaches of the internal law of an organization, but if it did not want to go that far, it should add a footnote stating: "The Commission reserves the possibility of deciding later whether the draft articles should cover the responsibility of an organization for breaches of certain internal rules or its own internal law. On this point, see paragraph (10) of the commentary to article 3 below."

17. Mr. BROWNLIE said that he was not opposed to Mr. Pellet's proposal, but that it would be useful to indicate that, in the case of States, the distinction between, so to speak, the "treaty envelope" and internal law was well understood and well established, whereas it was more difficult to distinguish between the "shell" of international organizations and their internal law. If a footnote was to be added, it should explain that, in the view of some members of the Commission, the problem was how the distinction should be drawn, and that the question should be set aside for the time being.

18. Mr. PELLET said that Mr. Brownlie's comment was entirely justified, but that was explained in paragraph (10) of the commentary to article 3, which should be referred to in a footnote.

<sup>1</sup> See 2751st meeting, footnote 3.

19. Mr. GAJA (Special Rapporteur) said that such a footnote would be complicated to draft and might, as things now stood, give rise to more problems than not saying anything at all. However, he would not object if Mr. Pellet drafted the footnote in such a way as to help the reader.

20. The CHAIR suggested that the Commission should come back to paragraph (9) later.

*It was so decided.*

*Commentary to article 2 (Use of terms)*

Paragraph (1)

21. Mr. ECONOMIDES said he did not think it should be stated at the beginning of the first sentence that the definition of “international organization” given in article 2 was not intended as a general definition. That definition had in fact been drafted for a general purpose in order to cover all international organizations, but, scientifically, it could not be complete because it did not contain all the possible elements of an international organization; it was thus a definition which was appropriate for the purposes of the draft articles. It was contrary to the Commission’s main intention to say that it was not a general definition.

22. Mr. PELLET said he agreed with Mr. Economides that a good definition of international organizations in general had been given in article 2. He proposed that the words “is not intended as a general definition, but rather as” should be replaced by the word “constitutes”, which would allow the Commission not to take a stand one way or the other on whether the definition was a general one.

23. Mr. GALICKI, supported by Mr. GAJA (Special Rapporteur) and Mr. BROWNLIE, said that he was in favour of keeping the wording as it stood. He pointed out, in particular, that that “modest” wording was in keeping with the approach adopted in the 1986 Vienna Convention, in which the term “international organization” was defined exclusively for the purposes of that Convention, and that it was therefore logical to abide by that approach.

24. Mr. MOMTAZ proposed that the first sentence should be amended to read: “The definition of ‘international organization’ given in article 2 is a definition which is appropriate for the purposes of the draft articles and is not intended as a general definition.”

25. Mr. MANSFIELD, referring to the proposal by Mr. Momtaz, suggested the following wording: “The definition of ‘international organization’ given in article 2 is considered appropriate for the purposes of the draft articles and is not intended as a definition for all purposes.”

26. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted paragraph (1), as amended by Mr. Momtaz and Mr. Mansfield.

*It was so decided.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

27. Mr. PELLET said that the sixth sentence was meaningless because “intergovernmental organization” usually did not mean either the constituent instrument of the organization or the members composing it, but the entity which resulted from the constituent instrument and was composed of members. The sentence should be either deleted or amended.

28. Mr. GAJA (Special Rapporteur) said that the words “refers to” should be translated into French by the word *visé*. The term “intergovernmental organization” did in fact give rise to a problem to which he had referred in his report and which had been raised during the plenary discussion. That was one of the reasons why the Commission had abandoned the traditional definition of the term “international organization”.

29. Mr. BROWNLIE said that the word “anyway” should be replaced by the words “in any case”.

30. Mr. ECONOMIDES said that, as a result of the amendment of paragraph (1), the words “and not as a general definition” in the second sentence should be replaced by the words “and not for all purposes”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

31. Mr. GAJA (Special Rapporteur), replying to a request for clarifications by Mr. Brownlie, proposed that the fourth sentence should be amended to read: “In other cases, although an implicit agreement may be held to exist, member States insisted that no treaty has been concluded to that effect, as, for example, in respect of OSCE.” The purpose of the amendment was to make it clear that States did not question the existence of the international organization, but only that of an implicit agreement.

32. Mr. RODRÍGUEZ CEDEÑO said that, contrary to what was stated in the sixth sentence, General Assembly resolutions could be binding. In addition, UNCTAD, referred to in the seventh sentence, was not an international organization but an organ of the United Nations, and should therefore not be given as an example of an international organization.

33. Mr. GAJA (Special Rapporteur) said it could not be inferred from the English text that all General Assembly resolutions were not binding. He was prepared to delete the reference to UNCTAD, if the Commission so wished.

34. Mr. BROWNLIE said that many authors regarded UNCTAD as an international organization. It was not so much the binding nature of a resolution as the general attitude of States, a kind of informal consent to establish an international organization, that was decisive.

35. Mr. ECONOMIDES, supporting Mr. Rodríguez Cedeño, proposed that the words “non-binding” should be replaced by the words “soft law”. It was from the point

of view of the internal system that the question must be approached. Not all resolutions establishing international organizations were binding, but the rules of procedure of those organizations were binding.

36. Mr. MOMTAZ said that what were important were the will and the intention of States to establish an international organization by means of such non-binding instruments. That intention should be referred to.

37. Mr. RODRÍGUEZ CEDEÑO proposed the wording “international instruments other than treaties by which States seek to establish an international organization”. In his view, regarding UNCTAD as an international organization might create problems involving the attribution of responsibilities because it could not be held responsible for an internationally wrongful act.

38. Mr. GAJA (Special Rapporteur) said that the fifth sentence met Mr. Rodríguez Cedeño’s concerns.

39. Mr. MATHESON proposed the wording “a non-binding instrument adopted by the General Assembly”.

40. Mr. MOMTAZ said that the criterion to be adopted in paragraph (4) was whether international legal personality existed or not. In that case, the deletion of the reference to UNCTAD would be justified.

41. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the amendment of the fourth sentence proposed by the Special Rapporteur and the deletion of the words “non-binding” in the sixth sentence and the reference to UNCTAD in the seventh sentence.

*It was so decided.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

42. Mr. BROWNLIE proposed that, in the last sentence, the words “any way” should be deleted because they were not necessary.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

43. Mr. PELLET questioned the logic of the third sentence, which referred to the more recent dicta of ICJ on the legal personality of international organizations without explaining what the earlier ones had been.

44. Following a discussion on the relationship between the recent dicta and the advisory opinion on the *Reparation for Injuries* case, in which Mr. PELLET, Mr. GAJA (Special Rapporteur), Mr. MANSFIELD, Mr. BROWNLIE and Mr. GALICKI took part, the Special Rapporteur suggested that the words “more recent” should be deleted.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

45. Mr. PELLET said that paragraph (10) did not explain why the usual wording, according to which the legal personality of an organization must be “distinct” from that of its member States, was not used instead of the wording of article 2, according to which the legal personality of the organization should be its “own”.

46. Mr. ECONOMIDES said that the words “own legal personality” were better because they referred to the autonomous legal personality of international organizations. He found it surprising that the last sentence ruled out the possibility that a certain conduct could also be attributed to all the members of the organization and not only to one or more of them. He therefore proposed that the end of the paragraph should read: “to one or more of its members, or to all of its members”.

47. Mr. PAMBOU-TCHIVOUNDA said that the majority of the members of the Drafting Committee had considered that the words “distinct from that of its members” and the word “own” meant the same thing and had therefore opted for the latter in order to economize on wording.

48. Mr. PELLET proposed that, for the sake of clarity, the word “own” should be followed by the words “a term that the Commission considers synonymous with the phrase ‘distinct from that of its member States’”.

*Paragraph (10) was adopted, subject to the two changes proposed by Mr. Economides and Mr. Pellet.*

Paragraph (11)

49. Mr. PELLET said it was regrettable that the Commission did not refer in paragraph (11) to the question of organizations of international organizations, of which the Joint Vienna Institute was the best example, even if only to indicate that it was not adopting a position in that regard.

50. Mr. BROWNLIE said that he shared Mr. Pellet’s view.

51. Mr. GAJA (Special Rapporteur) said that, in principle, that type of organization was covered by the general clause in the commentary to article 1 stating that the fact that an entity did not correspond to the definition of an international organization did not mean that the principles embodied in the draft articles could not be applied to it. It was better, moreover, not to refer specifically to organizations established by international organizations in order not to introduce concepts that were not clear, such as the indirect role of States, particularly as that phenomenon was, for the time being, limited.

52. Mr. ECONOMIDES said that organizations of international organizations were not covered by the definition adopted by the Commission. He would nevertheless agree



that the commentary should explain that the Commission did not intend to take a position on those entities.

53. Mr. GAJA (Special Rapporteur) proposed that a note on the Joint Vienna Institute should be added to paragraph (11) later in order to explain that, without taking a position on such entities, the Commission considered that they were included in the above-mentioned general clause.

*Paragraph (11) was adopted, subject to the addition of the note the Special Rapporteur would prepare on the basis of his proposal.*

Paragraph (12)

54. Ms. ESCARAMEIA said that the words “rather than States” in the last sentence could lead to the conclusion either that the paragraph contradicted article 2 or that the Commission was using the word “State” to mean two different things.

55. Mr. GAJA (Special Rapporteur) suggested that the words “rather than States” should be deleted.

*Article (12), as amended, was adopted.*

Paragraph (13)

56. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence, the words “associate or affiliate” should be added between the word “additional” and the word “members” because, in many cases, entities other than States did not have full membership status within international organizations that admitted them.

57. Ms. ESCARAMEIA said that some regional trade organizations in Asia had accepted territories such as Macao, Hong Kong and Taiwan as full members.

58. Mr. GAJA (Special Rapporteur) said that it was difficult to generalize one way or another, but, for accuracy’s sake and in order to reply to Mr. Rodríguez Cedeño’s comment, he would check the Convention of the World Meteorological Organization and, if necessary, amend the footnote.

*Paragraph (13) was adopted, subject to that reservation.*

Paragraph (14)

59. Mr. MOMTAZ said that, for accuracy’s sake, the word “international” should be added before the word “responsibility” in the first sentence.

60. Mr. GAJA (Special Rapporteur) said that the same amendment should be made in the second sentence.

*Paragraph (14), as amended, was adopted.*

*The commentary to article 2, as amended, was adopted.*

*Commentary to article 3 (General principles)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

61. Mr. PELLET said that the second sentence was hard to understand and very clumsy. He proposed that the beginning should be amended to read: “A judicial statement of this principle appears in the advisory opinion of ICJ...”.

62. Mr. PAMBOU-TCHIVOUNDA said that the word “judicial” was not necessary because reference was being made to ICJ.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

63. Mr. BROWNLIE said that the beginning of the last sentence was incorrect and should be amended to read: “Thus, in appropriate circumstances...”.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) and (9)

*Paragraphs (8) and (9) were adopted.*

Paragraph (10)

64. Mr. PELLET said that, probably because of the way it had been translated from English into French, the fifth sentence of the French text was meaningless. He would prepare a revised translation himself and submit it to the secretariat.

65. Mr. GAJA (Special Rapporteur), supporting the proposal by Mr. Pellet, said that, at the beginning of that sentence, the words *à la charge* should be replaced by the words *à l’égard*.

66. Mr. ECONOMIDES said that, since the internal law of international organizations as a whole belonged to international law, it was incorrect to say, as the Commission had done in the fourth sentence, that “some further parts of the internal law of the organization” belonged to international law. He therefore proposed that the end of the sentence should be amended to read: “and the other parts of its internal law, which belonged to international law”.

67. Mr. PELLET said that the question raised by Mr. Economides was actually much more complex and controversial than he had suggested and that the Commission could not take such a definite position by way of the commentary to a draft article.

68. Mr. ECONOMIDES proposed that, in order to take account of Mr. Pellet’s comment, the end of the sentence

should be amended to read: “and other parts of its internal law which belong to international law”.

*Paragraph (10), as amended, was adopted, on the understanding that Mr. Pellet would submit a revised translation of the fifth sentence to the secretariat.*

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 1 (Scope of the present draft articles) (concluded)*

Paragraph (9) (concluded)

69. The CHAIR invited the Commission to consider the footnote which would be indicated by an asterisk at the end of paragraph (9) of the commentary to article 1, the text of which had been distributed to the members of the Commission and which read:

“The Commission has not yet adopted a position on whether the draft articles will apply to violations of what is sometimes called the ‘internal law of international organizations’ and intends to take a decision on this question later. For a discussion of the problems to which the concept of the ‘internal law of international organizations’ gives rise, see paragraph (10) of the commentary to article 3.”

70. Mr. GAJA (Special Rapporteur) suggested that the word “whether” should be replaced by the words “the extent to which” to give the Commission some room for manoeuvre.

71. Mr. PELLET proposed that both terms should be retained.

72. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted that proposal.

*It was so decided.*

*The commentary to article 1, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter IV of the report, as amended, was adopted.*

#### CHAPTER V. Diplomatic protection (A/CN.4/L.637 and Add.1–4)

73. The CHAIR invited the members of the Commission to consider, with a view to its adoption, chapter V of the draft report of the Commission on diplomatic protection.

#### A. Introduction (A/CN.4/L.637)

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.637 and Add.1 and 4)

Paragraphs 12 to 14 (A/CN.4/L.637)

*Paragraphs 12 to 14 were adopted.*

Paragraph 15

74. Mr. GAJA (Special Rapporteur) said that a sentence reflecting the Commission’s consideration of draft articles 21 and 22 should be added to paragraph 15 or to a new paragraph 16.

75. The CHAIR said that that would be done by the Rapporteur in consultation with the Special Rapporteur. He invited the members of the Commission to consider document A/CN.4/L.637/Add.1, which related to the consideration of articles 17 to 20.

*Paragraph 15 was adopted, subject to the amendment proposed.*

Paragraph 16 (A/CN.4/L.637/Add.1)

*Paragraph 16 was adopted.*

Paragraph 17

76. Mr. GAJA said that the words “State of nationality of the”, which had been left out by mistake, should be added before the word “corporation”.

77. Mr. PELLET said that the phrase “and might even be corporations” should be added after the phrase “nationals of many countries”.

78. Mr. DUGARD (Special Rapporteur) said that he supported the proposal by Mr. Pellet.

*Paragraph 17, as amended, was adopted.*

Paragraph 18

*Paragraph 18 was adopted.*

Paragraph 19

79. Mr. BROWNLIE, referring to the *ELSI* case, said that there seemed to be a contradiction between paragraph 19 and paragraph 51. He proposed that the Special Rapporteur should take another look at those two paragraphs.

80. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 2785th MEETING

*Monday, 4 August 2003, at 3.05 p.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

#### CHAPTER V. *Diplomatic protection* (concluded) (A/CN.4/L.637 and Add.1-4)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter V, section B, of the draft report of the Commission on the work of its fifty-fifth session.

#### B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.637 and Add.1 and 4)

Paragraph 19 (*concluded*) (A/CN.4/L.637/Add.1)

2. Mr. MOMTAZ questioned the need for the last part of the first sentence, which read: “given that decisions of ICJ were not binding on the Commission”. He suggested deleting it, particularly in view of the reference in the last sentence to the *Barcelona Traction* case as a true reflection of customary international law.

3. Mr. PELLET recalled that the Special Rapporteur had specifically mentioned in his report the fact that the decisions of ICJ were not binding on the Commission. It was therefore for him to decide whether that part of the sentence should be deleted.

4. Mr. DUGARD (Special Rapporteur) confirmed that statement and said he had even cited instances in which the Commission had not followed the decisions of ICJ. He was therefore in favour of retaining the last part of the sentence.

5. Mr. BROWNLIE said that, since the Commission was a deliberative body and not one that dealt with cases, the question of whether it should be bound by the decisions of ICJ did not arise.

6. Mr. DUGARD (Special Rapporteur) recalled that the issue at stake had been whether the Commission could disregard the *Barcelona Traction* case and formulate rules of its own. He had made it clear at the very outset that it was possible to do so, and the debate had proceeded on

that basis. The last part of the first sentence might well be considered tautological, but the first part, which stated that it was for the Commission to decide on such matters, must be retained.

7. Mr. ECONOMIDES endorsed the suggestion by Mr. Momtaz. As currently worded, the phrase in question might give the impression that the judgments of ICJ were worthless. If the phrase were not deleted then a more accurate formulation should be found.

8. Mr. BROWNLIE suggested the wording “given that decisions of ICJ were not necessarily binding on the Commission given the different responsibilities of the two bodies”. That would make it quite clear that the Commission was not in competition with the Court.

9. Mr. DUGARD (Special Rapporteur) endorsed that suggestion.

10. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the wording suggested by Mr. Brownlie, but he suggested, to avoid repetition, that “given the different responsibilities of the two bodies” should read “bearing in mind the different responsibilities of the two bodies”.

*It was so decided.*

11. Mr. DUGARD (Special Rapporteur) recalled that at the previous meeting Mr. Brownlie had drawn attention to an inconsistency between the second sentence of paragraph 19 and paragraph 51. Further to consultations with Mr. Brownlie, he would suggest that the first part of the second sentence should be reworded to read: “He observed that, in the *ELSI* case, although the Chamber of the Court was there dealing with the interpretation of a treaty and not customary international law, it had overlooked the *Barcelona Traction* case...”.

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 to 23

*Paragraphs 20 to 23 were adopted.*

Paragraph 24

12. Mr. GAJA said that, in the light of the amendment to paragraph 19, paragraph 24 would need to be expanded slightly to make it quite clear that the *ELSI* case by no means contradicted *Barcelona Traction*, as had been pointed out during the debate on the subject. He suggested that, after the first sentence, a new sentence should be inserted to read: “This was held not to be contradicted in the *ELSI* case.”

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 to 37

*Paragraphs 25 to 37 were adopted.*



## Paragraph 38

13. Mr. DUGARD (Special Rapporteur) enquired as to the status of the text of article 17, which had been adopted by consensus in the Drafting Committee as a working basis for discussion at the fifty-sixth session. Perhaps some reference should be made to it in the paragraph.

14. Mr. MANSFIELD (Rapporteur) said he agreed with the Special Rapporteur. The paragraph was somewhat misleading, as it merely reproduced the text referred by the Working Group to the Drafting Committee, when in fact the Committee had reached consensus on a text.

15. Mr. KATEKA (Chair of the Drafting Committee) said that technically, since he had not reported to plenary on the outcome of the Drafting Committee's discussion on article 17, the matter should be held in abeyance until the next session. However, it was essential that discussion should not be reopened on the subject as a result.

16. Mr. GAJA drew attention to paragraph 14 of document A/CN.4/L.637, which stated that at its 2764th meeting the Commission had decided to refer article 17 to the Drafting Committee. It would be helpful for whoever was reading paragraph 38 of the document now under consideration to know exactly what the status of the article was. Perhaps a new sentence could be added to that effect. Moreover, for the sake of consistency, information on the status of all texts referred to the Drafting Committee should be included throughout the report.

17. The CHAIR said that paragraph 14 of document A/CN.4/L.637 would seem to meet the Special Rapporteur's concern.

18. Mr. DUGARD (Special Rapporteur) said his main concern was that the whole issue would not be reopened for discussion at the fifty-sixth session, given that the Drafting Committee had met twice to discuss the text and had reached consensus on it.

19. Mr. PELLET said he felt uncomfortable about mentioning something in the report which had not been reported to plenary earlier in the session. He assured the Special Rapporteur that the whole issue would not be reopened for discussion at the next session.

20. The CHAIR said that the Secretary had noted the status of the text and the concerns expressed, which would be taken into account when dealing with it at the next session. On that understanding, he would take it that the Commission wished to retain the text of paragraph 38 as it stood.

*It was so decided.*

## Paragraphs 39 to 44

*Paragraphs 39 to 44 were adopted.*

## Paragraph 45

21. Mr. PELLET, referring to the penultimate sentence, questioned the appropriateness of the phrase in the French text *plusieurs conventions d'investissement* given that more than 2,000 investment conventions were involved.

He suggested that it should be replaced by the words *un grand nombre de conventions d'investissement*.

22. Mr. GAJA suggested that in the English text the word "conventions" be replaced by "treaties".

23. Mr. BROWNLIE suggested by way of solution that the phrase "treaties and conventions" might be used, as was sometimes done in English text.

24. The CHAIR endorsed Mr. Gaja's suggestion, which was in line with the wording of the 1969 and 1986 Vienna Conventions.

25. Mr. DUGARD (Special Rapporteur), supported by Mr. Sreenivasa RAO, also stated a preference for the word "treaties". He had used that term in his report when referring to bilateral investment treaties.

26. Mr. PELLET said that the word *conventions* should be retained in the French version.

*Paragraph 45, as amended, was adopted.*

## Paragraphs 46 to 48

*Paragraphs 46 to 48 were adopted.*

## Paragraph 49

27. Mr. ECONOMIDES said that the last sentence of the paragraph did not read very well, at least in the French version.

28. Mr. DUGARD (Special Rapporteur) agreed and suggested that the text should be reworded: "His own view was that a customary rule was developing and that the Commission should be encouraged to engage in progressive development of the law in this area, if necessary. However, it should do so with great caution."

*Paragraph 49, as amended, was adopted.*

## Paragraphs 50 to 69

*Paragraphs 50 to 69 were adopted.*

**C. Draft articles on diplomatic protection provisionally adopted so far by the Commission (A/CN.4/L.637/Add.2 and 3)**

**1. TEXT OF THE DRAFT ARTICLES (A/CN.4/L.637/Add.2)**

**Article 9 [11] (Categories of claims)**

29. Mr. PELLET said that he was about to take a course of action of which he strongly disapproved: he wished to call into question the title of draft article 9 [11], even though it had already been adopted. The use of the French word *classement*, which the multilingual Mr. Gaja had told him translated into English as "shelving", was, however, totally inappropriate. That was not what draft article 9 [11] dealt with. At the very least, therefore, he would wish to see the French text aligned with the English word "classification". Even in English, however, "classification" was not quite right. The expression "characterization of claims" (and in French *qualification des réclamations*) would be preferable.

30. Mr. DUGARD (Special Rapporteur) said that his original title had been “Nature of claims”, which had been judged too bland. Mr. Pellet’s suggestion was acceptable to him if it commanded general support.

31. Mr. BROWNLIE said he feared he had been a member of the language group that had endorsed the title. Although not ideal, “characterization” of claims was greatly preferable to “classification”.

32. Ms. ESCARAMEIA suggested that the simplest solution would be to use the expression “types of claims”. The French version would be *types* and the Spanish *tipos*.

33. Mr. PELLET suggested the word “categories”, which, like “types”, was virtually the same in all three languages.

34. Mr. DUGARD (Special Rapporteur) concurred. “Categories” had the same meaning as “types” but was more elegant. The episode should be a lesson to the Commission that, in its satisfaction at drafting an acceptable text, it should not overlook other details.

35. The CHAIR, after expressing his concern that the Commission was breaking with every known precedent, said that, if he heard no objection, he would take it that the title of draft article 9 [11] should be amended to “Categories of claims”.

*Section C.1, as amended, was adopted.*

**B. Consideration of the topic at the present session (concluded)  
(A/CN.4/L.637 and Add.1 and 4)**

Paragraphs 70 and 71 (A/CN.4/L.637/Add.4)

*Paragraphs 70 and 71 were adopted.*

Paragraph 72

36. The CHAIR said that the words “article 5” in the second sentence of the English text should read “article 55”.

*Paragraph 72, as amended, was adopted.*

Paragraphs 73 to 77

*Paragraphs 73 to 77 were adopted.*

Paragraph 78

37. Ms. ESCARAMEIA said that the last sentence of the paragraph did not fully reflect the debate. She—and, she believed, others—had said that the provision should not be recast as a rule of priority. In order, therefore, to avoid giving the impression that the remedy in question must be exhausted before diplomatic protection could apply, she suggested that the following sentence might be added at the end of the paragraph: “The view was also expressed that a regime of priority could not be presumed, and that a ‘special regime’ could not always be seen as the remedy that needed to be exhausted before diplomatic protection could apply.”

*Paragraph 78, as amended, was adopted.*

Paragraphs 79 to 84

*Paragraphs 79 to 84 were adopted.*

Paragraph 85

38. Mr. GAJA said he welcomed the inclusion of the paragraph. Indeed, it was the kind of paragraph that he would have welcomed at the conclusion of the previous discussion: it would be very useful for the reader to be informed that a given draft article had been referred to the Drafting Committee, without needing to consult other documents to see what action had been taken.

39. Mr. MIKULKA (Secretary of the Commission) said that the paragraph had been included because of the specific nature of its content. Since the question of referring articles to the Drafting Committee was traditionally dealt with in another part of the report, it would, rather, be confusing to insert such paragraphs elsewhere, since the expectation would be raised that similar wording would be found in other chapters.

40. Mr. Sreenivasa RAO said that inverted commas should be inserted around the words “without prejudice”.

41. Mr. ECONOMIDES said that, according to his recollection, the decision had not been as clear-cut as was indicated in the paragraph. The suggestion that the provision should be reformulated as a “without prejudice” clause had been forcefully made, but other views had been expressed. The second half of the sentence should be made less categorical with the addition of a phrase such as “in particular”.

42. Mr. DUGARD (Special Rapporteur) recalled that the paragraph reflected the Chair’s support of the provision, which he himself had proposed should be deleted. There had been little discussion but general agreement with the Chair’s proposal to refer the provision to the Drafting Committee. It had been felt that it would be useful to reach agreement on a clause that retained the notion of the “special regime” but did not prejudice other regimes, particularly diplomatic protection.

43. The CHAIR acknowledged that he had seen some merit in retaining a clause that contemplated the existence of other regimes, such as bilateral investment treaties or human rights treaties. Such a clause should be of a general nature and should appear at the end of the draft articles, so that special regimes could be retained without necessarily being made *lex specialis*.

44. Mr. MATHESON confirmed that a “without prejudice” clause had been only one of several possibilities. He therefore suggested that the second half of the paragraph should be reworded along the following lines: “... with a view to having it reformulated and located at the end of the draft articles—for example, as a ‘without prejudice’ clause”.

*Paragraph 85, as amended, was adopted.*

Paragraphs 86 to 89

*Paragraphs 86 to 89 were adopted.*

Paragraph 90

45. Mr. GAJA said that two words had been omitted from the last sentence, which should read: "... provided that the place of management is located or registration takes place in the territory of the same State".

*Paragraph 90, as amended, was adopted.*

Paragraph 91

*Paragraph 91 was adopted.*

Paragraph 92

46. Ms. ESCARAMEIA suggested that the first word, "Several", should be replaced by "Some"; according to her recollection, only one person had expressed concern about the resort to diplomatic protection for the benefit of legal persons other than corporations, which was consistent with the view described in paragraph 93 that the Commission should not draft rules on the diplomatic protection of other legal persons. The opposite point had also been made: that States could always protect any other legal person. The following sentence should be added at the end of the paragraph: "Other speakers thought that diplomatic protection extended to all other legal persons, including non-governmental organizations, and that, anyway, States had always the discretionary power of protecting their own nationals."

47. Mr. DUGARD (Special Rapporteur) said that he supported the proposal, which more accurately reflected the balance of the debate.

48. Mr. KATEKA (Chair of the Drafting Committee) proposed that the second half of the proposed text should be reworded along the following lines: "... and that in any case States had the discretionary right to protect their own nationals".

49. Mr. RODRÍGUEZ CEDEÑO said that some explanatory phrase ought to be added to the term "non-governmental organizations". He therefore proposed that a phrase should be inserted after "organizations", namely, "the establishment and functioning of which were generally governed by the domestic law of those States".

*Paragraph 92, as amended, was adopted.*

Paragraphs 93 to 97

*Paragraphs 93 to 97 were adopted.*

*Section B, as amended, was adopted.*

### C. Draft articles on diplomatic protection provisionally adopted so far by the Commission (concluded)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.637/Add.3)

*Commentary to article 8 [10] (Exhaustion of local remedies)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

50. Mr. GAJA pointed out that, although all mention of the burden of proof had been removed from the article itself, it had reappeared in the commentary, and, in that connection, he was against the reference to the *ELSI* case, where it had been stated that the burden of proof was on the defendant, because in that case no distinction had been drawn between the existence of remedies and their effectiveness. He therefore urged the deletion of any allusion to the burden of proof and to the *ELSI* case.

51. Mr. DUGARD (Special Rapporteur) said that, while he could see the justification for dropping a reference to the *ELSI* case, he wondered if it was wise to omit all reference to the burden of proof, because the Commission had debated the matter at some length and some mention of it in the commentary would show that the Commission was aware of that thorny issue. Moreover, the commentary did distinguish between the two situations.

52. Mr. GAJA said that, after the protracted discussion to which the Special Rapporteur had alluded, many Commission members had decided that it was not proper to deal with the question of the burden of proof in a draft article, and therefore the commentary should also be silent on the matter. The rules on burden of proof varied tremendously, and even in the case law of the European Court of Human Rights those rules were evolving. As a compromise, he suggested that reference should be made to the subject in a footnote.

53. Mr. DUGARD (Special Rapporteur) said that most studies on the exhaustion of local remedies touched on the burden of proof and the Commission should not convey the impression that it had ignored the matter, particularly as the Commission had expunged the adjectives "adequate and effective" from the reference to local remedies. For that reason, he suggested inserting the word "generally" before "on the applicant State" and starting the footnote with the phrase "See also the *ELSI* case".

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted with minor drafting changes.*

Paragraph (6)

54. Mr. GAJA said that he was not in favour of quoting the *Finnish Ships Arbitration* as an authority that "all the contentions of fact and propositions of law which are



brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts” [p. 1502], because it established too stringent a test. He would rather use language from the *ELSI* case, namely, “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success” [p. 46, para. 59]. That criterion was more recent, more accurate and more flexible. Reference could be made to the *Finnish Ships Arbitration* in the footnote.

55. Mr. PELLET agreed with Mr. Gaja and recommended that the whole text of the paragraph should be reformulated.

56. Mr. DUGARD (Special Rapporteur) suggested the following wording:

“In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of ICJ stated that, ‘for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success’. This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that ‘all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts’. The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.”

The last sentence would not be amended.

57. The CHAIR noted that the footnotes would be modified accordingly.

*Paragraph (6), as amended, was adopted.*

*The commentary to article 8 [10], as amended, was adopted.*

*Commentary to article 9 [11] (Categories of claims)*

Paragraph (1)

58. Mr. GAJA said that he objected to the last sentence of the paragraph, as the principle cited was often invoked in the context of jurisdictional immunity, whereas in the case in point the foreign State had no immunity and there was no reason why it should not use local foreign courts. The sentence should be deleted, because it might confuse the reader, as it referred to a case in which the foreign State had been a defendant and was therefore inappropriate.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted with minor drafting changes.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

*The commentary to article 9 [11], as amended, was adopted.*

*Commentary to article 10 [14] (Exceptions to the local remedies rule)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted with minor drafting changes.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

*Paragraph (5) was adopted with minor drafting changes.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

*Paragraph (8) was adopted with minor drafting changes.*

Paragraph (9)

59. Mr. PELLET raised the question of italicization of Latin names and in references to the cases cited in Commission documents.

60. Mr. MIKULKA (Secretary of the Commission) undertook to check the editorial rules on italicization.

*Paragraph (9) was adopted with minor drafting changes.*

Paragraph (10)

61. Mr. MOMTAZ drew attention to the word “accidentally” in the first sentence, referring to the shooting down of an aircraft, and said it was not for the Commission to say whether such an action was taken “accidentally” or not. In some of the cases given as examples, the question was still at issue between the countries concerned. The word “accidentally” should be deleted. In the third sentence, relating to the aerial incident between Iran and the United States, the words *ex gratia* which appeared in the English version had been omitted in the French. It was important to know which text was authoritative. Since the

United States had never acknowledged a breach of international law, he questioned whether the case was relevant in the context of diplomatic protection.

62. Mr. MATHESON said it was a measure of the extent of Iranian-American cooperation that he, too, questioned the relevance of the case. Paragraph (10) of the commentary was intended to provide practical examples of cases in which States agreed to do away with the exhaustion of local remedies as a precondition for permitting certain kinds of claims. The *Aerial Incident of 3 July 1988* case between the United States and Iran had involved an offer of *ex gratia* payment, not a legal claim, and had certainly not entailed overlooking the exhaustion of local remedies rule as a precondition for bringing claims. He accordingly suggested that the sentence be deleted.

63. Mr. BROWNLIE said that, while the precedents given in paragraph (10) of the commentary should not be entirely ignored, he had doubts about whether they constituted viable examples: they were bargained settlements on an *ex gratia* basis. The claim by Pakistan against India (*Aerial Incident of 10 August 1999*) had involved the destruction of a State aircraft, and the local remedies rule would not have been applicable in any event.

64. Mr. CHEE said he endorsed Mr. Momtaz's comments. The shooting down of an aircraft, even if "accidental", was prohibited by the relevant article of the Protocol relating to an amendment to the Convention on International Civil Aviation (art. 3 *bis*), adopted by ICAO in 1984. If an aircraft, whether military or passenger, strayed into foreign airspace, the country concerned had to guide it to land at the nearest airport.

65. Mr. DUGARD (Special Rapporteur) said it was a pity the issue had not been raised earlier, but it did seem that paragraph (10) of the commentary had been shot down. If the Commission wished, he would try to salvage it, perhaps by deleting the first part relating to aircraft destruction and retaining the second part on transboundary environmental damage.

66. Mr. GALICKI pointed out that the example given in the last sentence was not appropriate inasmuch as the Convention on International Liability for Damage Caused by Space Objects established a special regime which could not be treated as support for the thesis advanced in paragraph (10). It had already been agreed that self-contained regimes should not be taken into account because they used specific systems applicable only to the situations governed by the relevant conventions.

67. Mr. ECONOMIDES said that, while some of the examples given in paragraph (10) might need to be deleted, the references in the footnotes of the paragraph to specific precedents should be retained. A solution might be to retain the first sentence, deleting the word "accidentally", and to attach a single footnote that combined the footnotes of the paragraph.

68. Mr. PELLET said that was not really a proper solution. If the examples were not pertinent, they remained so irrespective of whether they were placed in the text or in footnotes.

69. After further contributions to the discussion from Mr. BROWNLIE and Mr. CHEE, the CHAIR suggested that the Special Rapporteur be assigned the task of revising the paragraph in the light of the comments made.

70. Mr. DUGARD (Special Rapporteur) said that he would prefer to see the entire paragraph deleted.

*It was so decided.*

Paragraphs (11) to (18)

*Paragraphs (11) to (18) were adopted.*

*The commentary to article 10 [14], as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Chapter V of the report, as amended, was adopted.*

71. Mr. DUGARD (Special Rapporteur) thanked the members of the Commission for the careful reading they had given to the commentary and for all the corrections, editorial as well as substantive, that they had proposed. Their efforts ensured that the commentary did what it was supposed to do, namely, reflect the views of the Commission.

#### CHAPTER VIII. *Reservations to treaties* (A/CN.4/L.640 and Add.1-3)

##### A. Introduction (A/CN.4/L.640/Add.1)

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted with a minor editing change in paragraph 5.*

Paragraphs 10 to 15

72. Mr. PELLET (Special Rapporteur) queried the use of the words "the Commission provisionally adopted" in paragraphs 10, 13 and 15. It was his understanding that the draft guidelines in question had been adopted on first reading.

73. The CHAIR pointed out that a text was adopted on first reading only when all of its constituent elements were available. The Secretariat would investigate the situation and ensure consistency throughout the draft report further to the comments by the Special Rapporteur.

*Paragraphs 10 to 15 were adopted.*

Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.640 Add.1–3)**

Paragraphs 18 to 21 (A/CN.4/L.640/Add.1)

*Paragraphs 18 to 21 were adopted.*

**C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.640 and Add.1)**

**1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.640/Add.1)**

Paragraph 22

*Paragraph 22 was adopted.*

*Section C.1 was adopted.*

**Organization of work of the session (concluded)\***

[Agenda item 2]

74. Mr. PELLET said that the meetings being held at the present session to discuss reservations to treaties with individual human rights bodies were extremely interesting. It might be useful, however, to hold a general colloquium or symposium bringing together all the human rights bodies for a slightly more structured discussion, perhaps on the basis of reports. Such a meeting could be held during the Commission's session in 2004 or 2005; it would be particularly useful before the Commission took a decision on the preliminary conclusions on reservations to multi-lateral normative treaties, including human rights treaties, that it had adopted at its forty-ninth session.<sup>1</sup> What did members of the Commission think?

75. Mr. DUGARD said he strongly supported the proposal and thought it should be implemented in 2004, if possible. The meetings with human rights bodies had been encouraging. They should become an ongoing dialogue on an issue on which there was a great need for cooperation.

76. Mr. MANSFIELD said he also supported the proposal. The meetings with human rights bodies had allowed some progress to be made in harmonizing positions that had initially appeared very far apart. The organizational aspects of implementing the proposal, including venue and cost implications, should be investigated.

77. Ms. ESCARAMEIA said the meetings with human rights bodies were extremely useful but what was lacking was some sort of structure. Often the bodies had taken positions in individual cases but had not reflected very deeply on the overall question of reservations. She would like to see the dialogue with individual bodies continued, with particular emphasis on their reasoning about reservations to the treaties that concerned them. As for holding a symposium, it was certainly an interesting idea and she could support it, but not at the expense of a continuing dialogue with individual human rights bodies.

78. Mr. Sreenivasa RAO said exchanges were useful but should not amount to negotiation between the Commission and the human rights bodies.

79. Mr. BROWNLIE said the proposal was very attractive from the logical standpoint, but his intuitive reaction was that it was premature. It would be absolutely appropriate, but at a later stage in the dialogue with the human rights bodies. Bilateral, somewhat informal contacts were probably all they were prepared for at the moment. They were feeling their way forward, and the Commission should not be seen to be imposing a structure on the discussion or pressing for a resolution of the issue.

80. Mr. PELLET said the point was for everyone to feel the way forward together. He understood Mr. Sreenivasa Rao's concerns about not entering into negotiations, but it would be useful to seek a synthesis of positions about reservations to treaties, especially since he sincerely hoped that in 2005 the Commission would adopt a decision on the preliminary conclusions it had adopted at its forty-ninth session. He would not, however, press his proposal.

81. The CHAIR said there was no substantive opposition to Mr. Pellet's proposal but some questions had been raised about the logistical implications. Members of the Commission should continue to reflect on the idea.

*The meeting rose at 6.05 p.m.*

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## 2786th MEETING

*Tuesday, 5 August 2003, at 10 a.m.*

*Chair: Mr. Enrique CANDIOTI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, 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. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.*

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\* Resumed from the 2780th meeting.

<sup>1</sup> See 2781st meeting, footnote 11.



## Draft report of the Commission on the work of its fifty-fifth session (*continued*)

### CHAPTER VIII. *Reservations to treaties* (continued) (A/CN.4/L.640 and Add.1–3)

#### C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.640 and Add.1)

##### 2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.640)

*Commentary to the explanatory note*

Paragraph (1)

1. Mr. GAJA proposed that the words “Following a suggestion by the Drafting Committee”, which were inappropriate in that context, should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

2. Mr. GAJA, referring to the peremptory tone of the last sentence, said it suggested that readers were incapable of reaching their own conclusions and had to rely on the commentaries to the model clauses to determine whether the situation was one in which the inclusion of the clauses in the treaty would be useful.

3. Mr. MANSFIELD proposed that the words “alone can determine” should be replaced by the words “may help in determining”.

*Paragraph (4), as amended, was adopted.*

*Commentary to draft guideline 2.5 (Withdrawal and modification of reservations and interpretative declarations)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph [(3)]

4. Mr. PELLET (Special Rapporteur) said that, since the Commission had not adopted draft guideline 2.3.5, paragraph [(3)] should be deleted for the time being.

*Paragraph [(3)] was deleted.*

Paragraph (4)

*Paragraph (4), which became paragraph (3), was adopted with a minor drafting change.*

*Commentary to draft guideline 2.5.1 (Withdrawal of reservations)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted with minor drafting changes.*

Paragraph (3)

5. Mr. GAJA noted that paragraph (3) stated that the new draft article 19 no longer mentioned the notification procedure for the withdrawal of reservations. The proposal by Sir Gerald Fitzmaurice on formal notification<sup>2</sup> was reproduced in full in paragraph (2), while the description of the notification procedure proposed by Sir Humphrey Waldock<sup>3</sup> was relegated to a footnote. It would be clearer if it was included in the body of paragraph (3) in order to indicate that there had been a specific proposal on the notification procedure.

6. Mr. PELLET (Special Rapporteur) said that he agreed with that proposal and indicated that some footnotes corresponding to the paragraph in question should be merged.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

Paragraph (10)

7. Mr. GAJA said that the last sentence implied that reservations were only the result of the unilateral expression of the will of a State, but the Commission had not yet considered the question of the existence of an agreement. He therefore proposed that that sentence should be deleted.

8. Mr. MATHESON said that the word “unilateralism” had taken on a negative political connotation and referred to action carried out by a State in total disregard for the rights and interests of others, but that was certainly not what was meant at the end of the second sentence. He therefore suggested that that word should be replaced by a term such as “unilateral action” or “unilateral decision”, which would not have the same political implications.

9. Mr. MELESCANU said that, in his view, the last sentence contained a very important idea and an argument in favour of the idea that a reservation could be withdrawn unilaterally. It was important to indicate that the withdrawal of a reservation could be done without the agreement of the other contracting parties, although he did agree that the concept of unilateralism, which was perhaps overemphasized, should be eliminated.

10. Mr. PELLET (Special Rapporteur) said that he supported Mr. Gaja’s proposal even though he disagreed with him. Two unilateral acts did not make an agreement. The idea he was trying to put across was that an agreement was one unilateral act and a reservation was another. It might

<sup>2</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

<sup>3</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 76.

be considered that two unilateral acts ultimately ended up as an agreement, but that was not the case. The question was complicated and the Commission would have an opportunity to come back to what non-objection meant. The sentence under discussion was not wrong, but it did represent a doctrinal stand, and it was perhaps too early to lead the Commission into its adoption without having discussed it. It should therefore be deleted.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted with a minor drafting change in the French text.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

*Paragraph (13) was adopted with a minor drafting change in the French text.*

Paragraphs (14) to (16)

*Paragraphs (14) to (16) were adopted.*

*Commentary to draft guideline 2.5.2 (Form of withdrawal)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

*Paragraph (5) was adopted with a minor drafting change.*

Paragraphs (6) to (10)

*Paragraphs (6) to (10) were adopted.*

Paragraph (11)

11. Mr. GAJA said that he had problems with the theoretical approach taken in paragraph (11). The relationship between treaties and domestic law was very complex and it could not simply be assumed that the treaty would in any event be regarded as exclusively applicable and that a domestic law should just be ignored. If a reference to monism or dualism had to be included, it should be more flexible. Perhaps the text should be redrafted to take account of the fact that a treaty did not necessarily take precedence over an amended domestic law.

12. Mr. PELLET (Special Rapporteur) said that Mr. Gaja's argument about the complexity of the relationship between treaties and domestic law was not necessarily transposable to the problem covered by paragraph (11), which dealt with the relationship between reservations to treaties and domestic law.

13. Mr. GAJA said that the theoretical element of paragraph (3) gave a rather sketchy idea of the relationship between treaties, including reservations, and domestic law. He therefore proposed that the two sentences referring to monism and dualism should be deleted.

14. Mr. PELLET (Special Rapporteur) said that the deletion of those two sentences would disrupt his reasoning and was all the more unnecessary in that the sentences indicated that the result could but did not have to be legal chaos. For example, in monist countries, the court might have to decide whether it should apply the treaty—and the reservation thereto—or domestic law, even though the reservation had been based on that law.

15. Mr. GAJA said that a problem of interpretation could arise regardless of the legal theory prevailing in the country concerned.

16. The CHAIR noted that the majority of the members of the Commission were in favour of retaining the two sentences referred to by Mr. Gaja.

17. Mr. ECONOMIDES said that the words “the scope of which, however, is still uncertain” in the last sentence were unnecessary and should be deleted.

18. Mr. BROWNLIE said that the legal chaos referred to in paragraph (11) did not have to be described as “total”.

19. Mr. PELLET (Special Rapporteur) said that the French text of the last sentence referred to the possibility that the reserving State could continue “à s'en prévaloir à l'égard des autres parties”, whereas the English text used the words “to have an advantage over the other parties”. In his opinion, the words “to avail itself of” should be used.

20. The CHAIR proposed the following amendments: to delete the word “total” in the third sentence; to replace the words “to have an advantage over” by the words “to avail itself of the reservation with regard to” in the fourth sentence; and to delete the phrase referred to by Mr. Economides.

*It was so decided.*

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

*Commentary to draft guideline 2.5.3 (Periodic review of the usefulness of reservations)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

21. Mr. MATHESON proposed that the scope of the second sentence should be reduced by replacing the word “undermines” by the words “may undermine”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*Commentary to draft guideline 2.5.4 [2.5.5]* (Formulation of the withdrawal of a reservation at the international level)

Paragraphs (1) to (8)

*Paragraphs (1) to (8) were adopted.*

Paragraph (9)

22. Mr. PELLET (Special Rapporteur) said that he would check with the secretariat that it was draft guideline 2.1.3 that should be referred to in this paragraph and that the text of that provision, as contained in the footnote, actually corresponded to the version adopted by the Commission.

*Paragraph (9) was adopted, subject to that condition.*

Paragraphs (10) to (17)

*Paragraphs (10) to (17) were adopted.*

*Commentary to draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter]* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

23. Mr. GAJA said that, at the end of the footnote, the word “international” should be replaced by the word “internal”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

24. Mr. PELLET (Special Rapporteur) said that the last footnote in the paragraph should read: “See commentary to draft guideline 2.5.4, para. (17)”. The next footnote should read: “*Ibid.*, para. (1)”.

25. Mr. GAJA proposed that, in the second sentence, the words “the position that it took” should be replaced by the words “the position taken”.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft guideline 2.5.6* (Communication of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

26. Mr. GAJA proposed that the words “recipients of withdrawals of reservations” should be replaced by the

words “recipients of communications of the withdrawal of reservations”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.7 [2.5.7, 2.5.8]* (Effect of withdrawal of a reservation)

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted, on the understanding that the secretariat would rearrange the presentation of paragraph (2) to make it more readable.*

Paragraph (7)

27. Mr. PELLET (Special Rapporteur) said that, in the first sentence of the French text, the words *lui-même et* should be deleted.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

28. Mr. GAJA proposed that, in order to remove any ambiguity, the words “as of the entry” should be replaced by the words “as from the entry”.

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*Commentary to draft guideline 2.5.8 [2.5.9]* (Effective date of withdrawal of a reservation)

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were adopted.*

Paragraph (11)

29. Mr. GAJA said that the words “in respect of them” should be added after the word “effect” in the second sentence because the withdrawal did not take effect at the same time in respect of all the States and international organizations concerned.

*Paragraph (11), as amended, was adopted.*

Paragraphs (12) to (14)

*Paragraphs (12) to (14) were adopted.*



*Commentary to model clause A* (Deferment of the effective date of the withdrawal of a reservation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

30. Mr. GAJA said that, in the penultimate sentence of the French text, the words *projet de directive 2.5.8* should be replaced by the words *projet de directive 2.5.9*.

*Paragraph (2), as amended, was adopted.*

*Commentary to model clause B* (Earlier effective date of withdrawal of a reservation)

Paragraph (1)

31. Mr. GAJA proposed that the following sentence should be added at the end to indicate when the model clause could be used: “This is especially true when there is no need to modify internal law as a consequence of the withdrawal of a reservation by another State or organization.”

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

*Commentary to model clause C* (Freedom to set the effective date of withdrawal of a reservation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*Commentary to draft guideline 2.5.9 [2.5.10]* (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

32. Mr. GAJA said that he did not understand the second sentence of the French text.

33. Mr. PELLET (Special Rapporteur) said that that was perhaps because the sentence contained a mistake which distorted its meaning: the word *préserver* should be replaced by the word *réserver*.

34. Mr. GALICKI, referring to the words “integral obligations”, asked whether the quotation marks were really necessary.

35. Mr. PELLET (Special Rapporteur) said that that concept was in quotation marks because it was not yet fully accepted by writers on law.

36. Mr. MANSFIELD proposed that that term should be defined in a footnote.

37. Mr. PELLET (Special Rapporteur) said that he did not want to get into the definition of a controversial concept in a footnote. The obligations in question were primarily “non-reciprocal” obligations that also existed, for example, in environmental law. The concept had originated with Sir Gerald Fitzmaurice.

38. Mr. PAMBOU-TCHIVOUNDA proposed that the wording “, i.e., non-reciprocal obligations” should be added after the wording “integral obligations”.

39. Mr. PELLET (Special Rapporteur) said that they were not only non-reciprocal obligations, but also obligations whose breach could not result in the suspension of the treaty. That was a seminal concept, and in his view it would be a mistake for the Commission to leave it out. He proposed that it should be retained and that a footnote relating to it should be prepared.

*Paragraph (5) was adopted, subject to that amendment.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.10 [2.5.11]* (Partial withdrawal of a reservation)

40. Mr. GAJA said that the English and French texts of the draft guideline were different. The French text read: “*Le retrait partiel d’une réserve atténue ... et assure plus complètement ...*”, while the English text stated: “The partial withdrawal of a reservation purports to limit ... and to achieve a more complete ...”. He suggested that the two texts should be harmonized.

41. Mr. PELLET (Special Rapporteur) said that the Drafting Committee had adopted the French text of the draft guideline and that the authentic English text was the one contained in document A/CN.4/L.640/Add.1, which read: “The partial withdrawal of a reservation limits ... and achieves ...”.

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

42. Mr. BROWNLIE said that the use of the word “we” should be avoided. He proposed that the first sentence should be amended to read: “Reservation clauses expressly ... are to be found more frequently.”

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

43. Mr. PAMBOU-TCHIVOUNDA said that it should be indicated in a footnote, for example, why “This similarity is ... sometimes contested in the literature”.

44. Mr. PELLET (Special Rapporteur) suggested that, in the French text, the words *Cette assimilation, confirmée par la pratique* should be replaced by the words *Ce rapprochement, confirmé par la pratique*.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

45. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the words “to conventions” should be added after the wording “a number of reservations”. The quotation from Mr. Schabas should be in italics.

Paragraph (7)

46. Mr. GAJA proposed that, for the sake of consistency with the quotation contained in paragraph (6), the wording “limits the scope” should be replaced by the wording “does not enlarge the scope”.

47. Mr. PELLET (Special Rapporteur) said that he had no objection to that amendment, provided that the words *n’élargit pas* were in italics in the French text.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

48. Mr. ECONOMIDES said that the words “after much hesitation” and the word “(correctly)” in the footnote at the end of the sentence should be deleted.

49. Mr. PELLET (Special Rapporteur) said he agreed that the word “(correctly)” could be deleted. However, the words “after much hesitation” reflected an objective element and should therefore be maintained.

50. Mr. MOMTAZ said that the use of those words would have to be justified.

51. Mr. ECONOMIDES, agreeing with Mr. Momtaz, said that indications justifying the use of those words should be given in a footnote.

*Paragraph (9), as amended, was adopted, subject to the addition of the footnote proposed by Mr. Economides.*

Paragraph (10)

52. The CHAIR said that, in the French text, the words *le droit des conventions* should be replaced by the words *le droit des traités*.

*Paragraph (10), as amended, was adopted.*

Paragraphs (11) to (20)

*Paragraphs (11) to (20) were adopted.*

*Commentary to draft guideline 2.5.11 [2.5.12] (Effect of a partial withdrawal of a reservation)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

53. Mr. GAJA said that, in the penultimate sentence, the words “does not relate” should be replaced by the words “does not apply” and the words “that has been withdrawn” by the words “which has been withdrawn”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

54. Mr. GAJA said that the words “for there seems to be no case where partial withdrawal of a reservation has led to a withdrawal of objections” should be deleted.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

55. Mr. PELLET (Special Rapporteur) said that the words *prima facie* should be added in the French text of the second sentence and that the words “there might seem, *prima facie*, to be less doubt” should be replaced by the words “it might seem, *prima facie*, very doubtful”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

56. Ms. ESCARAMEIA said that, as it stood, paragraph (6) did not refer to the fact that the withdrawal of a reservation could have a discriminatory effect, not only in respect of the States parties to the treaty but also in respect of the persons directly concerned. The commentary should therefore be amended accordingly.

57. Mr. PELLET (Special Rapporteur) said that he agreed with Ms. Escarameia’s comment and proposed that, at the end of the third sentence, the words “or some categories of beneficiaries to the exclusion of others” should be added after the words “certain parties or categories of parties” and that, in the fourth sentence, the words “In that case” should be replaced by the words “In such cases”.

*Paragraph (6), as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Section C, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2787th MEETING

*Tuesday, 5 August 2003, at 3 p.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)* (A/CN.4/L.638)

1. The CHAIR invited members of the Commission to take up chapter VI of the draft report.

#### A. Introduction

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

Paragraph 7

2. In response to a comment by Mr. BROWNLIE, Mr. Sreenivasa RAO (Special Rapporteur) suggested that in the first sentence the word “again” should be deleted.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

Paragraph 11

3. Mr. MOMTAZ queried the phrase “International liability in case of loss from transboundary harm arising out of hazardous activities”, which was placed in parentheses in the first sentence.

4. Mr. MIKULKA (Secretary of the Commission) pointed out that it was part of the official title of the topic.

5. Mr. GAJA noted that in earlier paragraphs a different title was given, and that that might create some confusion. The transition should be made clearer.

6. Following a discussion in which Mr. MANSFIELD (Rapporteur) and Mr. KATEKA (Chair of the Drafting Committee) took part, the CHAIR suggested that the phrase in parentheses in the first sentence should be deleted and the last sentence revised to read: “The Commission adopted the report of the Working Group, decided that the topic would be entitled ‘International liability in case of loss from transboundary harm arising out of hazardous activities’ and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.”

*Paragraph 11, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### B. Consideration of the topic at the present session

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

7. Ms. ESCARAMEIA said the paragraph raised a general question about how the proceedings of the working groups were reflected in the Commission’s report. The practice seemed to be to say nothing about them, and that was the approach used in paragraph 13. On the other hand, the Commission’s report to the General Assembly on the work of its fifty-fourth session contained an entire section on the activities of the Working Group on the present topic.<sup>1</sup> At the current session, the same Working Group had made a great deal of progress on a number of substantive questions, and it was difficult to see why such progress was not reflected in the report.

8. Mr. Sreenivasa RAO (Special Rapporteur) said that in 2002 the Working Group had reached agreement on fundamental issues relating to the approach to the topic. In 2003 a productive exchange of ideas had taken place, but no conclusions had been reached. During the preparation of the draft report, the idea of covering the Working Group’s deliberations had been discussed, but after due consideration it had been decided not to. However, in deference to Ms. Escameia’s position and to give a sense of the very productive work that had been done, he could suggest the inclusion, at the end of the second sentence, of the phrase “and generally exchanged views on different aspects of the topic, particularly on the basis of the summary and submissions presented by the Special Rapporteur in his report”.

9. The CHAIR said he thought there was no harm in providing a factual description of what the Working Group had done, even though the secretariat had informed him that that went against the general practice and might set an unfortunate precedent. In addition, the Working Group in question was not a Working Group of the Commission, but a body convened to assist the Special Rapporteur.

<sup>1</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C, paras. 442–457.



10. Mr. BROWNLIE said that it would be a pity if precedents and past practice were the sole considerations governing reporting on the efforts of working groups. On the other hand, there were substantial reasons for not giving extensive coverage to what went on in those groups: their deliberations were therapeutic in character, problem-solving exercises that provided a foundation for future progress. He would be in favour of keeping the reporting at the present low level of coverage, without being entirely secretive about the proceedings in the Working Group.

11. Following a discussion in which Mr. MELESCANU, Mr. PELLET, Mr. MANSFIELD (Rapporteur) and Mr. CHEE took part, Mr. Sreenivasa RAO (Special Rapporteur) undertook to draft a text describing the Working Group's deliberations for insertion in the section entitled "Comments on the summation and submissions of the Special Rapporteur".

12. The CHAIR suggested that the Commission should endorse that proposal and that the phrase "to exchange views on various items with a view to assisting the Special Rapporteur in the preparation of his next report" should be inserted at the end of the first sentence in paragraph 13.

*It was so decided.*

*Paragraph 13, as amended, was adopted.*

#### Paragraph 14

13. In response to a remark by Mr. PELLET, the CHAIR suggested that the word *dommages* in the French version should be replaced by *préjudice*.

*It was so decided.*

*Paragraph 14, as amended, was adopted.*

#### Paragraph 15

14. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "once again" in the first sentence should be deleted and the word "urged" replaced by "recalled".

*It was so decided.*

15. Mr. BROWNLIE said he was unhappy with the substance of subparagraph (b) because it contradicted certain other propositions that appeared in the report, one of which was that the work on liability was without prejudice to the operation of the system of State responsibility. In real life, there was a great potential for overlap between the two systems. It would accordingly be preferable to modify the phrase "not involving State responsibility" to read "not necessarily involving State responsibility".

16. Mr. MELESCANU said the problem was that, if the Commission was simply endorsing the recommendations made by the Working Group in 2002, the wording of those recommendations could not be changed.

17. Mr. BROWNLIE said he accepted Mr. Melescanu's point, but adoption of subparagraph (b) as it stood would greatly narrow the scope of the topic, for the situations covered would shrink in number.

18. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Brownlie's amendment should be incorporated; even if that meant slightly deviating from the wording of the Working Group's recommendations, it would give the Commission more room to deal with certain issues.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

#### Paragraph 16

19. Mr. PELLET queried the use of the term "innocent victim" in subparagraph (c), which seemed to imply that some victims were not innocent. The term had been extensively discussed the year before and he had been under the impression that it was to be avoided.

20. Mr. Sreenivasa RAO (Special Rapporteur) said the phrase had been used in the discussion of the topic from the very start. The meaning of "innocent victim" as a term of art had even been brought up in the General Assembly. It should be retained because it had entered into the vernacular as a means of referring to those who were not involved in the operation of a project as either administrators or managers yet were likely to be affected by the project.

21. Ms. ESCARAMEIA said that the expression "innocent victim" had been used in the Working Group. During discussions in plenary she had objected to the expression, but her objection differed from that of Mr. Pellet. She considered that the environment *per se* should be covered, yet the quality of innocence could not be attributed to the environment, and thus the adjective "innocent" was inappropriate. It was surprising that there was no mention of that discussion under subsection B.2 of the report, relating to the summary of the debate. When the Commission came to deal with that section, reference should be made to the fact that the expression "innocent victim" had been discussed and different views and concerns had been expressed.

22. Mr. Sreenivasa RAO (Special Rapporteur) said that when the Commission dealt with that section of the report it would consider inserting a few lines to satisfy Ms. Escarameia's concern and ensure that her views were properly reflected. The expression "innocent victim" was a term of art generally used to describe human beings—not the environment—who were innocent in the sense that they were not directly involved in the operation of hazardous activities. A distinction was drawn between those involved and those not involved because the former would normally be governed by factories acts or other relevant national legislation. A footnote could be added to the effect that an innocent victim generally referred to a person adversely affected by the damage resulting from a hazardous activity who was not a person employed to conduct or be in control of the activity.

23. Mr. GAJA wondered whether such a definition would not rule out some people the Commission was seeking to protect. For instance, in the case of a firm which employed people on both sides of a border, when harm was caused to those living on the other side of the border the fact that they were employed or somehow connected with hazard-

ous activities should not really be relevant. What of employees living within the border of the territory where the harm had originated? Should they not also be protected? Since it would clearly be difficult for the Commission to decide on a definition at that juncture, perhaps the matter should be deferred until the next report.

24. Mr. MANSFIELD (Rapporteur) said that the footnote suggested by Mr. Sreenivasa Rao could be shortened considerably by saying something along the lines of “generally referred to those not involved in or benefiting from the activity in question”.

25. The CHAIR observed that the views of the Special Rapporteur must be accurately reflected.

26. Mr. BROWNLIE said that, like some other members, he was in favour of retaining the expression “innocent victim”, which seemed the most apt under the circumstances. There were all kinds of unresolved technical problems, such as the case of the innocent victim who owned shares in an offending enterprise in another State. However, the Commission did need a provisional term of art, which had some political advantages. Perhaps it could be made clear in the footnote that the definition was without prejudice to the various technical problems that would be explored in due course.

27. Mr. ECONOMIDES said that the notion of the innocent victim lay at the very heart of the draft and must therefore be referred to sooner rather than later. It should be mentioned in general terms by means of a footnote. For the time being, it did not seem necessary to provide a definition, since it was clear what it meant—the victim of a tragedy.

28. Mr. MOMTAZ said that the idea conveyed by the expression “innocent victim” was of a person who did not derive benefit from a hazardous activity. In that connection, he drew attention to the last sentence of paragraph 27, which stated that such activities were essential for the advancement of the welfare of the international community. The basic criterion was thus not a question of a person’s involvement or non-involvement in such activities but whether they derived some benefit from them.

29. Ms. ESCARAMEIA said it would be useful to have a footnote, but instead of providing a definition of the “innocent victim” it should simply say that the expression generally signified a person who did not benefit from the activity in question. No mention should be made of the involvement aspect.

30. Mr. MATHESON said that members were losing sight of the purpose of the section of the report under consideration—to relate what the Special Rapporteur had said when introducing his first report. It should not reflect what members felt the Special Rapporteur should or could have said, but simply what he had said.

31. Mr. PELLET said that was all very well, but the Commission needed to understand what the Special Rapporteur meant. He wished to explain what bothered him about the expression “innocent victim”. Some 10 years ago there had been an attack on a synagogue in Paris which had caused around 15 casualties. The Prime Minister at that time had had the bad taste to announce that

there had been three Jewish victims and nine innocent victims. Surely the Jews were also innocent victims? He had been very upset by the incident and had mentioned it to the Commission the previous year. He was raising the matter again because at that time he had felt that the Special Rapporteur had grasped the problem and was ready to give him satisfaction. That no longer seemed to be the case. As far as the example of workers at a nuclear power station was concerned, perhaps they were not innocent in the sense the Special Rapporteur intended, but they were innocent in the usual sense. They might well be the innocent victims of a nuclear disaster—they were certainly not guilty. He was not asking for a different term to be used, but he did want to dispel the uneasiness surrounding the expression “innocent victim”. He was certain the Special Rapporteur was not using the expression in a pejorative way, but his own understanding of innocence differed from the Special Rapporteur’s. Those working in hazardous activities were as innocent as others who did not. He did not wish to reopen the discussion on the matter, particularly since they were dealing with the Special Rapporteur’s report. He endorsed the idea of a footnote along the lines suggested by Mr. Momtaz—in other words, defining a specific concept. What the Special Rapporteur surely had in mind was not the innocence of Adam and Eve but the fact of not deriving greater benefit from an activity. The Commission would need to be careful about the implications of the words it chose.

32. Mr. GAJA disagreed. The idea of deriving benefit was not what the Commission was looking for. One might take the example of a dam built for agricultural purposes: there was an accident, the dam broke, and the farmland was flooded. Undoubtedly, the dam had been built for the benefit of the farmers, but would that mean that they were not victims? The Commission should not try to decide on a definition in such a short time, in view of the problems that remained to be resolved. If a footnote was to be added, it should be to the effect that the concept would be clarified in due course.

33. Mr. MELESCANU endorsed Mr. Gaja’s remarks. He did not believe it really useful to define an innocent victim as someone who did not derive benefit from the activity in question. Mr. Momtaz and Mr. Pellet had given the example of workers in the nuclear power industry, but they did derive some benefit because they earned a salary. It was very difficult to determine what was meant by deriving benefit from an activity, and the more the matter was discussed, the more complicated it became. The only solution, therefore, was a footnote stating that the concept would be defined in due course.

34. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed with Mr. Gaja. It was very difficult to define the concept of benefit as it was such a broad term. All consumers, persons supported by social welfare, traders and dealers were beneficiaries. If the term were extended to cover those kinds of situations, it would be impossible to draw a distinction between innocent victims, who were entitled to compensation, and those who were not. From the outset, the Commission had worked on the assumption that a large class of persons not directly involved in an operation should be given the benefit of compensation. In the case of the operation of motor vehicles it was easy to draw the distinction. One person drove the vehicle and

the others were passengers; if the latter were hurt they would be classified as innocent victims. However, if one attempted to extend the concept of operation to workers in the chemical or nuclear industries where different people were involved in the various operating stages—safety, monitoring, maintenance—the matter was not so straightforward. Mr. Pellet had said that the Commission had one year to resolve the problem. However, it was not a question of time. The Commission would not be able to solve the problem even if it had 10 years at its disposal, at least not without dissenting opinions. His suggestion had not been made without reflection. He had been an adviser in his country at the time of the drafting of a liability act for an atomic energy plant. The answer had been that persons working on and in the plant were covered by the Factories Act, whereas general liability provisions covered the remainder of the workers. That was the kind of idea he was trying to introduce, but it might not be acceptable to the Commission.

35. Ms. Escameia had introduced a completely different dimension, which might well be envisaged. There was no reason why different elements could not be added to the concept over time. Also, the sentimental aspect referred to by Mr. Pellet should be borne in mind so as to ensure that the Commission did not commit a similar gaffe. The expression “innocent victim”, was a term of art used since the beginning of the consideration of the topic, and the question of who was covered for the purposes of liability and for compensation required careful study. His understanding of the expression was that it meant persons not directly involved in the relevant operation. He would make no reference to those responsible for accidents, since the Commission did not want to make it a culpability issue. Therefore, a footnote should be added stating that “innocent victim” was a term of art generally understood to mean persons not directly involved in the operation, without prejudice to other technical issues, which, as Mr. Brownlie had suggested, would leave scope for further debate.

36. Mr. CHEE said he failed to understand the need to debate the definition of an innocent victim. In his view, it simply meant a person innocent of causing the accident. It could be used in tort law and a variety of other situations. In paragraph 16 it was being used in the context of harm caused in a situation over which the victim had no control; he was in favour of retaining it.

37. The CHAIR said that the debate had been long and interesting. However, if he heard no objection, he would take it that the Commission endorsed the Special Rapporteur’s proposal to add a footnote explaining what was meant by “innocent victim”.

*It was so decided.*

*Paragraph 16, as amended, was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

38. Mr. BROWNLIE said that the second sentence was rather clumsy. It would be easier to read if it were turned around. It should be reworded to read: “Factors which militated against the achievement of full and complete compensation included the following: problems with the definition of damage; difficulties of proof of loss; problems of the applicable law; limitations on the operator’s liability; and limitations within which contributory and supplementary funding mechanisms operated.”

*Paragraph 18, as amended, was adopted.*

Paragraph 19

*Paragraph 19 was adopted with a minor drafting change.*

Paragraph 20

39. Mr. PELLET, referring to the end of the second sentence, said that the word “(liability)” would need to be inserted in the French version after the word *responsabilité*. He also questioned the use of the term “option”; perhaps the word “aspect” would be more appropriate.

40. Mr. Sreenivasa RAO (Special Rapporteur) suggested the addition of a phrase at the end of the last sentence which would read: “as it might force the Commission to enter a different field of study altogether”.

41. The CHAIR suggested that the word “force” should be replaced by “lead”.

*Paragraph 20, as amended, was adopted.*

Paragraph 21 (a)

42. Mr. MOMTAZ asked for clarification regarding the phrase at the end of the second sentence: “still less one based on any particular set of elements”.

43. Mr. MANSFIELD (Rapporteur) said the problem stemmed from the phrase in the first part of the sentence “that duty would be best discharged by negotiating a liability convention”. He suggested it should be reworded: “that the best approach would be the negotiation of a liability convention”. Similarly, the phrase in the third sentence “the duty could be equally discharged, if considered appropriate” should be replaced by “another possibility would be”.

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase queried by Mr. Momtaz would be clearer if the start of the sentence were reworded: “While the schemes of liability reviewed had common elements” and the words “of compensation” were inserted after “duty” in the second sentence. In his review of various liability regimes, he had listed the different factors involved. It was difficult to negotiate a particular liability convention precisely because of the wide variety of factors.

45. Mr. MOMTAZ requested confirmation that the Special Rapporteur’s aim was not to draft a convention that would consolidate the elements of various regimes but simply to identify the general principles that would apply to all activities.



46. Mr. Sreenivasa RAO (Special Rapporteur) said that the way forward was not yet clear. There were no elements common to all regimes, so it seemed impossible to draft a comprehensive convention. On the other hand, in the absence of a model convention, he wondered whether various elements could be used in an *ad hoc* manner, although such a course of action was more difficult because it provided less guidance. However, for the time being, the aim was just to report to the General Assembly. Finer points of detail could be thrashed out within the Commission at the next session.

47. Mr. MOMTAZ said that the second sentence remained misleading. He wondered whether the Special Rapporteur's argument would be impaired if the phrase "still less one based on any particular set of elements" was deleted.

48. Mr. Sreenivasa RAO (Special Rapporteur) said any fears Mr. Momtaz might harbour that the Commission would be unable to draft a convention were misplaced, although it was not yet clear what form such a convention would take. There were strong views on both sides, but the phrase to which Mr. Momtaz had referred would not vitiate any future convention exercise.

49. Mr. MANSFIELD (Rapporteur) suggested that the Special Rapporteur's views would be more accurately reflected if the second sentence was reworded along the following lines: "Certainly the review did not suggest that the duty to compensate would best be discharged by negotiating a particular form of liability convention."

*Paragraph 21 (a), as amended, was adopted.*

Paragraph 21 (b)

*Paragraph 21 (b) was adopted.*

Paragraph 21 (c)

50. Mr. BROWNLIE said that, as it stood, the wording of subparagraph (5) was too elliptical: wording should be found to make it clear that State liability was the exclusive basis of liability in the case of outer space activities.

51. Mr. Sreenivasa RAO (Special Rapporteur) suggested the wording "Except in the case of outer space activities, State liability was not used exclusively as a basis of liability."

52. Ms. ESCARAMEIA pointed out that State liability existed as a subsidiary rather than a primary form in several conventions. Subparagraph (5) did not fully convey that. Therefore, the phrase "in the sense of exclusive liability" should be inserted after the word "exception".

53. Mr. GAJA recalled that some space activities, such as damage by one spaceship to another, were subject to fault liability rather than absolute liability. State liability was, in short, a very vague term and included liability based on fault.

54. Mr. GALICKI said that such exclusive State liability was not without exceptions, such as the combined liability of States and international organizations. The text should therefore take account of the possible variations.

55. Mr. Sreenivasa RAO (Special Rapporteur) said that he feared that tinkering with the paragraph would only make it worse. The points in paragraph 21 (c) were, after all, merely his recommendations; and the Commission understood what he had meant to convey in subparagraph (5).

56. Mr. BROWNLIE drew attention to two editorial changes that should be made in subparagraph (14).

*Paragraph 21 (c), as amended by Mr. Brownlie, was adopted.*

*Paragraph 21 as a whole, as amended, was adopted.*

Paragraph 22

57. Mr. Sreenivasa RAO (Special Rapporteur) said it was not clear that the last sentence related to a recommendation made by him rather than by the Commission. The wording "he suggested," should be inserted after "possibility".

*Paragraph 22, as amended, was adopted.*

Paragraph 23

58. Ms. ESCARAMEIA regretted that the negative tone of the paragraph might give the impression that the debate had focused exclusively on the viability of the topic and its conceptual and structural difficulties in relation to other areas of international law. In order to reflect the positive attitude of some members, the words "difficulties in relation to" should be replaced by "affinities with".

*Paragraph 23, as amended, was adopted.*

Paragraph 24

59. Ms. ESCARAMEIA said that not only the Sixth Committee had been favourably disposed towards consideration of the topic: strong support had also been expressed within the Commission. She therefore suggested that the following sentence should be added at the end of the paragraph: "Since General Assembly resolution 56/82 requested in its paragraph 3 that the Commission review the consideration of the liability aspects of the topic and article 18, paragraph 3, of the Commission's statute requires that priority be given to requests of the General Assembly, a discussion on the viability of the project was misplaced."

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 and 26

60. Mr. BROWNLIE said that the word "pragmatic" in the penultimate sentence of paragraph 25 was redundant and should be deleted.

61. Mr. PELLET said that the last sentence of paragraph 26 appeared to be inconsistent with the body of the paragraph.

62. Mr. BROWNLIE said that paragraph 26 needed restructuring altogether. He also suggested that the phrase

“incidence of cases highly probable” in the second sentence should be replaced by the phrase “a greater incidence of cases probable”.

63. Mr. MANSFIELD (Rapporteur) said the problem lay in the fact that the middle section comprised a summary of the statement by Mr. Koskenniemi, in which he had identified all the various criticisms that had been made and rebutted them point by point. The paragraph, however, listed only the criticisms and not the rebuttals; that was the reason for the apparent inconsistency noted by Mr. Pellet.

64. Ms. ESCARAMEIA said that what was in effect a double negative in the first sentence was misleading. The sentence should be rephrased to the effect that “some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development”. She also suggested the addition of a final sentence that would sum up Mr. Koskenniemi’s conclusions.

*The meeting was suspended at 4.35 p.m. and resumed at 4.45 p.m.*

65. Mr. Sreenivasa RAO (Special Rapporteur) said that, following informal consultations, paragraph 26 would be recast, taking account of the suggestions that had been made and incorporating the sentence at the end suggested by Ms. Escarameia. The middle section of the paragraph, enumerating the criticisms of the topic—(a) to (e)—would be transposed to paragraph 25, to follow the penultimate sentence. It would be preceded by the phrase “In addition, the following difficulties were noted:...”. The revised paragraph 26 would read:

“On the other hand, some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development. They expressed the view that the subject was important theoretically and in practice, with a greater incidence of highly probable cases in the future. They also noted that some of the various criticisms against the topic needed to be taken into account in the Commission’s work, but they did not debar the Commission from achieving a realizable objective. The Commission could draft general rules of a residual character that would apply to all situations of transboundary harm that occurred despite best-practice prevention measures.”

*Paragraphs 25 and 26, as amended, were adopted.*

Paragraphs 27 and 28

*Paragraphs 27 and 28 were adopted.*

Paragraph 29

66. Mr. BROWNLIE said that the text would read better if the word “which” was inserted before “caused”, in the second sentence.

67. Mr. PELLET suggested that, in view of the Commission’s previous discussion, the expression “innocent parties” should be replaced by “innocent victims”.

68. Mr. Sreenivasa RAO (Special Rapporteur) agreed to the proposal. He also proposed that the second half of the last sentence should be recast along the following lines: “and, second, to deal with the different social costs, which, from an analysis of the various regimes, varied from sector to sector”.

*Paragraph 29, as amended, was adopted.*

Paragraph 30

69. Mr. Sreenivasa RAO (Special Rapporteur) said that the words “were not prejudiced”, in the first sentence, should be replaced by “should not be prejudiced”.

70. Mr. BROWNLIE said that, if the Commission was taking the *Corfu Channel* case as the basis for its argument, as it should, precisely because the principle it enshrined was important, the fifth sentence of the paragraph should refer not only to a State’s knowledge of acts contrary to the rights of other States but also to the means of knowledge: Albania had been held liable not on the basis of the proof of its knowledge but because it had the means of knowing that a mine had been laid. He therefore suggested that the phrase “of which it had knowledge or means of knowledge” should be inserted after the word “acts”. He also suggested that the phrase following the words “other States” should be recast as a separate sentence, to read: “Such obligation would apply to the environment as well.” He would add that the distinction was nonetheless somewhat artificial, because the *Corfu Channel* was also part of the environment.

71. Mr. MOMTAZ said that he detected a contradiction between the last sentence, which appeared to sum up the paragraph, and the content of the paragraph itself. On the one hand, it was said that State responsibility largely dealt with the subject matter of the topic, yet surely that was not compatible with the aim of avoiding an overlap.

72. Mr. BROWNLIE said that, in his opinion, a system of options existed and the option of State responsibility still applied where appropriate. The snag had always been that earlier Special Rapporteurs had used as examples of what they deemed to be liability cases which were in fact classic instances of State responsibility. The problem was not one of conflict, but of the relationship between separate, coexisting options. That was why every draft contained a proposition that the State liability project was without prejudice to the law relating to State responsibility. If that were not so, it would be necessary to reconsider the 40 years’ work on State responsibility, and a splendid mess would then ensue.

73. Mr. Sreenivasa RAO (Special Rapporteur) said that he would defer to Mr. Brownlie on that question.

74. Mr. MANSFIELD (Rapporteur) said he agreed with Mr. Brownlie and that there was no disagreement on the main issue. The crux was that, in order for State responsibility to be incurred, there had to be a wrongful act, whereas the situations covered in chapter VI of the report were primarily those in which loss had arisen in circumstances where no wrongful act had occurred and where fault-prevention action had been taken.

75. Mr. BROWNLIE said that, in the paragraph under consideration, the Special Rapporteur had faithfully reflected the debate on the issue. He personally wished to make it clear that in his own previous comment he had not added anything new, but had merely elucidated the precedents set by the *Corfu Channel* case.

76. Mr. MOMTAZ said that readers would be perplexed, because the whole paragraph alluded to the interaction between the two regimes and yet the last sentence asserted that it was within the competence of the Commission to avoid any overlap.

77. The CHAIR said that the sentence in question reflected an individual opinion expressed during the debate and Mr. Brownlie appeared to be satisfied that his standpoint had been correctly reported. Although he therefore believed that the sentence should be retained, he asked Mr. Brownlie if he insisted on keeping the sentence.

78. Mr. BROWNLIE said that he had not, in fact, drawn that conclusion. His position was that there was a whole series of options, which included all the existing schemes of multilateral treaties dealing with that kind of issue. The Commission was wisely designing a new option. A benign competition took place between those options. They did not collide with one another. Hence there was an overlap, but it was not something negative. What alternative was there to acknowledging that coexistence? Was the Commission supposed to consolidate everything into a single scheme of liability that would subsume State responsibility and all the other treaty regimes? To his knowledge, no member had expressed that view.

79. The CHAIR suggested that the last sentence should be deleted.

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 and 32

*Paragraphs 31 and 32 were adopted.*

Paragraph 33

80. Ms. ESCARAMEIA said that, further to the discussion centering on the term “innocent victim”, it might be advisable, at the end of the paragraph, to add the following sentence: “Some members commented also on the appropriateness of the expression ‘innocent victim’, as in the case of damage to the environment.”

81. Mr. PELLET said that if that sentence were included in the report another sentence would have to be added in order to indicate that some members disagreed with that notion. Furthermore, he wished to know what was meant by “replacement language for a draft convention”. Did that phrase embrace the possibility of a draft convention?

82. Mr. Sreenivasa RAO (Special Rapporteur) said that the terms “models” and “legal regimes” had been selected so as not to imply that the definite aim was the drafting of a convention.

83. Mr. PELLET said his impression was that the idea to be conveyed was that the terms “models” and “legal regimes” did not necessarily exclude the possibility of a draft convention but, on the contrary, covered the whole

range of potential outcomes. If that was the case, the expression “replacement language” was inapt.

84. Following a discussion in which Mr. ECONOMIDES, Mr. PELLET, Ms. ESCARAMEIA and the CHAIR took part, Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should end with a formulation reading: “Some members also commented on the appropriateness of the expression ‘innocent victim’, particularly in relation to damage to the environment. Another view objected in principle to the use of the expression ‘innocent victim’.”

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 and 35

*Paragraphs 34 and 35 were adopted with minor drafting changes.*

Paragraph 36

85. Mr. PELLET said that the structure of the paragraph was illogical, as it referred to “general support” in one sentence and “some members” in the next. For that reason, it would be better to say that there had been wide support for maintaining the same threshold.

*Paragraph 36, as amended, was adopted.*

Paragraph 37

*Paragraph 37 was adopted.*

Paragraph 38

86. Mr. Sreenivasa RAO (Special Rapporteur) said that the traditional liability approach should not serve as a pretext for skirting the topic of damage to the environment. He suggested that, in order to make the meaning of the second sentence plainer, it should read, “It was stressed that any emphasis on traditional civil liability approaches should not be considered as an excuse for not dealing with questions concerning damage to the environment.”

*Paragraph 38, as amended, was adopted.*

Paragraph 39

87. Mr. Sreenivasa RAO (Special Rapporteur) said that the footnote should refer to the final printed version of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

*Paragraph 39 was adopted with minor drafting changes.*

*The meeting rose at 6 p.m.*



**2788th MEETING**

*Wednesday, 6 August 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, 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. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

**Draft report of the Commission on the work of its fifty-fifth session (*continued*)**

CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.638)*

**B. Consideration of the topic at the present session (*concluded*)**

Paragraph 40

1. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the words “made comments” in the first sentence of the English text should be replaced by the word “commented”. He also suggested that the word “general” in the second sentence should be replaced by “wide” and that the phrase “detailed comprehensive regimes that would cover” in the last sentence should be replaced by “detailed comprehensive regimes with wide scope covering”.

2. Mr. PELLET suggested that the words “The Commission” should be replaced by “The members of the Commission”.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

*Paragraph 41 was adopted.*

Paragraph 42

3. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the phrase “offered their comments with hesitancy” in the first sentence should be replaced by “made tentative comments”, and that the words “arising from” in the English text of the penultimate sentence should be replaced by “indicating”.

4. Mr. MANSFIELD, Mr. GAJA and Ms. ESCARAMEIA wondered what exactly was meant by the second sentence, which appeared to be saying that the Commission had to await the reaction of the Commission.

5. Mr. GAJA suggested that the end of that sentence, starting with the words “before first receiving”, should be deleted.

*Paragraph 42, as amended, was adopted.*

Paragraphs 43 and 44

*Paragraphs 43 and 44 were adopted.*

Paragraph 45

6. Mr. PELLET pointed out that the correct name of the court mentioned in the footnote was “Court of Justice of the European Communities”.

*Paragraph 45, as amended, was adopted.*

Paragraph 46

7. Ms. ESCARAMEIA said that the last sentence of the paragraph was confusing, as it gave the impression that some considerations were not legitimate.

8. Mr. MANSFIELD (Rapporteur) suggested rewording the sentence to read: “Accordingly, even if the question of strict or fault liability was to be set aside, the basis of State liability would arise, as would the question whether or not compensation would in such cases be full or limited.”

9. Mr. PELLET pointed out that the second sentence introduced a false opposition between absolute liability and strict liability, when in fact the former was the ultimate stage of the latter.

10. Mr. ECONOMIDES suggested that the words “and not strict” should be deleted from the sentence.

*Paragraph 46, as amended, was adopted.*

Paragraph 47

11. Mr. MANSFIELD (Rapporteur) said that the last sentence in the paragraph was unclear.

12. Mr. BROWNLIE said that declarations of acceptance of the compulsory jurisdiction of ICJ often mentioned other methods of settlement. The last sentence of paragraph 47 was intended to make it clear that the system which the Commission wished to develop would be just one of those other methods. He therefore suggested clarifying that point by putting the phrase “another available means of settlement” in quotation marks.

13. Mr. GAJA suggested deleting the words “or regimes regarding reservations”.

14. Mr. PAMBOU-TCHIVOUNDA noted that the second sentence did not specify the purpose for which the general principle “would probably not be sufficient”.

15. Mr. PELLET wondered what the precise nature of that general principle was.

16. Mr. MANSFIELD (Rapporteur) suggested that the phrase “the general principle alone would probably not be sufficient in practice” should be replaced by “a statement

to that effect would not be sufficient for that purpose”, the purpose in question being the one expressed in the previous sentence, namely, not to prejudice the work on State responsibility.

*Paragraph 47, as amended, was adopted.*

#### Paragraph 48

17. Mr. MOMTAZ, supported by Mr. Sreenivasa RAO (Special Rapporteur), said that, in order to faithfully reflect the discussion and for the sake of logic, the order of the second and third sentences in paragraph 48 should be reversed.

18. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*Paragraph 48, as amended, was adopted.*

#### Paragraph 49

19. Mr. PELLET said that the phrase “within the same territory” in the first sentence made little sense.

20. Mr. GAJA said that the sentence in question was intended to reflect a comment he had made during the discussion, namely, that the harm caused within the territory of the State of origin itself should not be ignored. He therefore suggested replacing the words “within the same territory” by “within the territory of the State of origin”.

21. The CHAIR said he took it that the Commission agreed to Mr. Gaja’s proposal.

*It was so decided.*

*Paragraph 49, as amended, was adopted.*

#### Paragraph 50

22. Ms. ESCARAMEIA recalled that during the discussion she had said that for the purposes of compensation she would prefer to retain a lower threshold, such as that of “appreciable harm”, as was in fact mentioned in paragraph 36. It therefore seemed contradictory to say in paragraph 50 that the Commission had agreed with the principle of retaining the same threshold. She would like to have the beginning of the first sentence changed.

23. Mr. Sreenivasa RAO (Special Rapporteur) said that the first sentence of paragraph 50 could not be deleted, as it reported a view expressed about a specific provision, whereas paragraph 36 dealt with general comments. He therefore suggested, in order to take account of Ms. Escarameia’s comment, that paragraph 36 should be reproduced at the beginning of paragraph 50, but with the words “general support” replaced by “wide support”. The remainder of the paragraph would then read: “The suggestion was made that, in the context of liability, the term ‘significant harm’ could be changed to ‘significant damage’. The importance of reaching agreement on a meaning of ‘significant harm’ that would be understood in all legal systems was emphasized.”

24. The CHAIR said he took it that the Commission agreed to the Special Rapporteur’s proposal.

*It was so decided.*

*Paragraph 50, as amended, was adopted.*

#### Paragraph 51

25. Mr. PELLET drew attention to a mistake in the French translation of the third sentence of the paragraph and suggested that the words *l’appui de la Sixième Commission* should be replaced by *un certain appui de la Sixième Commission*.

26. Ms. ESCARAMEIA said that it was an opinion that she had expressed that was reported in the sentence in question; she suggested, for the sake of completeness, that the words “and was covered in several instruments, including the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment” should be added.

27. The CHAIR said he took it that the Commission agreed to the proposals made by Mr. Pellet and Ms. Escarameia.

*It was so decided.*

*Paragraph 51, as amended, was adopted.*

#### Paragraph 52

28. Mr. GALICKI suggested that the terminology used in the paragraph and in the footnote should be made consistent, since one spoke of “a European Union Directive” while the other referred to “a Directive of the European Parliament and of the Council”.

29. The CHAIR said that the Secretariat would attend to the matter.

30. Mr. MANSFIELD (Rapporteur) suggested that the word “Conversely” at the beginning of the fourth sentence in paragraph 52 should be deleted, as there was no logical contrast between the sentence it introduced and the one that preceded it.

*It was so decided.*

*Paragraph 52, as amended, was adopted.*

#### Paragraph 53

31. Mr. GAJA said that the paragraph reported a view that had been expressed by him, and he suggested that, in the interest of accuracy, it should be reworded to read:

“Further, it was observed that this proposition should be reviewed from the perspective of the need to secure assets in the event of loss. It was essentially for that reason that ship-owners rather than charterers were held liable in the relevant conventions for harm caused by ships. Those who owned assets such as ships could insure such assets against risks and could easily pass on the costs to others if necessary.”

32. The CHAIR said he took it that the Commission agreed to Mr. Gaja's proposal.

*It was so decided.*

*Paragraph 53, as amended, was adopted.*

Paragraph 54

33. Mr. MANSFIELD (Rapporteur) said that the third sentence of the paragraph was not clear.

34. Mr. PELLET said that it referred to an opinion he had expressed during the discussion in response to a passage in the report of the Special Rapporteur in which the latter had contrasted the causal link with reasonableness. He proposed that the sentence should be amended to read: "According to this view, 'causality' was a criterion for establishing 'reasonableness'."

35. The CHAIR said he took it that the Commission agreed to Mr. Pellet's proposal.

*It was so decided.*

*Paragraph 54, as amended, was adopted.*

Paragraph 55

*Paragraph 55 was adopted.*

Paragraph 56

36. Mr. BROWNLIE said that "would" should be changed to "could" at the end of the second sentence.

37. The CHAIR said he took it that the Commission agreed to Mr. Brownlie's proposal.

*It was so decided.*

*Paragraph 56, as amended, was adopted.*

Paragraph 57

*Paragraph 57 was adopted.*

Paragraph 58

38. Ms. ESCARAMEIA said that the paragraph was intended to reflect an opinion that she had expressed and that, in order to report accurately what she had said, the word "would" in the second sentence of the English text should be replaced by "should".

*Paragraph 58, as amended, was adopted.*

Paragraphs 59 to 65

*Paragraphs 59 to 65 were adopted.*

Paragraphs 66 and 67

39. Mr. MANSFIELD (Rapporteur) said that the paragraphs appeared to introduce some confusion in the concepts involved, namely, on the one hand, the idea that damage to the environment could be caused within the

jurisdiction of the State or in an area beyond national jurisdiction and, on the other hand, the issue of whether it was possible to compensate for damage to the environment which it was not possible to quantify in monetary terms. He therefore proposed that paragraphs 66 and 67 should be combined into a single paragraph which would read:

"The submission that damage to the environment *per se* should not be considered compensable for the purposes of the topic received some support. In that regard, it was noted that there was a distinction between damage to the environment which could be quantified and damage to the environment which it was not possible to quantify in monetary terms. It was pointed out that in some liability regimes, such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the proposal for a Directive of the European Parliament and of the Council on environmental liability, damage to the environment or natural resources would be directly compensable. The work of the United Nations Compensation Commission was also considered helpful in this area. A separate issue was whether, in view of global interconnectedness, the inclusion of damage to the environment beyond national jurisdiction should be considered."

40. The CHAIR said he took it that the Commission agreed to the Special Rapporteur's proposal for paragraphs 66 and 67 and to the subsequent renumbering of the following paragraphs.

*It was so decided.*

*The new paragraph 66, which was based on a combination of paragraphs 66 and 67, was adopted.*

Paragraphs 68 to 77

*Paragraphs 68 to 77 were adopted.*

Paragraph 78

41. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "cannot be traced" in the English version should be replaced by "could not be traced" and that the words "with the jurisdiction" should be replaced by "within the jurisdiction".

42. Mr. MOMTAZ wondered what was meant by the phrase *la dimension équitable du degré subsidiaire faisant intervenir l'État* in the French text.

43. Mr. ECONOMIDES proposed that the phrase should be simplified to read: *la dimension équitable de la charge subsidiaire qui devrait être assumée par l'État*.

44. Mr. Sreenivasa RAO (Special Rapporteur) supported Mr. Economides' proposal and said that the English version should also be improved.

45. Mr. MANSFIELD (Rapporteur) suggested the following wording for the English version: "equity for involving the State as a subsidiary tier".

*Paragraph 78, as amended, was adopted.*



## Paragraph 79

46. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should be simplified to read: “He noted that there was a need for further work and reflection on the various issues raised and, if possible, to produce concrete formulations in the next report.”

*Paragraph 79, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VI of the report, as amended, was adopted.*

# CHAPTER VII. *Unilateral acts of States* (A/CN.4/L.639 and Add.1)

47. The CHAIR invited members of the Commission to consider section A and the first part of section B of chapter VII of the draft report, on unilateral acts of States, as contained in document A/CN.4/L.639.

## A. Introduction (A/CN.4/L.639)

### Paragraphs 1 to 12

*Paragraphs 1 to 12 were adopted.*

*Section A was adopted.*

## B. Consideration of the topic at the present session (A/CN.4/L.639 and Add.1)

### Paragraph 13 (A/CN.4/L.639)

*Paragraph 13 was adopted.*

### Paragraph 14

48. The CHAIR said that the following text should be added at the end of the sentence: “chaired by Mr. Alain Pellet. At its 2783rd meeting, on 31 July 2003, the Commission considered and adopted the recommendations contained in parts 1 and 2 of the report of the Working Group (A/CN.4/L.646)[footnote deleted] [see sect. C below].” A section C containing parts 1 and 2 of document A/CN.4/L.646 would therefore be added to the chapter.

*Paragraph 14, as amended, was adopted.*

### Paragraphs 15 to 40

*Paragraphs 15 to 40 were adopted.*

49. The CHAIR invited members of the Commission to consider the continuation of section B of chapter VII of the draft report, contained in document A/CN.4/L.639/Add.1.

### Paragraphs 1 and 2 (A/CN.4/L.639/Add.1)

*Paragraphs 1 and 2 were adopted.*

## Paragraph 3

50. Mr. MOMTAZ suggested replacing the words “on grounds of absence of coherence and lack of legal quality” with “on grounds of absence of coherence and lack of legal character”.

*Paragraph 3, as amended, was adopted.*

## Paragraph 4

*Paragraph 4 was adopted.*

## Paragraph 5

51. Mr. GAJA suggested that the words “and acts” in the second sentence should be deleted.

*Paragraph 5, as amended, was adopted.*

## Paragraph 6

52. Mr. GAJA suggested that the word “very” in the third sentence should be deleted and that the fifth sentence should be amended to read: “The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects...”. He suggested replacing the verb “constitute” with the phrase “provide the basis for”. Finally, he thought that it would be better to delete the sentence that read: “Furthermore, the examination of the basis for the obligatory nature of recognition could not be dealt with under the heading of the legal effects of recognition.”

*Paragraph 6, as amended, was adopted.*

## Paragraphs 7 to 14

*Paragraphs 7 to 14 were adopted.*

## Paragraph 15

53. Mr. MOMTAZ suggested that the word “perilously” in the first sentence should be deleted.

*Paragraph 15, as amended, was adopted.*

## Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

## Paragraph 18

54. Mr. PELLET suggested that the words “given in paragraphs 42 to 45 of the report” should be replaced by “given in the report”.

*Paragraph 18, as amended, was adopted.*

## Paragraph 19

55. Mr. ECONOMIDES said that the word *constitutive* in the French version should read *déclarative*.

56. Mr. BROWNLIE said that, in the second sentence of the English version, it would be preferable to insert the words “to be” between “recognition” and “declaratory”.

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 to 28

*Paragraphs 20 to 28 were adopted.*

Paragraph 29

57. Mr. PELLET suggested that, as the last sentence of the paragraph made little sense, it should be replaced with the following sentence: “The main purpose of the sixth report was to show that the definition of recognition corresponded to the draft definition of unilateral act, *stricto sensu*, analysed by the Commission in previous years.”

58. Mr. RODRÍGUEZ CEDEÑO supported that proposal but said that it should refer to “the definition of the act of recognition”.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 and 31

*Paragraphs 30 and 31 were adopted.*

*Section B, as amended, was adopted.*

*Chapter VII of the report, as amended, was adopted.*

**CHAPTER X. *The fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/L.642)**

**A. Introduction**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 6

59. Mr. PELLET said that, for the sake of coherence, the words “following his election to ICJ” should be added at the end of the paragraph.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

*Section B, as amended, was adopted.*

**C. Report of the Study Group**

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

Paragraph 12

*Paragraph 12 was adopted with minor drafting changes.*

Paragraphs 13 to 22

*Paragraphs 13 to 22 were adopted.*

Paragraph 23

60. Mr. PELLET asked if there were any plans to publish the outline prepared by Mr. Koskenniemi, Chair of the Study Group on the Fragmentation of International Law, which was an extremely interesting, enlightening and fundamental work that would benefit from exposure to a wider readership in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*.

61. Ms. ESCARAMEIA said that the Study Group had made such a proposal; however, if that was not feasible, the outline should at least be posted on the Commission’s web site. According to the secretariat, the outline could not be published, as it was not an official document.

62. Mr. MIKULKA (Secretary to the Commission) said that documents for limited distribution were not made public, as that was the Commission’s policy. Of course, the Commission was free to decide otherwise, but it should be borne in mind that the Chair of the Study Group had indicated that he considered his outline to be still at a preliminary stage, and it was thus understood that it should not be published in the *Yearbook of the International Law Commission*.

63. Mr. PELLET said that outlines by chairs of study groups were similar to the reports of special rapporteurs. Of course, if the author concerned did not wish the document to be included in the *Yearbook of the International Law Commission*, he could not be forced to agree to it. However, as a rule, the suggestion should be put to him, and the Commission should perhaps issue a guideline on the matter.

64. The CHAIR said that the author’s opinion had to be taken into account; if the author did not think that his document was in final form, the Commission should wait until the next session for a completed version.

65. Mr. BROWNLIE said that it was of course desirable to consult the author, who was perhaps not expecting his work to be published; however, the Commission was certainly able to reclassify the document, which should pose no problem unless Mr. Koskenniemi had some objection.

66. Mr. GAJA said he did not think that Mr. Koskenniemi would have objected, but the latter had not written the document with publication in mind, and it should not be forgotten that the Commission was considering a report by the Study Group which was actually a very detailed summary of what Mr. Koskenniemi had said, with a few changes. Moreover, the final product would be available to the Commission at its next session. If the document

was to be published, it would be preferable, as with all other documents of that kind, to do so on the Commission's website rather than in the *Yearbook of the International Law Commission*.

67. Mr. MIKULKA (Secretary to the Commission) pointed out that as soon as the final version of the Study Group's report was available, it would be dealt with in the same way as the reports by special rapporteurs and thus would be published in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*. To insist on having the outline published there would serve little practical purpose, as volume II was scheduled to appear in just six years, five years after the final version of the Study Group's report would have been published as a document for general distribution. Posting the document on the Commission's website after consulting the author was therefore a solution that the Commission might wish to consider.

68. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to post on its website, after consultation with Mr. Koskenniemi, the outline of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

*It was so decided.*

Paragraphs 23 to 25

*Paragraphs 23 to 25 were adopted.*

Paragraph 26

*Paragraph 26 was adopted with minor drafting changes to the English version.*

Paragraph 27

69. Mr. PELLET suggested that the words "self-contained regimes" should be inserted in parentheses after the words *régimes autonomes* in the French text, as the English term was commonly used in French, whereas the term *régime autonome* was never used.

*Paragraph 27, as amended, was adopted.*

Paragraphs 28 and 29

*Paragraphs 28 and 29 were adopted.*

*Section C, as amended, was adopted.*

*Chapter X of the report, as amended, was adopted.*

*The meeting rose at 1 p.m.*

## 2789th MEETING

*Thursday, 7 August 2003, at 10.10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

#### CHAPTER VIII. *Reservations to treaties* (*continued*)\* (A/CN.4/L.640 and Add.1–3)

##### B. *Consideration of the topic at the present session* (*continued*)\*\* (A/CN.4/L.640/Add.1–3)

Paragraphs 1 to 8 (A/CN.4/L.640/Add.2)

*Paragraphs 1 to 8 were adopted.*

#### CHAPTER IX. *Shared natural resources* (A/CN.4/L.641)

##### A. *Introduction*

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

##### B. *Consideration of the topic at the present session*

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

1. Mr. YAMADA (Special Rapporteur) asked whether it would be against the rules to list the names of the experts from FAO and UNESCO and of the representatives of ILA who had briefed the Commission. He proposed that the second sentence of the paragraph should read: "The Commission also had an informal briefing by experts on groundwaters from FAO and the International Association of Hydrogeologists on 30 July 2003. Their presence was arranged by UNESCO."

2. Mr. MIKULKA (Secretary of the Commission) explained that the exchanges with the representatives of ILA had not formed part of the discussion of the topic, but had taken place within the framework of cooperation with

\* Resumed from the 2786th meeting.

\*\* Resumed from the 2785th meeting.



other bodies. The issue should therefore be raised in the context of chapter XI.

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 10

*Paragraphs 6 to 10 were adopted.*

Paragraph 11

*Paragraph 11 was adopted with minor drafting changes.*

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

*Paragraph 13 was adopted with minor drafting changes.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

3. Mr. PELLET said that, in the French version, either the word “liability” should be added in brackets after the words *responsabilité internationale*, or the full title of the topic should be given.

*Paragraph 15 was adopted with that drafting change in the French version.*

Paragraph 16

4. Mr. PAMBOU-TCHIVOUNDA queried the use of the word “metaphor”.

5. Mr. BROWNLIE said that he was happy to claim responsibility for having introduced that term during the debate, when he had referred to the example of the Nubian aquifer. The report therefore accurately reflected that debate.

6. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized the statements of Mr. Operti Badan and Mr. Brownlie.

*Paragraph 16 was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

7. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence of the Spanish version, the word *recelos* was too strong.

8. The CHAIR suggested *dudas*.

9. Mr. MOMTAZ suggested the addition of the adjective “solid” to qualify “minerals”.

10. Following a discussion in which Mr. PELLET, Mr. BROWNLIE, Mr. KATEKA and Ms. ESCARAMEIA took part, the Commission concluded that minerals could take the form of solids or solutes.

*Paragraph 18 was adopted with minor drafting changes.*

Paragraph 19

11. Mr. MOMTAZ proposed that the word “general” should be replaced by “single”.

*Paragraph 19, as amended, was adopted.*

Paragraph 20

12. Mr. RODRÍGUEZ CEDEÑO said he could see no reason to retain the paragraph. Deleting it would have the advantage of enabling paragraph 19 to be merged with or followed immediately by paragraph 21, the two paragraphs being linked by a common thread of argument.

13. Mr. MATHESON said that paragraph 20 set out a viewpoint expressed during the discussion that the subject of oil and gas was not suitable for the Commission’s consideration, raised issues different from those raised by groundwaters and could be addressed by other processes. It should therefore be retained.

*Paragraph 20 was adopted.*

Paragraph 21

14. Mr. MATHESON said that the second sentence did not accurately reflect what he had said in the debate. He therefore proposed that it be replaced by a sentence reading: “The view was expressed that any consideration of the topic of oil and gas should be postponed until the Commission had completed its work on groundwaters.”

*Paragraph 21, as amended, was adopted.*

Paragraph 22

15. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized comments by Mr. Pambou-Tchivounda, Mr. Momtaz and Mr. Operti Badan, but needed improvement. In the first sentence, the words “in some cases” should be deleted.

*It was so decided.*

16. Mr. MANSFIELD (Rapporteur) said the point made by those three members was that the Commission should perhaps be developing a type of framework regime, like that established by the United Nations Convention on the Law of the Sea, under which regional arrangements in addition to the overall structure were envisaged. The word “framework” should perhaps be inserted in the first sentence, before “regime”. The second sentence reflected Mr. Operti Badan’s concern that any reference to maritime resources might imply a common heritage. He proposed

that the first part of that sentence, which read “Nonetheless, it was also stressed that the criterion of sovereignty should be applied to groundwaters, just as it had been for oil and gas...”, should be revised to read: “It was also stressed that the criterion of sovereignty was as relevant to groundwaters as it was to oil and gas...”

17. Mr. BROWNLIE said that the reference in the first sentence to a regime “along the lines of the one for maritime resources” was not clear. What regime was envisaged? The law of the sea dealt with maritime spaces, not resources, or, in the case of the exclusive economic zone, with the allocation of resources.

18. Mr. PELLET said that, as an objective observer not having participated in the debate on the subject, he found the paragraph unclear. In particular, the reference at the end to the “shared heritage of mankind” seemed to come from nowhere.

19. Mr. PAMBOU-TCHIVOUNDA said the reference to “characteristics” in the first sentence was somewhat vague and the word “hydrogeological” should perhaps be inserted before it. His point had been that State jurisdiction over confined groundwaters should perhaps be determined on the basis of the depth of the groundwaters beneath the surface. The phrase “criterion of sovereignty” was incorrect: it should read “principle of sovereignty”. Mr. Operti Badan’s remarks, reflected in the phrase “any reference to the concept of shared heritage of mankind would raise concerns”, followed on remarks of a different nature made by other members, and they might be better placed elsewhere.

20. Mr. MANSFIELD (Rapporteur) said that the paragraph appeared to require extensive redrafting: Might it not be better to delete it altogether?

21. Mr. CHEE said that the concept of the common heritage of mankind had been proposed by Arvid Pardo in 1962 in connection with seabed mineral resources outside national jurisdiction.<sup>1</sup> The phrase “maritime resources” was ambiguous, as it carried the connotation of fisheries resources.

22. The CHAIR said that, to avoid any confusion, the phrase “along the lines of the one for maritime resources” in the second sentence should be deleted. In the first sentence, the word “groundwaters” should be replaced by “them”.

*It was so decided.*

23. Mr. BROWNLIE said that the phrase “shared heritage”, in the second sentence, should be replaced by “common heritage”.

*It was so decided.*

*Paragraph 22, as amended, was adopted.*

Paragraph 23

*Paragraph 23 was adopted.*

<sup>1</sup> See A. Pardo, *The Common Heritage: Selected Papers on Oceans and World Order, 1967–1974* (Malta University Press, 1975).

Paragraph 24

24. Ms. ESCARAMEIA suggested the inclusion of additional wording at the end of the paragraph in order better to reflect the point she had made. The amendment would read: “and to clarify the meaning of ‘confined’, since it did not seem to be a term used by hydrogeologists”.

25. Mr. MELESCANU endorsed the proposal but said the word “legal” should be inserted before “meaning”, to make it plain that it was not the technical or scientific aspect that would be addressed.

*Paragraph 24, as amended, was adopted.*

Paragraph 25

*Paragraph 25 was adopted.*

Paragraph 26

*Paragraph 26 was adopted with minor drafting changes.*

Paragraph 27

26. The CHAIR said that, at the beginning of the paragraph, “The point was made” should be replaced by “Some members suggested”.

*Paragraph 27, as amended, was adopted.*

Paragraph 28

27. Mr. PAMBOU-TCHIVOUNDA said that the paragraph did not read well. In particular, he took issue with the opening phrase “The view was expressed”, which might give the impression *inter alia* that only one member had stated that the principles of the permanent sovereignty of States over natural resources should be taken into account. In fact, several members had made that point. The phrase should be reworded to read: “Some members expressed the view...”

*Paragraph 28, as amended, was adopted.*

Paragraph 29

28. Mr. PAMBOU-TCHIVOUNDA suggested that, in order to follow on from paragraph 28, the opening phrase “Some members” should read “Other members”.

29. Ms. ESCARAMEIA said that the paragraph did not reflect the concern expressed by some members about the need to differentiate between the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses and the work of the Commission, particularly since the Convention dealt with groundwaters linked with surface waters as they flowed into a common terminus. She therefore suggested adding a sentence that would read: “Some members also raised concerns regarding the scope of the present study *vis-à-vis* that of the Convention on the Law of the Non-navigational Uses of International Watercourses, since this Convention also covered some types of groundwaters and used expressions such as

‘flowing into a common terminus’, which were not very clear.”

30. The CHAIR suggested deleting the last part of Ms. Escameia’s proposal, which implied criticism of the wording of the Convention on the Law of the Non-navigational Uses of International Watercourses, for which the Commission was also partly responsible.

*It was so decided.*

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 32

*Paragraphs 30 to 32 were adopted.*

Paragraph 33

31. Mr. MANSFIELD (Rapporteur), referring to the second sentence, suggested that the word “would” should be replaced by “should” and that the phrase “to identify the means to get assistance in” should be reworded to read: “identify appropriate techniques for”.

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 to 36

*Paragraphs 34 to 36 were adopted.*

Paragraph 37

32. Mr. YAMADA (Special Rapporteur) suggested that the words “priority focusing on” should be replaced simply by the word “and”.

*Paragraph 37, as amended, was adopted.*

Paragraph 38

*Paragraph 38 was adopted.*

*Section B, as amended, was adopted.*

*Chapter IX of the report, as amended, was adopted.*

#### **CHAPTER XI. Other decisions and conclusions of the Commission (A/CN.4/L.643)**

##### **A. Programme, procedures and working methods of the Commission, and its documentation**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

33. Mr. PELLET suggested deleting the words “in fact” in the last sentence.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

34. Mr. ECONOMIDES proposed, on behalf of eight members of the Commission, the inclusion of an additional paragraph in the report based on a text submitted to the Commission at its 2783rd meeting. He suggested that it might come under the heading “Reminder of the fundamental principles of international law”. Since the 2783rd meeting the text had been substantially revised with a view to attracting the support of more members and (he hoped) the majority of the Commission. Mr. Galicki had already signalled his support for the new text, which read:

“Some members of the Commission recalled that the fundamental principles of international law are designed to guarantee peace, security and order in relations among States. They stressed the absolute need for the international community to preserve such principles, which are peremptory and thus non-derogable, and proposed that the Commission should make itself available with a view to reaffirming them.”

The factual part of the text which had prompted considerable reaction had been deleted; what now remained was more neutral in tone and dealt only with the fundamental principles of the international legal order. It was also fully in line with the statement by the Secretary-General of the United Nations published in the *International Herald Tribune* on 1 August 2003, which stressed the urgent need to review the role of the United Nations in the light of the international crisis.

35. Mr. GAJA asked for clarification of the procedure to be followed, since it was fairly unusual for such a proposal to be submitted at the present juncture. Without wishing to enter into the details of the proposed text, he thought the Commission might consider it appropriate to deal with the substance under its long-term programme of work in connection with enhancing the effectiveness of the role of the United Nations. He did have some reservations about the Commission setting a precedent by expressing views on issues which related to United Nations resolutions. If it were to comment on one issue, might not its silence on other decisions of the United Nations be regarded as tacit approval? In his opinion, it was not the role of the Commission to take up such matters; it should adhere to its mandate, namely, codification and progressive development of international law.

36. Mr. DUGARD said that the purpose of the proposal was to express concern about recent events which, although not of a political nature, nonetheless threatened the role of international law. Mr. Economides had radically amended his original proposal. Notwithstanding Mr. Pellet’s remark that he could not endorse a proposal unless it expressly condemned one particular State, Mr. Economides had watered the text down simply to indicate the Commission’s concern about the fundamental principles of the international legal order. The proposal raised the question of whether it would ever be appropriate for the Commission to comment on such matters, which were clearly not provided for in its mandate. In that connection, he recalled the debate which had frequently taken place among legal bodies in South Africa during the apartheid era, when the basic principles of law were being undermined by the executive, the legislature and the ruling political party. Initially opinion in the legal bodies had been divided, but finally they had felt that it was incumbent



upon them to express their views. Perhaps the Commission had not yet reached that stage, but many members believed that recent events inside and outside the United Nations warranted comment. Moreover, many members who were in teaching found it increasingly difficult as students began to question the very existence of international law. It should be borne in mind that the Commission was the senior international law body in the United Nations system, and obviously ICJ could not comment on such matters in the absence of any dispute submitted to it. It was incumbent on the Commission to act in the final resort as a guardian of the principles of international law and to reaffirm them as and when appropriate. He was not certain that Mr. Economides' very bland proposal captured the concerns of the members who had originally supported it, but somewhere and somehow it had to be said that some members were concerned by recent developments in international law.

37. Mr. YAMADA, speaking on a point of order, said that he fully respected the views of Mr. Economides and Mr. Dugard and recognized their right to air them in the Commission. Nevertheless, he believed the proposed text was an evaluation of an external political event that simply fell outside the mandate of the Commission. If action was taken on the proposal, it would have serious implications in the General Assembly and would divide the members of the Commission, who had worked so harmoniously thus far. In accordance with rule 113 of the rules of procedure of the General Assembly, he requested the Chair to rule that the matter fell outside the mandate of the Commission.

38. The CHAIR said that, having listened to the arguments on both sides, he was ruling that, although the concern that had been expressed was undoubtedly valid, a chapter relating to the decisions and conclusions of the Commission was not the appropriate place for the proposal read out by Mr. Economides. The matter would be more appropriately raised within the Planning Committee or the Study Group on the Fragmentation of International Law. Important and topical though it was, the issue should be addressed in accordance with the appropriate procedure, in the same way that the Commission took up all its concerns.

39. Mr. ECONOMIDES said that, while he respected the Chair's ruling, he regretted that members had not been afforded an opportunity to express their views on a topic that was far from exhausted. Indeed, discussion had been curtailed in a somewhat authoritarian way. If, however, the proposed text was unacceptable in that part of the report, he proposed that an even more anodyne text should be inserted in the section on relations of the Commission with the Sixth Committee, with the following wording: "A proposal was made within the Commission that the Commission should offer its availability to contribute to the consideration and reaffirmation of the fundamental principles of international law." It was the least the Commission could do to show its concern.

40. The CHAIR said that, if a challenge was being made to his ruling, it should be made clearly and openly.

41. Mr. PELLET said that he wished to emphasize that, although his personal feeling had been that the original

proposal was too weak, he had never used the words ascribed to him by Mr. Dugard. He fully supported the Chair's ruling: the Commission was not the right body for that kind of statement.

42. Ms. ESCARAMEIA pointed out that Mr. Economides had made a new proposal, to be inserted in a different part of the report. There was surely no reason why the Commission should not offer to study the fundamental principles of international law. Moreover, since the issue had been raised a number of times during the current session, the concern should be reflected in the report.

43. Mr. YAMADA pointed out that, according to rule 123 of the rules of procedure, when a proposal had been adopted or rejected, it could not be reconsidered at the same session unless a two-thirds majority of the Commission so decided.

44. The CHAIR ruled that the proposed text was not appropriate in the chapter under consideration and had not gone through all the necessary steps in the Commission's normal procedure for insertion in another chapter. He added that he would prefer that the issue should not go to a vote. The Commission should try to avoid reaching a situation in which a vote became inevitable.

45. Ms. ESCARAMEIA, speaking on a point of order, said that she wished to place on record her disagreement with the assertion that rule 123 of the rules of procedure was applicable. There was no question of reconsidering the proposal: in accordance with rule 113, there had been no appeal against the Chair's ruling. On the contrary, a new proposal had been made. Any talk of voting was therefore out of place.

46. Mr. PAMBOU-TCHIVOUNDA said that the Chair's ruling had been based on the principle that the consideration of Mr. Economides' proposal was not appropriate under agenda item 10. The proposal had, however, been submitted under agenda item 13 ("Other business"), and it was regrettable that the Chair had not allowed the discussion to proceed on that basis. As for the question of whether, in considering the topic, the Commission would be straying beyond its mandate, he recalled that the Commission's development and codification of international law was based on principles; otherwise the exercise would be meaningless. If the Commission was competent to develop and codify the law, it was surely competent to express a view on the current state of international law.

47. The CHAIR invited the Commission, in the absence of a challenge to his ruling, to continue adopting the report.

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

Paragraph 12

48. Mr. PELLET proposed that the paragraph, together with its title, should be deleted. It said nothing, yet at the same time it might attract unwelcome attention from the Sixth Committee.

49. Mr. MELESCANU said that, in the absence of Mr. Kabatsi, he felt bound to convey to the Commission his colleague's strong view, expressed in the Planning Committee, that the paragraph performed a useful function. The Commission had, after all, adopted cost-saving measures, including the introduction of the shorter session.

50. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to delete the paragraph.

*Paragraph 12 was deleted.*

Paragraph 13

51. Mr. BROWNLIE said that the text would read better if the words "the basis of" were inserted between "fairness on" and "which the United Nations".

*Paragraph 13, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### **B. Date and place of the fifty-sixth session**

Paragraph 14

*Paragraph 14 was adopted.*

*Section B was adopted.*

#### **C. Cooperation with other bodies**

Paragraphs 15 to 18

*Paragraphs 15 to 18 were adopted.*

Paragraph 19

52. Mr. YAMADA said that a reference to the meeting on the topic of shared natural resources had appeared elsewhere. The last sentence could therefore be deleted.

53. The CHAIR said that, in view of the fact that the paragraph concerned cooperation with other bodies, both references should be retained. He added that the meeting with the experts from UNESCO and FAO had taken place not on 23 July, as was stated, but on 30 July.

54. Mr. PELLET expressed regret that the Commission's contacts with the human rights bodies were dealt with so cursorily. He would prefer to have them described as useful, interesting or stimulating.

55. Mr. MANSFIELD (Rapporteur) agreed that the effect was rather stark. He would like to see the inclusion of a warm tribute to the experts from UNESCO, who had made special efforts to meet the Commission.

56. The CHAIR suggested that a sentence should be introduced at the beginning of the paragraph, reading: "The following meetings, which were particularly valuable and useful, took place."

57. Mr. KATEKA (Chair of the Drafting Committee) said that the Commission would not be holding such

meetings if it did not consider them valuable. There was no need to state the obvious.

58. The CHAIR, after observing that to single out for praise meetings with one body might seem to cast an aspersions on the others, said that he nonetheless saw some merit in drawing attention to the expansion of the Commission's contact with other bodies.

59. Mr. PELLET concurred. The Commission's relations with human rights bodies had not always been particularly warm in the past. To include words of commendation would be both truthful and tactful.

60. The CHAIR suggested the insertion of a new paragraph 20 *bis* stating that the meetings with other bodies had been useful.

*It was so decided.*

*Paragraph 19, as amended, was adopted.*

Paragraph 20

*Paragraph 20 was adopted.*

*Section C, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

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## **2790th MEETING**

*Friday, 8 August 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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### **Draft report of the Commission on the work of its fifty-fifth session (concluded)**

1. The CHAIR invited the members of the Commission to continue their consideration of chapter XI of the draft

report of the Commission on the work of its fifty-fifth session. He recalled that the Commission had adopted sections A, B and C of that chapter at its previous meeting.

**CHAPTER XI. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.643)**

**D. Representation at the fifty-eighth session of the General Assembly**

Paragraph 21

*Paragraph 21 was adopted.*

Paragraph 22

2. The CHAIR said he took it that the Commission wished Mr. Gaja to attend the fifty-eighth session of the General Assembly.

*It was so decided.*

*With this addition, paragraph 22 was adopted.*

*Section D was adopted.*

**E. International Law Seminar**

Paragraphs 23 to 25

*Paragraphs 23 to 25 were adopted.*

*Section E was adopted.*

*Chapter XI of the report, as amended, was adopted.*

3. The CHAIR invited the members of the Commission to continue their consideration of chapter VIII, section B, of the draft report of the Commission.

**CHAPTER VIII. Reservations to treaties (concluded) (A/CN.4/L.640 and Add.1–3)**

**B. Consideration of the topic at the present session (concluded) (ACN.4/L.640/Add.1–3)**

Paragraphs 1 to 4 (A/CN.4/L.640/Add.3)

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

4. Mr. GAJA said that the word “compared” in the first sentence of the English text should be replaced by the word “likened”.

*Paragraph 5, as amended, was adopted.*

Paragraph 6

5. Mr. GAJA proposed that the last sentence of the paragraph, which was almost incomprehensible, should be deleted.

6. The CHAIR said he took it that the Commission agreed to Mr. Gaja’s proposal.

*It was so decided.*

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 14

*Paragraphs 7 to 14 were adopted.*

Paragraph 15

7. Ms. ESCARAMEIA proposed that the words “Secretary-General of the” should be inserted before “Council of Europe” in the first sentence of paragraph 15, and that the word “perhaps” should be deleted from the second sentence. In addition, as the penultimate sentence of the paragraph did little to enlighten the reader, she proposed that the following words should be added after the closing bracket: “as it was never possible to give a broader interpretation to a reservation made earlier, even if all parties agreed with it”.

8. The CHAIR said he took it that the Commission agreed to Ms. Escarameia’s proposals.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 to 28

*Paragraphs 16 to 28 were adopted.*

*Section B, as amended, was adopted.*

*Chapter VIII of the report, as amended, was adopted.*

**CHAPTER II. Summary of the work of the Commission at its fifty-fifth session (A/CN.4/L.634)**

9. Mr. PELLET said that chapter II in its current form left the reader no wiser. It would have been better to highlight the main problems the Commission had had to deal with rather than simply enumerate in a mechanical way the formal decisions it had taken. It would be a good idea in the future to rethink the structure of the chapter.

10. Mr. MANSFIELD (Rapporteur), agreeing with Mr. Pellet’s comment, said that the Commission should organize an early meeting of the Planning Group at its next session to remedy the problem.

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Paragraph 5*

11. Mr. GALICKI pointed out that, since the Commission had not referred draft articles on objections to reservations to the Drafting Committee, the words “and also with objections to reservations” should be deleted from the end of paragraph 5.



12. The CHAIR said he took it that the Commission agreed to Mr. Galicki's proposal.

*It was so decided.*

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 11

*Paragraphs 6 to 11 were adopted.*

*Chapter II of the report, as amended, was adopted.*

**CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.635)**

Paragraph 1

*Paragraph 1 was adopted.*

**A. The responsibility of international organizations**

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

*Section A was adopted.*

**B. Diplomatic protection**

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

*Section B was adopted.*

**C. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)**

Paragraph 6

13. Ms. ESCARAMEIA proposed that the words "of State funding and" should be inserted before the words "of the steps that might or should be taken ..." in subparagraph (d). She also proposed the addition of a new subparagraph, (f), to read: "(f) The final form of the Commission's work."

14. The CHAIR said he took it that the Commission agreed to Ms. Escameia's proposal.

*It was so decided.*

*Paragraph 6, as amended, was adopted.*

*Section C, as amended, was adopted.*

**D. Unilateral acts**

Paragraph 7

15. Mr. MATHESON proposed that, in the first sentence, the words "the broadening of the purpose or scope of the topic" should be replaced by the words "a redefinition of the scope of the topic". Moreover, States should be

told what the Commission meant by "unilateral acts *stricto sensu*", a term used in the second sentence. He therefore proposed that a footnote reference should be added after the word *sensu* and that the definition of the phrase as formulated within the Working Group should be given in the footnote. Finally, the words "unilateral acts" should be replaced by the words "these unilateral acts" in the last sentence.

16. The CHAIR said he took it that the Commission agreed to Mr. Matheson's proposal.

*It was so decided.*

*Paragraph 7, as amended, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

Paragraph 9

17. Mr. PELLET proposed that the words "to consider the possibility of providing" should be replaced by the words "to provide" in the second sentence, as the Commission was actually once again requesting Governments to provide information.

18. The CHAIR said he took it that the Commission agreed to Mr. Pellet's proposal.

*It was so decided.*

*Paragraph 9, as amended, was adopted.*

*Section D, as amended, was adopted.*

**E. Reservations to treaties**

Paragraphs 10 to 12

*Paragraphs 10 to 12 were adopted.*

Paragraph 13

19. Mr. GAJA proposed that the words "would be happy to know" in the first sentence should be replaced by the words "would like to know".

20. The CHAIR said he took it that the Commission agreed to Mr. Gaja's proposal.

*It was so decided.*

*Paragraph 13, as amended, was adopted.*

Paragraph 14

*Paragraph 14 was adopted.*

21. Ms. ESCARAMEIA proposed that a new paragraph 14 *bis* should be adopted, to read: "Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to

divergent positions. It would be of interest to the Commission to know whether Governments think it should be kept, deleted or amended.”

22. Mr. PELLET pointed out that such a proposal would be applicable only on second reading. In fact, the draft had been returned to the Drafting Committee on first reading, and account must be taken of that fact. As far as the actual text of the proposal was concerned, he objected to it strongly, as it offered no explanation to States and so did not allow them to reply.

23. Mr. MELESCANU suggested that, to facilitate the adoption of the new paragraph proposed by Ms. Escameia, it could be pointed out that a vote had been taken and the Commission had decided to retain the draft guideline. As it stood, the text gave the impression that the Commission had no opinion on the matter, whereas it had in fact taken a decision.

24. Mr. Sreenivasa RAO reminded the members of the Commission that, as a rule, the report covered only the official discussions within the Commission.

25. Mr. ECONOMIDES said that he supported Ms. Escameia's proposal, which he found comprehensive and objective. He also agreed with Mr. Sreenivasa Rao's comment.

26. Mr. GAJA said that the Commission did not need to ask Governments whether a particular proposal should be deleted or amended. That decision was for the Commission to take. However, it could ask for comments on the issue. The request should be drafted in such a way that Governments could understand it; it would therefore be useful to include in a footnote the draft text submitted to the Drafting Committee.

27. Mr. MELESCANU said that he supported Mr. Gaja's proposal, which struck him as a compromise.

28. The CHAIR proposed that Ms. Escameia's proposal should be formulated in the following way: “Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to divergent views. It was referred to the Drafting Committee. The views of Governments on this guideline would be particularly welcomed.” He also proposed that a footnote containing the text of the relevant draft should be added. If he heard no objections, he would take it that the Commission agreed to those proposals.

*It was so decided.*

*The new paragraph 14 bis was adopted.*

*Section E, as amended, was adopted.*

## **F. Shared natural resources**

Paragraph 15

29. The CHAIR proposed that the text of subparagraph (b) should be replaced by the phrase “Main uses of specific groundwaters and State practice relating to their management” and the text of subparagraph (d) by the phrase “National legislation, in particular the legislation of federal States that governs groundwaters across its political subdivisions, together with information as to how such legislation is implemented”.

*Paragraph 15, as amended, was adopted.*

*Section F, as amended, was adopted.*

*Chapter III of the report, as amended, was adopted.*

## **CHAPTER I. Organization of the session (A/CN.4/L.633)**

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted.*

Paragraph 10

30. Mr. PELLET said that the words *composés comme suit* should be deleted from the end of the sentence in the French text.

31. The CHAIR said that they had been left in by mistake, like the corresponding words in the Spanish version, *integrados por los miembros que a continuación se indican*, which should also be deleted.

*Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 13

*Paragraphs 11 to 13 were adopted.*

*Chapter I of the report was adopted.*

*The report of the Commission on the work of its fifty-fifth session, as a whole, as amended, was adopted.*

## **CLOSURE OF THE SESSION**

32. After the customary exchange of courtesies, the CHAIR declared the fifty-fifth session of the International Law Commission closed.

*The meeting rose at 10.55 a.m.*





# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

## 2003

*Volume I*

*Summary records  
of the meetings  
of the fifty-fifth session  
5 May–6 June and  
7 July–8 August 2003*

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UNITED NATIONS  
New York and Geneva, 2009



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2002*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the fifty-fifth session of the Commission (A/CN.4/SR.2751–A/CN.4/SR.2790), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2003
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UNITED NATIONS PUBLICATION
<i>Sales No.:</i> E.09.V.2 ISBN 978-92-1-133786-0
ISSN 0082-8289

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*Rapporteur:* Mr. William MANSFIELD

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*

## **AGENDA**

The Commission adopted the following agenda at its 2751st meeting, held on 5 May 2003:

1. Filling of casual vacancies in the Commission (article 11 of the statute).
2. Organization of work of the session.
3. Diplomatic protection.
4. Reservations to treaties.
5. Unilateral acts of States.
6. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities).
7. The responsibility of international organizations.
8. The fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Shared natural resources.
10. Programme, procedures and working methods of the Commission, and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-sixth session.
13. Other business.

## ABBREVIATIONS

BIS	Bank for International Settlements
ECOWAS	Economic Community of West African States
EBRD	European Bank for Reconstruction and Development
FAO	Food and Agriculture Organization of the United Nations
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
MERCOSUR	South American Common Market
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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<i>AJIL</i>	<i>American Journal of International Law</i>
<i>BYBIL</i>	<i>British Year Book of International Law</i>
<i>ICJ Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
<i>ILM</i>	<i>International Legal Materials</i> (Washington, D.C.)
<i>ILR</i>	<i>International Law Reports</i>
<i>ITLOS Reports</i>	<i>ITLOS, Reports of Judgments, Advisory Opinions and Orders</i>
<i>PCIJ, Series A</i>	<i>PCIJ, Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>PCIJ, Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>UNRIAA</i>	<i>United Nations, Reports of International Arbitral Awards</i>

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is [www.un.org/law/ilc/index.htm](http://www.un.org/law/ilc/index.htm).



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<i>Aerial Incident of 3 July 1988</i>	( <i>Islamic Republic of Iran v. United States of America</i> ), <i>Preliminary Objections, ICJ Pleadings</i> , vol. II, pp. 3 <i>et seq.</i>
<i>Aerial Incident of 10 August 1999</i>	( <i>Pakistan v. India</i> ), <i>Jurisdiction, Judgment, ICJ Reports</i> 2000, p. 12.
<i>Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections</i>	( <i>Yugoslavia v. Bosnia and Herzegovina</i> ), <i>Judgment, ICJ Reports</i> 2003, p. 7.
<i>Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)</i>	( <i>El Salvador v. Honduras</i> ), <i>Formation of Chamber, Order of 27 November 2002, ICJ Reports</i> 2002, p. 618.
<i>Application of the Convention on Genocide</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports</i> 1996, p. 595.
<i>Arbitral Award Made by the King of Spain on 23 December 1906</i>	<i>Judgment, ICJ Reports</i> 1960, p. 192.
<i>Asylum</i>	( <i>Colombia/Peru</i> ), <i>Judgment, ICJ Reports</i> 1950, p. 266.
<i>Avena and Other Mexican Nationals</i>	( <i>Mexico v. United States of America</i> ), <i>Provisional Measures, Order of 5 February 2003, ICJ Reports</i> 2003, p. 77.
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports</i> 1970, p. 3.
<i>Belilos</i>	European Court of Human Rights, <i>Series A: Judgments and Decisions</i> , vol. 132, <i>Belilos v. Switzerland</i> , judgment of 29 April 1988.
<i>Bhopal</i>	<i>Union Carbide Corporation gas plant disaster at Bhopal, India in December, 1984</i> , opinion and order, 12 May 1986, U.S. District Court, New York. Opinion reproduced in <i>ILM</i> , vol. 25, no. 4 (July 1986), p. 771.
<i>Biloune</i>	<i>Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana</i> , award on jurisdiction and liability of 27 October 1989 and award on damages and costs of 30 June 1990, <i>ILR</i> , vol. 95, p. 184.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Certain Criminal Proceedings in France</i>	( <i>Republic of the Congo v. France</i> ), <i>Provisional Measures, Order of 17 June 2003</i> , ICJ Reports 2003, p. 102.
<i>Certain German Interests in Polish Upper Silesia</i>	<i>Merits, Judgment No. 7, 1926, PCIJ, Series A, No. 7.</i>
<i>Certain Phosphate Lands in Nauru</i>	( <i>Nauru v. Australia</i> ), <i>Order of 13 September 1993</i> , ICJ Reports 1993, p. 322.
<i>Continental Shelf</i>	( <i>Tunisia/Libyan Arab Jamahiriya</i> ), <i>Judgment</i> , ICJ Reports 1982, p. 18.
<i>Continental Shelf between the United Kingdom and France</i>	<i>Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic</i> , decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 130 and 339.
<i>Corfu Channel</i>	<i>Merits, Judgment</i> , ICJ Reports 1949, p. 4.
<i>Delagoa Bay Railway</i>	Decision of 29 March 1900, Martens, <i>Nouveau recueil général de traités</i> , 2nd series, vol. 30, p. 329.
<i>Delimitation of the Marine Boundary in the Gulf of Maine Area</i>	<i>Judgment</i> , ICJ Reports 1984, p. 246.
<i>Diallo</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> , <i>Order of 7 November 2002</i> , ICJ Reports 2002, p. 607.
<i>Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights</i>	<i>Advisory Opinion</i> , ICJ Reports 1999, p. 62.
<i>Eastern Greenland</i>	<i>Legal Status of Eastern Greenland</i> , <i>Judgment</i> , 1933, PCIJ, Series A/B, No. 53, p. 22.
<i>El Triunfo Company</i>	Decisions of 2 and 8 May 1902, UNRIAA, vol. XV (Sales No. 1966.V.3), p. 455.
<i>ELSI</i>	<i>Elettronica Sicula S.p.A. (ELSI)</i> , <i>Judgment</i> , ICJ Reports 1989, p. 15.
<i>Finnish Ships Arbitration</i>	Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels during the War, decision of 9 May 1934, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479.
<i>Fisheries</i>	( <i>United Kingdom v. Norway</i> ), <i>Judgment</i> , ICJ Reports 1951, p. 116.
<i>Fisheries Jurisdiction</i>	( <i>United Kingdom v. Iceland</i> ), <i>Merits, Judgment</i> , I.C.J. Reports 1974, p. 3.
<i>Frontier Dispute (Benin/ Niger)</i>	<i>Formation of Chamber</i> , <i>Order of 27 November 2002</i> , ICJ Reports 2002, p. 613.
<i>Frontier Dispute</i>	( <i>Burkina Faso/Republic of Mali</i> ), <i>Judgment</i> , ICJ Reports 1986, p. 554.

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<i>Gabčíkovo-Nagymaros Project</i>	(Hungary/Slovakia), <i>Judgment</i> , ICJ Reports 1997, p. 7.
<i>Interhandel</i>	<i>Preliminary Objections</i> , <i>Judgment</i> , ICJ Reports 1959, p. 6.
<i>Kasikili/Sedudu Island</i>	(Botswana/Namibia), <i>Judgment</i> , ICJ Reports 1999, p. 1045.
<i>LaGrand</i>	(Germany v. United States of America), <i>Judgment</i> , ICJ Reports 2001, p. 466.
<i>Land and Maritime Boundary between Cameroon and Nigeria</i>	(Cameroon v. Nigeria), <i>Preliminary Objections</i> , <i>Judgment</i> , ICJ Reports 1998, p. 275. (Cameroon v. Nigeria: Equatorial Guinea intervening), <i>Judgment</i> , ICJ Reports 2002, p. 303.
<i>Land, Island and Maritime Frontier Dispute</i>	(El Salvador/Honduras: Nicaragua intervening), <i>Judgment</i> , ICJ Reports 1992, p. 351.
<i>Legality of the Threat or Use of Nuclear Weapons</i>	<i>Advisory Opinion</i> , ICJ Reports 1996, p. 226.
<i>Legality of the Use by a State of Nuclear Weapons in Armed Conflict</i>	<i>Advisory Opinion</i> , ICJ Reports 1996, p. 66.
<i>Loizidou</i>	<i>Loizidou v. Turkey</i> , European Court of Human Rights, judgment of 23 March 1995 ( <i>Preliminary Objections</i> ), <i>Series A: Judgments and Decisions</i> , vol. 310, and judgment of 18 December 1996 ( <i>Merits</i> ), <i>Reports of Judgments and Decisions</i> , 1996–VI.
<i>Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities</i>	Case C-241/87, European Court of Justice, <i>Reports of Cases before the Court of Justice and the Court of First Instance</i> , 1990-5, p. I-1797.
<i>Marine Delimitation and Territorial Questions between Qatar and Bahrain</i>	<i>Merits</i> , <i>Judgment</i> , ICJ Reports 2001, p. 40.
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<i>Mexican Eagle</i>	M. M. Whiteman, <i>Digest of International Law</i> , vol. 8 (1967).
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<i>Mines de Potasse d'Alsace</i>	<i>Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace S.A.</i> (case 21/76), judgement of 30 November 1976, Court of Justice of the European Communities, <i>Reports of Cases before the Court</i> , 1976-8, p. 1735.
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<i>North Sea Continental Shelf</i>	<i>Judgment</i> , ICJ Reports 1969, p. 3.
<i>Norwegian Loans</i>	<i>Certain Norwegian Loans (France v. Norway)</i> , <i>Judgment</i> , ICJ Reports 1957, p. 9.



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<i>Nuclear Tests</i>	( <i>Australia v. France</i> ), <i>Judgment, ICJ Reports 1974</i> , p. 253. ( <i>New Zealand v. France</i> ), <i>ibid.</i> , p. 457.
<i>Oil Platforms</i>	( <i>Islamic Republic of Iran v. United States of America</i> ), <i>Order of 28 August 2001, ICJ Reports 2001</i> , p. 568.
<i>Ok Tedi</i>	<i>Dagi, Rex and Ors v. BHP Ltd. and Ok Tedi Mining Ltd.</i> , Victoria Supreme Court, judgement of 22 September 1995.
<i>Orinoco Steamship Company</i>	(United States of America, Venezuela), arbitral award of 25 October 1910, UNRIAA, vol. XI (Sales No. 1961.V.4), p. 237.
<i>Passage through the Great Belt</i>	( <i>Finland v. Denmark</i> ), <i>Order of 10 September 1992, ICJ Reports 1992</i> , p. 348.
<i>Peter Pázmány University</i>	<i>Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Peter Pázmány University)</i> , Judgment of 15 December 1933, <i>PCIJ, Series A/B</i> , No. 61, p. 208.
<i>Pinochet</i>	<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate</i> , ex parte <i>Pinochet Ugarte</i> (No. 3), England, House of Lords, 24 March 1999, <i>ILR</i> , vol. 119.
“ <i>Rainbow Warrior</i> ”	Case concerning the differences between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the <i>Rainbow Warrior</i> affair, ruling of 6 July 1986 by the Secretary-General of the United Nations, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 197.  Decision of 30 April 1990, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215.
<i>Reparation for Injuries</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949</i> , p. 174.
<i>Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria</i>	(Cameroon v. Nigeria), Preliminary Objections ( <i>Nigeria v. Cameroon</i> ), <i>Judgment, ICJ Reports 1999</i> , p. 31.
<i>Right of Passage over Indian Territory</i>	<i>Merits, Judgment, ICJ Reports 1960</i> , p. 6.
<i>Sabbatino</i>	<i>Banco Nacional de Cuba v. Sabbatino, Receiver (United States Reports</i> , vol. 376, 1964), p. 398.
<i>South West Africa</i>	<i>Second Phase, Judgment, ICJ Reports 1966</i> , p. 6.
<i>Southern Bluefin Tuna</i>	( <i>New Zealand v. Japan; Australia v. Japan</i> ), <i>Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999</i> , p. 280.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Sovereignty over Pulau Ligitan and Pulau Sipadan</i>	<i>(Indonesia/Malaysia), Judgment, ICJ Reports 2002, p. 625.</i>
<i>Temple of Preah Vihear</i>	<i>Merits, Judgment, ICJ Reports 1962, p. 6.</i>
<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>	<i>Judgment, ICJ Reports 1994, p. 6.</i>
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| North Atlantic Treaty (Washington, D.C., 4 April 1949) | United Nations, <i>Treaty Series</i> , vol. 34, No. 541, p. 243. |
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### Pacific settlement of disputes

- |   |  |
|---|--|
| Anti-War Treaty of Non-Aggression and Conciliation (Rio de Janeiro, 10 October 1933)    | League of Nations, <i>Treaty Series</i> , vol. CLXIII, No. 3781, p. 393. |
| European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957) | United Nations, <i>Treaty Series</i> , vol. 320, No. 4646, p. 243.       |

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| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)  | United Nations, <i>Treaty Series</i> , vol. 500, No. 7310, p. 95.           |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963)  | <i>Ibid.</i> , vol. 596, No. 8638, p. 261.                                  |
| European Convention on Consular Functions (Paris, 11 December 1967)  | Council of Europe, <i>European Treaty Series</i> , No. 61.                  |
| Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) | United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87. |

### Human rights

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| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) | United Nations, <i>Treaty Series</i> , vol. 213, No. 2889, p. 221. |
| International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)                       | <i>Ibid.</i> , vol. 660, No. 9464, p. 195.                         |
| American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)                                     | <i>Ibid.</i> , vol. 1144, No. 17955, p. 123.                       |
| Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)                              | <i>Ibid.</i> , vol. 1249, No. 20378, p. 13.                        |
| Convention on the Rights of the Child (New York, 20 November 1989)   | <i>Ibid.</i> , vol. 1577, No. 27531, p. 3.                         |



Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000)	<i>Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 49 (A/54/49), vol. III, resolution 54/263.</i>
Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo, 4 April 1997)	United Nations, <i>Treaty Series</i> , vol. 2137, No. 37266, p. 171.
Additional Protocol to the Convention on Human Rights and Biomedicine on Transplantation of Organs and Tissues of Human Origin (Strasbourg, 24 January 2002)	Council of Europe, <i>European Treaty Series</i> , No. 186.
<b>Nationality and statelessness</b>	
Convention relating to the Status of Refugees (with schedule) (Geneva, 28 July 1951)	United Nations, <i>Treaty Series</i> , vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
European Convention on Nationality (Strasbourg, 6 November 1997)	<i>Ibid.</i> , vol. 2135, No. 37248, p. 213.
<b>International trade and development</b>	
Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, D.C., 18 March 1965)	United Nations, <i>Treaty Series</i> , vol. 575, No. 8359, p. 159.
Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 17 March 1994)	OAS, <i>Treaty Series</i> , No. 78.
<b>Transport and communications</b>	
Convention on Road Signs and Signals (with annexes) (Vienna, 8 November 1968)	United Nations, <i>Treaty Series</i> , vol. 1091, No. 16743, p. 3.
European Agreement Supplementing the Convention on Road Signs and Signals opened for signature in Vienna on 8 November 1968 (with annexes) (Geneva, 1 May 1971)	<i>Ibid.</i> , vol. 1142, No. 17935, p. 225.
Protocol on Road Markings Additional to the European Agreement Supplementing the Convention on Road Signs and Signals opened for signature in Vienna on 8 November 1968 (with annex and diagrams) (Geneva, 1 March 1973)	<i>Ibid.</i> , vol. 1394, No. 23345, p. 263.
<b>Civil aviation</b>	
Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929)	League of Nations, <i>Treaty Series</i> , vol. CXXXVII, No. 3145, p. 11.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , volume 15, No. 102, p. 295.
Protocol relating to an Amendment to the Convention on International Civil Aviation (article 3 <i>bis</i> ) (Montreal, 10 May 1984)	<i>Ibid.</i> , vol. 2122, No. 36983, p. 337.

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| Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)   | <i>Ibid.</i> , vol. 704, No. 10106, p. 219.  |
| Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)   | <i>Ibid.</i> , vol. 860, No. 12325, p. 105.  |
| Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)   | <i>Ibid.</i> , vol. 974, No. 14118, p. 177.  |
| Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February 1988) | <i>Ibid.</i> , vol. 1589, No. 14118, p. 474. |

### Miscellaneous penal matters

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|---|--|
| European Convention on Extradition (Paris, 13 December 1957)  | United Nations, <i>Treaty Series</i> , vol. 359, No. 5146, p. 273.   |
| Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters (Brussels, 27 September 1968)                          | <i>Ibid.</i> , vol. 1262, No. 20747, p. 153.   |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973)       | <i>Ibid.</i> , vol. 1035, No. 15410, p. 167.   |
| European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977)   | <i>Ibid.</i> , vol. 1137, No. 17828, p. 93.  |
| Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003)   | Council of Europe, <i>European Treaty Series</i> , No. 190.  |
| International Convention against the Taking of Hostages (New York, 17 December 1979)  | United Nations, <i>Treaty Series</i> , vol. 1316, No. 21931, p. 205.   |
| Convention on the Physical Protection of Nuclear Material (with annexes) (Vienna, 26 October 1979, opened for signature in Vienna and New York on 3 March 1980) | <i>Ibid.</i> , vol. 1456, No. 24631, p. 101.   |
| Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)   | <i>Ibid.</i> , vol. 1678, No. 29004, p. 201.   |
| Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988)                      | <i>Ibid.</i>   |
| Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg, 8 November 1990)   | United Nations, <i>Treaty Series</i> , vol. 1862, No. 31704, p. 69.  |
| Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991)   | <i>Official Records of the Security Council, Forty-sixth Year, Supplement for January, February and March 1991</i> , S/22393, annex I. |

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| Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)   | United Nations, <i>Treaty Series</i> , vol. 2051, No. 35457, p. 363.   |
| International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)   | <i>Ibid.</i> , vol. 2149, No. 37517, p. 256.   |
| Rome Statute of the International Criminal Court (Rome, 17 July 1998)   | <i>Ibid.</i> , vol. 2187, No. 38544, p. 3.   |
| International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)  | <i>Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 49 (A/54/49)</i> , vol. I, resolution 54/109, annex. |
| Convention on Cybercrime (Budapest, 23 November 2001)   | Council of Europe, <i>European Treaty Series</i> , No. 185.  |
| Additional Protocol to the Convention on Cybercrime concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems (Strasbourg, 28 January 2003) | <i>Ibid.</i> , No. 189.  |

#### Law of the sea

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|---|--|
| Convention on the Continental Shelf (Geneva, 29 April 1958)                     | United Nations, <i>Treaty Series</i> , vol. 499, No. 7302, p. 311. |
| United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) | <i>Ibid.</i> , vol. 1833, No. 31363, p. 397.                       |

#### Law applicable in armed conflict

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|---|---|
| Treaty of Peace between the Allied and Associated Powers and Hungary (Peace Treaty of Trianon) (Trianon, 4 June 1920) | <i>British and Foreign State Papers, 1920</i> , vol. 113 (London, H. M. Stationery Office, 1923), p. 486. |
| Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)   | United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973.   |
| Geneva Convention relative to the Protection of Civilian Persons in Time of War                                       | <i>Ibid.</i> , No. 973, p. 287.   |

#### Law of treaties

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|---|--|
| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)                            | United Nations, <i>Treaty Series</i> , vol. 1155, No. 18232, p. 331. |
| Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) | <i>Ibid.</i> , vol. 1946, No. 33356, p. 3.                           |



Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)

A/CONF.129/15.

### Liability

Convention on Third-Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)

United Nations, *Treaty Series*, vol. 956, No. 13706, p. 251.

Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, D.C., 29 March 1972)

*Ibid.*, vol. 961, No. 13810, p. 187.

Convention on Civil Liability for Oil Pollution Damage from Offshore Operations Resulting from Exploration for and Exploitation of Sea Bed Mineral Resources (London, 1 May 1977)

*ILM* (Washington, D.C.), vol. 16, No. 6 (November 1977), p. 1450.

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)

Council of Europe, *European Treaty Series*, No. 150.

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 10 December 1999)

UNEP/CHW.5/29.

### Environment

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)

United Nations, *Treaty Series*, vol. 973, No. 14097, p. 3.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971)

*Ibid.*, vol. 1110, No. 17146, p. 57.

Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal, 16 September 1987)

*Ibid.*, vol. 1522, No. 26369, p. 3.

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)

*Ibid.*, vol. 2101, No. 36508, p. 177.

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)

*Ibid.*, vol. 1989, No. 34028, p. 309.

Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev, 21 May 2003)

ECE/MPEIA/2003/3.

Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)

United Nations, *Treaty Series*, vol. 2105, No. 36605, p. 457.

Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Kiev, 21 May 2003)

ECE/MP.WAT/11.

Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)

United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000)	<i>Ibid.</i> , vol. 2226, No. 30619, p. 208.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/54/49)</i> , vol. III, resolution 51/229, annex.
Convention on Supplementary Compensation for Nuclear Damage (Vienna, 12 September 1997)	OIEA, doc. GOV/INF/822-GC(41)/INF/13 and Corr. (N5-52 Circ. [Depositary Notification]). See also <i>ILM</i> (Washington, D.C.), vol. 36, No. 6 (November 1997), p. 1473.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	ECE/CEP/72 (United Nations publication, Sales No. E.00.II.E.3).
Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Kiev, 21 May 2003)	ECE/MP.PP/6.
<b>Outer space</b>	
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Moscow, London and Washington, D.C., 27 January 1967)	United Nations, <i>Treaty Series</i> , vol. 610, No. 8843, p. 205.
<b>Miscellaneous</b>	
Convention on Rights and Duties of States (Montevideo, 26 December 1933)	League of Nations, <i>Treaty Series</i> , vol. CLXV, No. 3802, p. 19.
Convention of the World Meteorological Organization (with annexes and Protocol concerning Spain) (Washington, D.C., 11 October 1947)	United Nations, <i>Treaty Series</i> , vol. 77, No. 998, p. 143.
Charter of the Organization of American States (Bogota, 30 April 1948)	<i>Ibid.</i> , vol. 119, No. 1609, p. 3.
Treaty Establishing the European Community (Rome, 25 March 1957) as amended by the Treaty on European Union	European Union, <i>Selected Instruments Taken from the Treaties</i> , book I, vol. I (Luxembourg, Office for Official Publications of the European Communities, 1995), p. 101.
Statutes of the World Tourism Organization (Mexico City, 27 September 1970)	United Nations, <i>Treaty Series</i> , vol. 985, No. 14403, p. 339.

Convention Establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985)	<i>Ibid.</i> , vol. 1508, No. 26012, p. 99; see also <i>ILM</i> (Washington, D.C.), vol. 24, No. 6 (November 1985), p. 1598.
Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Amsterdam, 2 October 1997)	<i>Official Journal of the European Communities</i> , No. C 340 (10 November 1997), p. 1.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	United Nations, <i>Treaty Series</i> , vol. 2216, No. 39391, p. 225.
Additional Protocol to the Criminal Law Convention on Corruption (Strasbourg, 15 May 2003)	Council of Europe, <i>European Treaty Series</i> , No. 191.
Civil Law Convention on Corruption (Strasbourg, 4 November 1999)	United Nations, <i>Treaty Series</i> , vol. 2246, No. 39988, p. 3.
Inter-American Democratic Charter (Lima, 11 September 2001)	<i>ILM</i> (Washington, D.C.), vol. 40, No. 5 (September 2001), p. 1289.
Convention on Contact concerning Children (Strasbourg, 15 May 2003)	Council of Europe, <i>European Treaty Series</i> , No. 192.



## CHECKLIST OF DOCUMENTS OF THE FIFTY-FIFTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/527 and Add.1–3	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	A/CN.4/527 and Add.2 reproduced in <i>Yearbook ... 2002</i> , vol. II (Part One). A/CN.4/527 and Add.1 and 3 mimeographed.
A/CN.4/528	Provisional agenda	Mimeographed. For agenda as adopted, see p. [...] above.
A/CN.4/529	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-seventh session of the General Assembly	Mimeographed.
A/CN.4/530 and Add.1	Fourth report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in <i>Yearbook ... 2003</i> , vol. II (Part One).
A/CN.4/531	First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	<i>Idem.</i>
A/CN.4/532	First report on the responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/533 and Add.1	First report on shared natural resources, by Mr. Chusei Yamada, Special Rapporteur	<i>Idem.</i>
A/CN.4/534	Sixth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/535 and Add.1	Eighth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.630 [and Corr.2]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee	See summary record of the 2760th meeting (para. 34).
A/CN.4/L.631	Diplomatic protection. Titles and texts of draft articles 8 [10], 9 [11] and 10 [14] adopted by the Drafting Committee	See summary record of the 2768th meeting (para. 3).
A/CN.4/L.632	The responsibility of international organizations. Titles and texts of draft articles 1, 2 and 3 adopted by the Drafting Committee	See summary record of the 2776th meeting (para. 1).
A/CN.4/L.633	Draft report of the International Law Commission on the work of its fifty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10</i> (A/58/10). The final text appears in <i>Yearbook ... 2003</i> , vol. II (Part Two).
A/CN.4/L.634	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-fifth session)	<i>Idem.</i>
A/CN.4/L.635	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.636 and Add.1	<i>Idem</i> : chapter IV (The responsibility of international organizations)	<i>Idem.</i>
A/CN.4/L.637 and Add.1–4	<i>Idem</i> : chapter V (Diplomatic protection)	<i>Idem.</i>
A/CN.4/L.638	<i>Idem</i> : chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities))	<i>Idem.</i>
A/CN.4/L.639 and Add.1	<i>Idem</i> : chapter VII (Unilateral acts of States)	<i>Idem.</i>
A/CN.4/L.640 and Add.1–3	<i>Idem</i> : chapter VIII (Reservations to treaties)	<i>Idem.</i>

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.641	<i>Idem</i> : chapter IX (Shared natural resources)	<i>Idem</i> .
A/CN.4/L.642	<i>Idem</i> : chapter X (The fragmentation of international law: difficulties arising from the diversification and expansion of international law)	<i>Idem</i> .
A/CN.4/L.643	<i>Idem</i> : chapter XI (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.644	The fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group	Mimeographed. Reproduced in <i>Yearbook ... 2003</i> , vol. II (Part Two), chap. X, sect. C.
A/CN.4/L.645	Programme, procedures and working methods of the Commission, and its documentation. Report of the Planning Group	Mimeographed.
A/CN.4/L.646	Unilateral acts of States. Report of the Working Group	<i>Idem</i> .
A/CN.4/SR.2751–A/CN.4/SR.2790	Provisional summary records of the 2751st to 2790th meetings	<i>Idem</i> . The final text appears in the present volume.





# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-FIFTH SESSION

*Held at Geneva from 5 May to 6 June 2003*

### 2751st MEETING

*Monday, 5 May 2003, at 3.05 p.m.*

*Outgoing Chair:* Mr. Robert ROSENSTOCK

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

### Opening of the session

1. The OUTGOING CHAIR declared open the fifty-fifth session of the International Law Commission and extended a warm welcome to all members.

### Tribute to the memory of Valery Kuznetsov, member of the Commission

2. The OUTGOING CHAIR said it was sad to recall that Valery Kuznetsov had passed away the previous year. Valery Kuznetsov had been the head of the international law department of the Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation and a member of the Permanent Court of Arbitration and had served on several important international bodies. He had combined the talents of the practitioner of international law with the erudition of the academic. He had been elected to the Commission in 2002 and had served as its Rapporteur.

3. On behalf of the Commission, he would send a letter of condolences to Valery Kuznetsov's family.

*At the invitation of the Outgoing Chair, the members of the Commission observed a minute of silence.*

4. The OUTGOING CHAIR said that the topical summary of the discussion on the Commission's report held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat, was contained in document A/CN.4/529. Delegations in the Sixth Committee had expressed an interest in enhancing the dialogue between the Committee and the Commission. Mr. Dugard, representing the Commission, had been able to respond to several questions regarding the topic of diplomatic protection. The proceedings had been held in a very positive atmosphere.

### Election of officers

*Mr. Candioti was elected Chair by acclamation.*

*Mr. Candioti took the Chair.*

5. The CHAIR thanked the members of the Commission for the honour they had done him and said that he would make every effort to deserve their trust and make the session a success.

6. Since the position of first Vice-Chair was to be filled by a member from an Eastern European country, the election of that officer should perhaps be deferred until after the elections to fill casual vacancies.

7. Mr. GALICKI supported that suggestion. Currently, he was the only Eastern European member of the Commission, and vacancies for two more members from Eastern European countries were to be filled.

*It was so decided.*

*Mr. Chee was elected second Vice-Chair by acclamation.*

*Mr. Kateka was elected Chair of the Drafting Committee by acclamation.*

*Mr. Mansfield was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/528)

8. Mr. DUGARD said that consultations were currently taking place on the possibility of proposing an additional agenda item. He asked whether the adoption of the provisional agenda would preclude such a possibility.

9. The CHAIR said that additional issues could be considered under item 13, "Other business", but that the proposal would first have to be considered by the Bureau and the Planning Group.

*The agenda was adopted.*

### Organization of work of the session

[Agenda item 2]

10. The CHAIR drew attention to the proposed programme of work for the first two weeks of the Commission's session. If he heard no objection, he would it take that the Commission decided to adopt the proposed programme.

*It was so decided.*

11. The CHAIR invited members to join the Drafting Committee and the Planning Group. Since the Drafting Committee would be taking up the topic of reservations to treaties the following afternoon, he urged its Chair to form its membership as soon as possible.

### Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/527 and Add.1-3)

[Agenda item 1]

12. The CHAIR announced that the Commission was required to fill three casual vacancies that had arisen as a consequence of the death of Valery Kuznetsov and the election of Mr. Bruno Simma and Mr. Peter Tomka to ICJ. The curricula vitae of the five candidates for the vacancies were contained in document A/CN.4/527/Add.1. He would suspend the meeting to enable members to hold informal consultations.

*The meeting was suspended at 4.10 p.m. and resumed at 4.45 p.m.*

13. The CHAIR announced that the Commission had elected Mr. Roman Kolodkin, Mr. Teodor Melescanu and Mr. Constantine Economides to fill the casual vacancies which had arisen. On behalf of the Commission, he would inform the newly elected members and invite them to join the Commission as soon as possible.

### The responsibility of international organizations (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

### FIRST REPORT OF THE SPECIAL RAPPORTEUR

14. Mr. GAJA (Special Rapporteur), introducing his first report on the responsibility of international organizations (A/CN.4/532), said that it built on the report of the Working Group on Responsibility of International Organizations adopted by the Commission at its fifty-fourth session<sup>2</sup> and attempted to take the Commission's work a few steps further. After a historical survey, the report addressed the scope of the work on the responsibility of international organizations and the related question of the definition of an international organization.

15. The report then discussed what the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>3</sup> had termed "General principles". Following the framework used in those articles, the next question to be dealt with would be attribution. In 2002 he had indicated his intention to cover in his first report attribution of conduct to international organizations. He had not been able to fulfil that part of his plan because international organizations had been slow responding to the request for information on their practices addressed to them by the Secretariat in accordance with the recommendation in paragraph 488 of the Commission's report to the General Assembly on the work of its fifty-fourth session.<sup>4</sup> The request had been sent in September 2002 and answers had reached the Secretariat only recently. Since the Commission had enlisted the support of organizations in providing information, it must take their answers into account, even if such a course took more time. All questions of attribution of conduct to an international organization, or to a State, when there was any uncertainty about the matter, would be dealt with in the next report.

16. As the consideration of questions of attribution had been postponed, only a few matters were now being proposed for discussion by the Commission, but they were far from secondary ones. For example, the determination of the scope of the work was of particular importance for the drafting of articles on substantive issues, since it would indicate which organizations' practice must be taken into account.

17. A number of elements relating to scope could already be gleaned from the Working Group's report, but the Commission had adopted that report at the very end of the previous session and had had little opportunity to discuss it in full. Moreover, the Working Group had examined the issues on a preliminary basis and had not had to grapple with the difficult questions that often arose when one was required to write an accepted solution as a normative proposition. The Working Group's conclusions did not entirely reflect his views, but he sincerely hoped they would not be reversed. He did, however, think there was room for refining and clarifying them.

18. He referred in his report to the Commission's specific contributions to the study of the responsibility of international organizations under international law. Much

<sup>2</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VIII, sect. C, p. 93.

<sup>3</sup> *Yearbook ... 2001*, vol. II (Part Two), pp. 26-30.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 96.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

more in the Commission's previous work was no doubt relevant as well, but a general survey of all the materials would be difficult to carry out at the present stage. The relevant materials would be taken into account in future work whenever the discussion so warranted, but for the time being it seemed appropriate to consider only contributions that he would term "specific". He accordingly mentioned in the report the saving clause contained in article 57 of the draft articles on State responsibility for internationally wrongful acts and the related commentary. Most of the other "specific" materials concerned attribution of conduct. The report referred in some detail to two draft articles which had been adopted on first reading but, for various reasons, dropped from the final text. It was the commentary to those draft articles that was particularly interesting, as was the discussion of questions that would undoubtedly arise in the Commission's future work. Attribution of conduct was an area in which international law had developed considerably in the past few years.

19. Many elements of interest could also be gathered from the work of other institutions. For example, in 1995, at its Lisbon session, the Institute of International Law had adopted a resolution entitled "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties".<sup>5</sup> The preparatory work, in particular the reports by Ms. Rosalyn Higgins, and the debates<sup>6</sup> were important.

20. Special mention should be made of work paralleling the Commission's now being undertaken by ILA, which had a Committee on the Accountability of International Organizations. The topic was undoubtedly broader than the Commission's, for it comprised good governance, for example. The Committee, chaired by Sir Franklin Berman, had presented its third report<sup>7</sup> in New Delhi in 2002, including a number of proposals on the responsibility of international organizations under international law. A series of articles had already been drafted, but the work was not yet finished. In a letter, the Chair of the Committee had informed him of the Committee's plans for a series of private seminars with groups of international organizations and had noted that there might be some useful overlap between that activity and the Commission's request to international organizations to provide information about their internal practices. Of course, cooperation between the Commission and ILA would have to be considered in a wider context, perhaps in the Planning Group, and not solely with reference to the responsibility of international organizations, but the situation did seem to offer an important opportunity for a concrete discussion on cooperation with learned institutions of a non-governmental character.

21. To speak of the responsibility of an international organization was to presuppose that the organization had legal personality. Otherwise, its conduct would have to be attributed to other entities, probably the member States. Article 1 of the resolution adopted by the Institute of International Law at its Lisbon session stated, "This Resolu-

tion deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members."<sup>8</sup>

22. It had traditionally been held that many organizations did not meet the legal personality requirement. The requirement had thus limited the scope of study to a small number of organizations, the most significant ones, starting with the United Nations and branching out to its larger family and to certain regional organizations. That approach was no longer tenable in view of the trend towards recognizing the legal personality of individuals, as was highlighted by the decision of ICJ in the *LaGrand* case and the Commission's own commentary on the draft articles on State responsibility for internationally wrongful acts. If individuals had legal personality, it was difficult to deny legal personality to organizations, whether their members were States or individuals or both States and individuals. The only proviso was that the organization should act in its own capacity, not merely as an instrument of another entity.

23. That left the need to look for other elements in defining organizations for the purpose of discussing international responsibility. It would be difficult to deal simultaneously with governmental organizations of a universal character and organizations composed of individuals. Obviously, different rules should be applied, and the Commission should focus on those that were more clearly a part of international law. Yet the references to international organizations contained in a number of codification instruments, starting with the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), which merely defined them as intergovernmental organizations. One might well ask whether that was a definition at all. Such a definition conveyed the idea that some members must be States, but did not necessarily say that the international organization must be established by treaty, and it did not make any distinction among the organizations created by States, which might also deal exclusively with commercial or private law matters. The definition of an international organization as an intergovernmental organization had been endorsed by the Commission, albeit briefly, in its commentary on article 57 of the draft articles on State responsibility for internationally wrongful acts. One alternative would be for the Commission to reproduce the definition contained in several codification conventions; "intergovernmental organization" could then be defined in greater detail in the commentary. As was pointed out in paragraph 14 of his report, the meaning was less obvious than might appear at first glance, particularly in view of the existence of several organizations whose members included not only States but subjects that could be individuals, territories or international organizations.

24. His report explored alternatives to the current definition. The Commission should try to produce a functional definition covering a relatively homogeneous category of organizations, so that it could establish one set of rules with just a few variations, rather than a number of different rules depending on the type of organization concerned. A new, more precise definition would in any case make an elucidation in the commentary superfluous.

<sup>5</sup> *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 444.

<sup>6</sup> *Ibid.*, pp. 233–320.

<sup>7</sup> ILA, *Report of the Seventieth Conference* (London, 2002), pp. 772–806.

<sup>8</sup> See footnote 5 above.



25. He had proceeded on the premise that the present work was a sequel to the draft articles on State responsibility. The Commission should try to define the category of organizations that exercised functions similar to those of States. In English, such functions might be referred to as governmental. He was aware that the use of that term might raise drafting problems in other languages. If the definition referred to governmental functions, then non-governmental organizations, which usually did not exercise those functions, were left out, apart from a few exceptions, such as ICRC, which exercised some governmental functions in the broad sense. The Commission might discuss what to do about those exceptions. His decision to rule out non-governmental organizations was in keeping with the views expressed by many delegations in the Sixth Committee in response to the Commission's request for comments. The proposed definition would also leave out governmental organizations whose conduct was less likely to give rise to questions of responsibility under international law. International human rights rules were of relevance to all organizations, whether governmental or non-governmental, but there were many rules of international law which concerned entities only insofar as they exercised governmental functions. For an organization to be covered by the draft articles, the definition might specify that some of its members must be States, but the presence of other subjects—other international organizations, territories or individuals—was not a reason for excluding it.

26. The definition in draft article 2 proposed by the Special Rapporteur in his report contained three elements: (a) the organization included States among its members; (b) it exercised functions in its own capacity and not as an instrument of other subjects; and (c) those functions might be regarded as governmental. The definition of "organization" related to the scope of the draft articles, but it might be preferable to follow the precedents referred to in paragraph 28 of the report and place the definition in draft article 2, while draft article 1 specified the general scope. It seemed appropriate to make it clear from the outset what the draft articles were about, namely issues relating to the responsibility of international organizations under international law. That would exclude the sometimes interrelated questions of the civil liability of international organizations. One reason was that at the present time there were very few rules of general international law on the civil liability of international organizations. Thus dealing with civil liability would constitute solely an exercise in progressive development of the law, which would be difficult to carry out on a general scale. The other reason for omitting civil liability was that the questions were heterogeneous. Rules of international law existed on the civil liability of States which operated a nuclear plant, but that did not mean the resulting civil liability was analogous to responsibility under international law. Referring to responsibility under international law would make it clear that the draft articles did not cover international liability for injurious consequences arising out of acts not prohibited by international law, the topic assigned to Mr. Sreenivasa Rao as Special Rapporteur. In suggesting that such liability should not be included in the present draft articles, he had again followed the view expressed by a large number of representatives in the Sixth Committee in response to the Commission's request for comments.

He did not wish to query the usefulness of a study on international liability for injurious consequences also in the case of international organizations, nor did he wish to increase the burden on Mr. Sreenivasa Rao. The Commission should perhaps decide that the questions which might arise in the case of international organizations were really more analogous to questions concerning States, and that it should deal with them as a sequel to the present study, or possibly within the scope of the work on liability.

27. Another point needed to be considered in an introductory provision. Article 57 of the draft articles on State responsibility for internationally wrongful acts expressly left aside not only "any question of the responsibility under international law of an international organization" but also any question of the responsibility of "any State for the conduct of an international organization". The study in hand would be inadequate if it did not attempt to fill that gap and cover responsibility for the conduct of an organization incurred by States as members or otherwise. The scope of the draft articles should include an express reference to that issue in draft article 1.

28. He would like to defer his presentation of draft article 3, on general principles, as it sought to encompass the substance of articles 1 to 3 of the draft articles on State responsibility for internationally wrongful acts.

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

[Agenda item 2]

29. Further to consultations, the CHAIR announced the composition of the Drafting Committee for the topic of reservations to treaties: Mr. Kateka (Chair), Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Rodríguez Cedeño, Mr. Rosenstock and Mr. Yamada (members), and *ex officio* Mr. Mansfield (Rapporteur). Membership was still open to other members of the Commission.

*The meeting rose at 5.50 p.m.*

### 2752nd MEETING

*Tuesday, 6 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

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

Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

**The responsibility of international organizations  
(continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup>  
A/CN.4/L.632)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIR invited the Commission to continue its consideration of draft articles 1 and 2 contained in the first report on the responsibility of international organizations (A/CN.4/532) introduced by the Special Rapporteur.

2. Ms. ESCARAMEIA commended the Special Rapporteur for his history of the topic. Like him, she believed that the Commission should try to model the draft articles on the responsibility of international organizations on the draft articles on State responsibility for internationally wrongful acts<sup>2</sup> whenever there was no specific reason to do otherwise. As for the scope of the study and with regard to the definition of the term “international organization”, it was good to use the references to international organizations contained in previous conventions. Since international organizations were not composed exclusively of States and their constituent instruments were not always international treaties, the Special Rapporteur was proposing a functional approach to the definition of an international organization, starting from the premise that, in order for such organizations to have responsibility, they must have international personality. While she realized that the organization itself was different from the sum of its members, she had problems with the Special Rapporteur’s proposal to use the governmental functions exercised by such organizations as a defining criterion. Governmental functions were in fact very difficult to establish. International organizations could exercise functions that were associated more with the State, for instance, judicial or legislative functions, but they could also be lobbies for human rights or environmental protection. Would an international organization then be responsible only for acts arising from its judicial or legislative functions and not from its other functions?

3. She agreed fully with the scope of the draft articles as defined in article 1, namely, responsibility under international law, but not civil liability. She also agreed that the Commission should limit itself for the time being to acts that were wrongful under international law and should tackle the difficult question of the responsibility of States which somehow contributed to the wrongful act of an organization or which were members of an organization that committed a wrongful act, the responsibility of the organization itself being a different issue. On the other hand, she had problems with the wording of article 2, particularly the phrase “insofar [as] it exercises in its own

capacity certain governmental functions”. That seemed to exclude any organization which did not exercise governmental functions, probably because it would involve issues of civil liability, but that could raise the question of international responsibility for acts that were not easily connected with governmental functions. That led to the core question of what governmental functions were. It might be safer to go back to the traditional criteria of the organization’s membership and constituent instrument and to say that the latter did not necessarily have to be an international treaty and that the organization’s members could be any kind of territorial-based entity, in other words, territories as well as States. She assumed that the present study did not apply to organizations whose member were non-territorial entities, such as individuals or non-governmental organizations.

4. Mr. PAMBOU-TCHIVOUNDA said that the use in English of the words “governmental functions” might mislead the reader. It went without saying that the concept of government related to States, but the topic under consideration concerned not States but international organizations. There could therefore be no doubt about what was meant by “governmental functions”, and the Special Rapporteur appeared to have succumbed to this confusion.

5. Mr. PELLET recalled that, during the consideration of the draft articles on State responsibility for internationally wrongful acts, the Commission had had lengthy discussions on how the idea of *prérogatives de puissance publique*, which was familiar to French jurists and had ultimately been used, should be translated into English. What applied in the context of State responsibility was less appropriate in the context of the responsibility of international organizations, however. The English term posed a real problem, whereas the French was perfectly acceptable, and a very complicated translation problem was thus involved. He nevertheless reserved his position, as he was not sure whether the definition of an international organization should be based on governmental functions. Many international organizations had no such functions; what they provided was much more of an international public service.

6. Mr. DUGARD said that the Special Rapporteur had been wise in stressing the elements of an international organization’s membership and its function in article 2. It would be extremely difficult to emphasize only governmental functions because some organizations seemed to exercise them while others did not. Many people considered, for example, that national liberation movements had international legal personality and could exercise governmental functions. The same might be said of many non-governmental organizations, which increasingly carried out functions normally reserved for States. It was even fair to say that today they played an important role in the development of international law, perhaps even in the creation of customary law, which might be described as a governmental function. But that simply showed that governmental functions could not be used as the sole criterion. There must be an additional criterion, and the Special Rapporteur had wisely chosen to emphasize both the function of the organization and the fact that States must be members. There must be some States involved in the organization in order to give it an intergovernmental char-

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st meeting, footnote 3.

acter. There were always going to be difficult cases, and that was why it was important to emphasize both criteria.

7. Mr. BROWNLIE said that it was not a good idea to try to define what governmental functions were. Governments did all sorts of things. They could create railways and even private enterprises. From a purely pragmatic viewpoint, he wondered why the criterion was useful as a factor of differentiation.

8. Mr. GAJA (Special Rapporteur) said he agreed that there was indeed a translation problem, the reverse of the one that had come up during the drafting of the draft articles on State responsibility for internationally wrongful acts. The term “governmental functions” could be understood in many ways. The concept could be widened to comprise that of *service public*, as mentioned by Mr. Pellet. The basic reason for having a criterion of that sort was that the Commission should be developing rules which followed the framework of the ones on State responsibility. It was reasonable to take into consideration those entities that, even if it was only a small part of their activity, could be assimilated to the activity of States, because some of the functions of the international organization were of the kind that a State would normally be expected to undertake. That did not mean that there might not be obligations under international law that were incumbent on other types of organizations. Similarly, individuals had not only rights under international law, but also obligations. The fact that one did not deal with the responsibility of individuals, or of non-governmental organizations composed of individuals, did not mean one denied that problems involving the responsibility of such entities existed.

9. Mr. ROSENSTOCK pointed out that a significant element of article 2 that facilitated the kind of language and approach used by the Commission was that it spoke of exercising certain functions, meaning that the institutions functioned, at some point, in some way, at a governmental level or like a government. That did not mean that they were governments, but rather that they did some things that governments did. The fact that it was not necessary for their activities to be specifically those of governments in order for the particular actions under consideration to give rise to responsibility seemed to support the general approach in article 2. It might be argued that the wording was not ideal, but, until something better was found, it could be seen as a reasonably sensible definition of what ought to be involved if the laws of State responsibility were to be applied.

10. Mr. BROWNLIE said that, in fact, the concept that worked best was that of “activity analogous to that of Governments”—a beautiful phrase that was completely useless, but was exactly what was needed. The article referred not to governmental functions but to the functions of international organizations, which were analogous to governmental activity.

*The meeting rose at 10.30 a.m.*

## 2753rd MEETING

*Wednesday, 7 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Statement by the Director-General of the United Nations Office at Geneva

1. Mr. ORDZHONIKIDZE (Director-General, United Nations Office at Geneva), welcoming the members of the Commission to Geneva, said that since its inception the Commission had held almost all its sessions in that city. Tasked with the progressive development and codification of international law, it had made impressive achievements over the 55 years of its existence: the law of treaties, the law of the sea, State responsibility, diplomatic relations, humanitarian law and an international criminal court were just a few of the areas that owed their codification to the Commission. Never before had so many different fields of international law been clarified and regulated. The fact that the last half-century had seen the universal codification of international law at an unprecedented pace was attributable in no small measure to the work of the Commission.

2. International law laid the foundations for just, humane and rational conduct among States. It set the basic rules on which any civilized society must rely. At the dawn of the twenty-first century, which was witnessing the emergence of a global community confronted with unprecedented challenges and risks, well-ordered State behaviour had become more crucial than ever before.

3. It was sometimes averred that the rule of law was too often ignored or flouted. He profoundly disagreed with that assertion: those whose short-sighted motives drove them to show contempt for international law usually found themselves obliged to circumvent it.

4. The scope of the Commission's agenda for its fifty-fifth session testified to the extensive areas of law that still required international regulation. The fact that the Commission studied topics such as diplomatic protection, reservations to treaties, unilateral acts of States and the responsibility of international organizations was proof that many fundamental elements remained to be defined before universally accepted norms were established. He was confident that the Commission would continue to fulfil



its pivotal role of contributing to the establishment of the rule of law in international relations, a notion that lay at the heart of the Charter of the United Nations. The United Nations Office at Geneva stood ready to provide any facilities that could contribute to creating an environment conducive to the smooth functioning of the Commission.

**The responsibility of international organizations**  
(*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup>  
A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

5. Mr. RODRÍGUEZ CEDEÑO said that article 1 of the draft articles on the responsibility of international organizations, as proposed by the Special Rapporteur in his first report (A/CN.4/532), restricted the scope of the draft to two separate areas which must, however, be considered as a whole: the international responsibility of an international organization for acts wrongful under international law; and the international responsibility of a State for the conduct of an international organization. Article 1 thus excluded civil liability, for justifiable reasons set out in paragraphs 29 and 30 of the report: questions of civil liability had not been dealt with in the Commission's previous work on State responsibility for internationally wrongful acts; furthermore, exclusion of that issue reflected the preference of most States. The first sentence of article 1 was thus satisfactory as currently drafted. The draft also covered responsibility for acts of another international organization, and the responsibility that might arise from the internationally wrongful act of an international organization of which that organization was a member. Thus, the wrongful act might arise from an act not performed by the organization itself, as was reflected in the second part of the draft article, the wording of which was broadly acceptable. The form of the article might perhaps be improved by dealing with the two situations it envisaged in two separate paragraphs. That, however, was a question for the Drafting Committee.

6. Article 2, defining the term "international organization", would need to be expanded in due course to cover other terms to be introduced elsewhere in the draft articles. The term must be defined in the broader context of the organization's international responsibility for wrongful acts. The definition of an "international organization" as an "intergovernmental organization" used, *inter alia*, in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Vienna Convention on Succession of States in Respect of Treaties (hereinafter "the 1978 Vienna Convention"), was thus too general for the purposes of the present draft articles and should be retained as just one element of a new definition covering a wider range of organizations.

7. It was important to distinguish clearly between, on the one hand, the legal capacity of the organization *vis-à-vis* the internal law of the State and, on the other, the inter-

national legal personality of the organization as a subject of international law. In practice, those terms tended to be confused. Accordingly, the Rome Statute of the International Criminal Court had included a provision expressly defining the Court as an international organization as well as a criminal jurisdictional body. Those were two different and not necessarily complementary questions, as the Special Rapporteur pointed out in paragraph 18 of his report.

8. Two fundamental criteria should govern a definition appropriate to the draft articles under consideration. First, the organization must be one established by States, whether through a formal instrument such as a treaty or agreement, or by some other means reflecting a conventional basis for its establishment. Second, it must be an intergovernmental organization, not in terms of its composition but in terms of its creation. In other words, the organization must be established by States, though it could also include entities other than the State—a criterion that automatically excluded non-governmental organizations, which did not fall within the scope of the draft.

9. The Special Rapporteur also put forward another, more complicated criterion: the vexed question of governmental functions. Leaving aside any potential problems of translation, such functions were analogous to governmental functions, as Mr. Brownlie had pointed out, but related to the competences—including implicit competences—and powers conferred on the organization by States. They were not "governmental functions" in the strict sense of the term, but functions that the organizations could perform in the context of the competences established by their constitutions, by their internal rules, regulations and decisions, and by practice.

10. In short, the definition, or the commentaries thereto, should thus specify that an organization, regardless of its composition, must be established by States; must have international legal personality; and must exercise its functions pursuant to its own relevant rules and practice.

11. Mr. PELLET, welcoming Mr. Gaja to the "special rapporteurs' club", said that the Special Rapporteur's first report was both stimulating and debatable. The task of a special rapporteur was often a thankless one, calling for an ability to give as good as one got and, above all, to turn colleagues' suggestions and criticisms to one's advantage while continuing to steer a steady course. The Special Rapporteur seemed abundantly endowed with all those qualities, save, perhaps, the ability to respond to ferocious criticism with a like ferocity. That quality, however, might too lurk undetected.

12. While, generally speaking, he endorsed the Special Rapporteur's approach, he nonetheless had some serious grounds for disagreement. In that regard he recalled how, when newly elected to the Commission, he had been surprised at the manner in which members would praise special rapporteurs' reports at length, only to subject them to very severe strictures thereafter. Responding to his surprise, a more experienced member had explained to him that the role of members *vis-à-vis* a special rapporteur was analogous to that of a surgeon, namely, to anaesthetize the patient before proceeding to painful surgery.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

13. First, the anaesthetic. The report was dense, concise, intelligent, interesting and broadly acceptable. In particular, the Special Rapporteur was right to define his topic in relation to the topic of State responsibility, and to propose to treat problems relating to the responsibility of international organizations that—rightly or wrongly—had been left aside by the Commission in its consideration of State responsibility. For instance, as the Special Rapporteur himself pointed out somewhat allusively in paragraphs 8 and 9 of the report, and more explicitly in paragraph 33, it might have been more logical to deal with State responsibility for the conduct of an international organization in the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> rather than in the current set of draft articles. That course, however, had not been taken. Nonetheless, if such a responsibility existed, it must certainly be dealt with somewhere, and the new topic was the natural—though not the most logical—place to do so.

14. However, there were two “buts”. First, the title of the topic was somewhat misleading. A better title would be “Responsibility arising by reason of the conduct of international organizations”; for one might otherwise infer that the conduct of international organizations could trigger the responsibility of the State. While a formal amendment of the title was not indispensable, that ambiguity, to which the Special Rapporteur had drawn attention, should be borne constantly in mind.

15. The same could not be said of his second reservation. The Special Rapporteur showed undue boldness, in his drafting of article 1, in seeming to propose that States could be held responsible for the conduct of an international organization—a point to which he would revert when, having, as it were, administered the anaesthetic, he came to perform the operation itself.

16. That being said, he nevertheless unreservedly endorsed the decision, referred to in paragraph 30 of the report, to exclude the responsibility of international organizations for activities not prohibited by international law. He agreed with the Special Rapporteur that those questions had their place within the topic of liability, and that they should be taken up forthwith in that context. He had no doubt that, in principle, the problem of liability was posed in the same terms for international organizations as for States, even if the formers’ lack of any resources could give rise to serious problems calling for imaginative yet practical solutions.

17. A third point on which he agreed with the Special Rapporteur concerned the method adopted. The Special Rapporteur was right to stress that the Commission was not starting from square one, having already postulated certain approaches, if only *a contrario*, as was clearly if somewhat succinctly indicated in paragraphs 3 to 11 of the report. He also endorsed the idea, again adumbrated somewhat allusively, notably in paragraph 11, that the draft articles on State responsibility for internationally wrongful acts should constitute a reference tool but that there should be no prior assumption of similarity, or even of comparability. There could be considerable variations between one problem and another, and even between one organization and another. In some cases international or-

ganizations “behaved” like States and there was no reason to treat them differently. That was particularly true of integration organizations, which tended to replace States in the exercise of their traditional functions and prerogatives. In other respects, however, international organizations posed specific problems which should be highlighted, and the solutions to them should not be calqued on the rules applicable to States. That, at any rate, was how he interpreted the Special Rapporteur’s intentions, couched as they sometimes were in somewhat sibylline terms.

18. Finally, he unhesitatingly endorsed the format adopted by the Special Rapporteur for draft articles 1 to 3, regarding the scope, definition—perhaps “definitions” would prove more appropriate—and general principles.

19. Now that the patient was—it was to be hoped—sufficiently anaesthetized, he would turn to some more critical remarks, stressing, however, that the problems tackled by the Special Rapporteur in his first report were so fundamental and central to international law that they must inevitably generate heated and impassioned debate.

20. Article 1 was conspicuous both for what it said and for what it omitted to say. As to the first sentence, he agreed that the scope should be limited to responsibility for internationally wrongful acts, and that it was thus imperative to align it with the draft articles on State responsibility for internationally wrongful acts. His only objection concerned the phrase “for acts that are wrongful under international law”. There seemed no reason to discard the terminology established in the draft articles on State responsibility, which had remained unchanged since the 1970s and was now firmly established in doctrine, and even in the jurisprudence of ICJ. The wording “for internationally wrongful acts” should be used.

21. He was more critical of the second sentence, to which he had already alluded. As drafted, it implied that the State could be responsible for the conduct of an international organization. That was possible, but not certain; and to incorporate it into a set of draft articles without first proving or even debating it seemed somewhat rash.

22. There were two possible solutions. The first, inelegant but simple, would be to place the sentence in square brackets pending further consideration. The second solution, one which he himself favoured, would be to delete the second sentence and to redraft the first sentence so as not to rule out that possibility, adopting some such wording as “This draft article applies to the question of [international] responsibility incurred by an international organization or arising by reason of internationally wrongful acts of an international organization.” The precise wording could be left to the Drafting Committee. The important point was to make it clear that the article concerned the responsibility for internationally wrongful acts of an international organization, while not prejudging questions of attribution or of the consequences or content of responsibility, which would also need to be considered in due course.

23. Admittedly, the first part of his proposal might raise objections, since responsibility incurred by an international organization did not necessarily exclude liability for acts not prohibited by international law, which the Spe-

<sup>2</sup> See 2751st meeting, footnote 3.

cial Rapporteur wanted to leave aside. However, wording could doubtless be found that would satisfy both himself and the Special Rapporteur. Besides, none of the draft articles on State responsibility for internationally wrongful acts formally excluded acts not prohibited by international law, and he wondered whether it was absolutely necessary to do so in the present draft, despite the somewhat sibylline explanations given by the Special Rapporteur in his report. It would become sufficiently clear from subsequent articles that such acts were excluded, and the title could even be changed, as had happened *in extremis* with the draft articles on State responsibility. Paragraph 31 of the report seemed to suggest that the Special Rapporteur would be open to making changes.

24. As to what the first sentence of draft article 1 omitted to say, he noted that the Special Rapporteur discussed one of the most important elements of the report, namely, civil liability, in paragraph 29 but made no mention of it in article 1. He disagreed with the Special Rapporteur's proposition that issues of civil liability, which the Special Rapporteur contrasted with responsibility under international law, should be left aside. He had two problems with that proposition. First, he was not convinced that civil liability and international responsibility could be contrasted in that way. International responsibility was neither civil nor criminal, it was simply international; the opposite of civil liability was not international responsibility but criminal liability. Second, and more importantly, unlike Mr. Rodríguez Cedeño he did not think that civil liability should be excluded. The Special Rapporteur gave as reasons for such exclusion the fact that the draft articles on State responsibility for internationally wrongful acts did not deal with questions of civil liability and his view that to state rules on civil liability would be an exercise in progressive development, rather than codification, of international law, and that the Commission was not the most appropriate body for studying those questions.

25. He disagreed with the Special Rapporteur for a number of reasons. First of all, under its Statute, the Commission was responsible for both the progressive development and the codification of international law. Second, he was not entirely sure that the Special Rapporteur's position on civil liability was based on premises that were factually correct. It did seem evident that what the Special Rapporteur termed "responsibility under international law" was based on far sounder practice than what he termed "civil liability". Third, the issue of civil liability raised real problems that were as essential to solve, if not more so, as those related to the traditional notion of international responsibility. The examples given in a footnote in paragraph 29 of the report made that quite clear. Fourth, he was far from convinced that the two concepts were as different and as easy to separate as the Special Rapporteur suggested. If international organizations incurred international responsibility in the restricted sense used by the Special Rapporteur, the question arose who would assume the resulting obligations, namely, reparation. That inevitably posed problems of the precise kind that the Special Rapporteur was proposing to leave aside by saying that they were issues of civil liability. Finally, he did not see why the Commission should not be the appropriate body to study those questions. He therefore disagreed with the exclusion of issues of civil liability from the wording in

paragraph 39, believing that the Commission could and must deal with those issues. Moreover, the Special Rapporteur was entirely capable of guiding the Commission in that task.

26. If, as he very much hoped, the Commission agreed that it should consider issues of civil liability and the Special Rapporteur resigned himself to doing so, that might mean article 1 would have to be redrafted. If the Commission subscribed to the Special Rapporteur's restrictive interpretation of the concept of international responsibility, "international" would have to be deleted before "responsibility" in the first sentence. Personally, he did not interpret the concept so narrowly and took the view that civil liability was in fact indissociable from international responsibility. If the Commission took the same view, the sensible solution would then be to retain "international". It was important not to ignore problems such as those that had arisen in the International Tin Council case (*MacLaine Watson and Co., Ltd. v. Council and Commission of the European Communities*). In that case, the English courts had been able to resolve some issues, but they had acted, or should have acted, only as bodies for the implementation of international law.

27. Draft article 2 posed a number of difficulties that had already been discussed following Ms. Escameia's statement at the previous meeting and by Mr. Rodríguez Cedeño. It was not the first time that a special rapporteur had attempted to define the concept of "international organization". At the Commission's eighth session, in 1956, Sir Gerald Fitzmaurice, in his first report on the law of treaties, had defined an international organization as "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States..."<sup>3</sup> Parts of that definition could be said to have become obsolete. For instance, not all international organizations were necessarily established by treaty, OSCE being the most notable exception. Moreover, international organizations did not necessarily consist only of member States, although the term "collectivity of States" did not expressly exclude non-State members. The only real objection that could be made to the 1956 definition, in his view, was that it did not envisage the possibility of international organizations consisting purely of organizations. The only such organization with which he was familiar was the Joint Vienna Institute, set up in 1994 by agreement of IMF, BIS, EBRD, OECD and WTO, but there might be others. Generally speaking, however, the 1956 definition was a good starting point, and a reference to organizations of organizations, although not really crucial, could be discussed at some future point.

28. Fitzmaurice's definition had been produced in the context of the law of treaties, whereas the Commission was currently dealing with international responsibility. However, that did not warrant a fundamental difference of definition. Whether the issue was the organization's capacity to conclude treaties or its capacity to engage its international responsibility, neither was conceivable unless the organization had international legal personality. On that point, he had considerable problems with the Special Rapporteur's approach, as discussed at some length in paragraphs 15 to 19 of the report. He did not entirely agree

<sup>3</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108.



with those paragraphs, firmly believing as he did that all international organizations had an objective international personality—not for the negative reasons invoked by ICJ in its advisory opinion in the *Reparation for Injuries* case, referred to in a footnote in paragraph 19 of the report, but for those invoked by Judge Krylov in his dissenting opinion in the same case. It was surprising that the Special Rapporteur attached such importance to the Court's advisory opinion, which seemed to be of marginal relevance to the issue at hand, and also that the Special Rapporteur drew no conclusions from his reasoning. It was essential to make the point that international organizations had international responsibility not because they existed but because they had international personality—a chair or a dog existed, but that did not give it responsibility. He could not understand why, in attempting to define international organizations for the purposes of international responsibility, the Special Rapporteur had not made that point. The Court's advisory opinion stated that international organizations had a measure of international personality and that that was sufficient for them to incur responsibility. Since, judging by paragraph 15, the Special Rapporteur agreed with that position, he wondered why such a vital element was omitted from the definition in article 2 and suggested that it should be reinstated.

29. The Special Rapporteur took the view that the definition should not include a reference to establishment by treaty. He, personally, would prefer to retain such a reference—while explaining in a commentary that there might be exceptions—since the vast majority of international organizations were established by treaty. More to the point, he wished to correct a slight error in paragraph 14. As Legal Adviser to the World Tourism Organization, he wished to point out that, contrary to the assertion in the 1971 article in the *Netherlands International Law Review*,<sup>4</sup> the organization had been established not by a non-binding instrument of international law but by a binding international instrument (Statutes of the World Tourism Organization), signed in Mexico City on 27 September 1970, which had entered into force on 2 January 1975 and which was registered with the United Nations Secretariat. It would, in fact, probably become the sixteenth specialized agency of the United Nations system in the course of 2003. In article 1 of its statutes, the Organization expressly defined itself as “intergovernmental”, even though its membership consisted of member States (full members), non-self-governing territories (associate members) and private companies, individuals, universities, non-governmental organizations, and others (affiliate members).

30. Accordingly, article 2 could simply state, as was mentioned in paragraphs 12, 13 and 23 of the report, that the definition referred to “intergovernmental” organizations, or else, as suggested by the Special Rapporteur, that it referred to organizations which included States among their members or, as suggested by Mr. Rodríguez Cedeño in an attempt to avoid mention of a treaty, to organizations established by States, in which case the commentary could explain that such organizations could be established either by treaty or by non-binding instrument. All those options were acceptable, but the first was the simplest. He

disagreed that to use the word “intergovernmental” would be to wrongly equate Governments with States. Which-ever of the three options was chosen, the commentary would have to recall that organizations of organizations could also exist.

31. In his opinion, organizations of organizations raised different problems, if only because they lacked the safety net of having States behind them. Such problems would have to be discussed when dealing with the issue of the possible responsibility of members of international organizations for the conduct of an international organization whose membership included States and other international organizations. That issue could not be left out of the draft articles, and the Special Rapporteur certainly had not suggested doing so.

32. The definition should therefore include the following elements: intergovernmental, possibly established by treaty, and possessing legal personality. The Special Rapporteur had, however, omitted any reference to establishment by treaty or to international legal personality. Instead, he had polarized the definition around the organization's exercise of certain governmental functions in its own capacity. As he had said at the previous meeting, using the English term “governmental functions” to render *prérogatives de puissance publique* might be acceptable for the draft articles on State responsibility for internationally wrongful acts, but not for those on responsibility of international organizations. Even though, as Mr. Rosenstock had said, it might be a generally reasonable translation, in the present case it was highly problematic. In that connection, he agreed with Mr. Brownlie that the organization must exercise functions analogous to those of a government, but he did not share his misgivings about including the management and promotion of tourism among such functions. The rendering “governmental functions” was a problem only for the English version, but in any case he seriously doubted whether the criterion used by the Special Rapporteur for the purposes of the draft was valid. In the systems of internal administrative law with which he was to some small extent familiar and which invoked the concept of *prérogatives de puissance publique*, the concept always seemed to refer to “inordinate” prerogatives of ordinary law, reflecting the idea that States and their organs did not behave like private individuals. If all activities that were not strictly governmental were excluded from the draft articles, however, that would leave little more than responsibility for the use of force, the conclusion of treaties and the adoption of binding legislation. That approach was unsatisfactory for many of the same reasons that he had invoked with regard to civil liability.

33. Moreover, the notion of *service public* was used in French administrative law to differentiate between activities under administrative law and those under private law—in other words, activities in the general interest as opposed to activities that served private interests. If he had to choose between the two terms, he would prefer to use *service public*. Article 2 would then read in French “...dans la mesure où elle assume une activité de service public”. However, he would rather use neither term, for a number of reasons. First, it was ill advised to refer, even implicitly, to concepts of internal law in an international legal instrument. That was clear from the translation problems to which he had alluded. International law was

<sup>4</sup> D. R. Gilmour, “The World Tourism Organization: international constitutional law with a difference”, *Netherlands International Law Review*, vol. 18 (1971), p. 275.

neither civil, criminal, Romano-Germanic nor common law, and he saw no reason to refer to concepts of internal law in the draft articles. The important point in article 2 was not that the international organization exercised certain governmental functions but that it did so “in its own capacity”. As soon as the organization acted in its own capacity rather than on behalf of its member States, it became internationally responsible. In fact, even the mention “in its own capacity” might be redundant, since an organization with legal capacity automatically acted in its own capacity.

34. To sum up, in article 2 his preference would be simply to say that the term “international organization” referred to an intergovernmental organization with international legal personality. However, he did not want the patient to emerge from the operation without anaesthesia and with no limbs left, so he would be prepared to retain the term “in its own capacity”, if the Special Rapporteur was attached to it, by inserting at the end “insofar as it acts in its own capacity”. For the time being, he could also agree to retain the wording “which includes States among its members” or to add a reference to the organization’s establishment by States or by treaty, although that did not really add anything. His proposal was a blend of the wording used by Fitzmaurice and by the Special Rapporteur, but it seemed appropriate.

35. He wished to thank the Special Rapporteur for initiating what promised to be a fascinating debate.

36. Mr. GAJA (Special Rapporteur) said that he would respond later to Mr. Pellet’s constructive comments. However, to dispel any confusion, he wished to clarify one point immediately. It had never been his intention to deny that international legal personality was an indispensable element. However, since many international organizations had such personality, he had not deemed it necessary to deal with the issue at length in the report or to include it expressly in draft article 2. The term “capacity” in article 2 implied that the organization had legal personality. While the wording might be improved, there was no need to discuss the issue of legal personality; such personality was an essential element and he did not think that Mr. Pellet’s otherwise constructive criticism was entirely justified on that score.

37. Mr. DUGARD said that, as he recalled, the International Tin Council would have fallen within the definition in article 2, since the Council had had member States and had exercised certain governmental functions. That point would prove important at a later stage. Of more immediate importance was the fact that the Special Rapporteur seemed to suggest in his report that the International Tin Council case (*Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*) had involved an internationally wrongful act, but that the plaintiffs had chosen to take the case to the municipal courts rather than to international litigation. If that was so, it was difficult to invoke that case to justify making a distinction between international responsibility and civil liability. He shared Mr. Pellet’s concern that the two concepts should not be separated, but he would be grateful if someone could clarify the history of the International Tin Council litigation for him.

38. He agreed with the Special Rapporteur that there was no need for a reference to international legal personality. Indeed, to include such a reference might be risky, given that an intense debate was currently under way on the legal personality of non-governmental organizations. The purpose of article 2 was to exclude non-governmental organizations from the scope of the draft by placing the emphasis on States and the exercise of governmental functions, and he supported the approach taken by the Special Rapporteur in that regard.

39. Mr. GAJA (Special Rapporteur) said the litigation concerning the International Tin Council did undoubtedly yield interesting material, and the judgements handed down by national courts, particularly the English courts, were of special interest. The problem was that, while some questions before national courts had pertained to international law, there had chiefly been issues of municipal law, indeed of civil liability. It was such issues that he thought were dissimilar to the ones dealt with in the draft articles on State responsibility for internationally wrongful acts, and he proposed to deal only with those that came under international law.

40. Mr. KAMTO, referring to Mr. Pellet’s statement that a chair or a dog could not be a subject of international law or bear international responsibility—in other words, that it was not because something existed that it had objective international personality—said the question should rather be viewed from the standpoint of legal personality. The status of subject of international law was conferred on an international organization by the fact that States were members. By their membership, States brought to the organization a number of prerogatives and constituent elements of international legal personality. The advisory opinion of ICJ in the *Reparation for Injuries* case was insufficiently clear in that regard, but he had problems with Mr. Pellet’s assertion that Judge Krylov’s dissenting opinion was correct.

41. Mr. Rodríguez Cedeño had raised the interesting point that it was the element of creation, and not merely of control, that counted. IUCN was a non-governmental organization and had not been created by treaty; did the presence of States within it mean it could be considered an international organization? He did not think so. For that purpose, the State presence must be large enough so that States could be deemed to have control over the organization. It was being contended in legal writings in France that enterprises which signed contracts with individuals became subjects of international law. He thought not: they lacked the element that transformed the State into a subject of international law, the element of sovereignty.

42. Mr. BROWNLIE said that he had at one point advised a number of the member States of the International Tin Council on what to do, and that in the end they had engaged in extensive diplomatic activity, for lack of any other recourse. Some had gone to municipal courts, which had made for terrific fun for the lawyers but had immensely complicated the situation and delayed the diplomatic resolution of the problem. The Special Rapporteur was quite right that the judgement of the English court, while interesting, was not about international law; rather, it was about recognition in English courts of international organizations. In that and other contexts referred to by

Mr. Pellet, the Commission might advert to the question of what was the applicable law, which often provided the answer.

43. Mr. PELLET, responding to Mr. Kamto's remarks, said Mr. Kamto was reasoning the wrong way around: one should start from the proposition that international organizations had legal personality, which was precisely what ICJ had done in its advisory opinion in the *Reparation for Injuries* case. It had then looked into whether that legal personality was objective. Judge Krylov's argument pertained solely to the second issue. A chair could never have objective personality, as it had no personality whatsoever. An organization did have personality, and personality which, it seemed to him, must necessarily be objective. On the other hand, like Mr. Kamto, he thought that consideration should be given to Mr. Rodríguez Cedeño's proposal to incorporate in the definition of international organizations a reference to the fact that they were created by States.

44. He strongly disagreed with Mr. Dugard's final point: not including in the draft any reference to international legal personality would not signify that non-governmental organizations were excluded. Both non-governmental and intergovernmental organizations had international legal personality to some degree, that of the latter being much better established than that of the former. The main difference was that intergovernmental organizations were created by States, *inter alia*. In the absence of legal personality, however, there was no responsibility, and the draft was supposed to be about responsibility.

45. The International Tin Council had been a purely intergovernmental organization comprising no private individuals, but only States and the European Community. Had it exercised governmental functions? Yes and no: it had bought and sold tin, and, under the Special Rapporteur's very broad conception of governmental functions, that could constitute the exercise of such functions—but so could engaging in tourism.

46. Finally, he agreed with what had just been said by Mr. Brownlie: the question was not which municipal courts had handed down judgements, but what types of issues had been involved. The English courts, like the French ones, were not terribly concerned about international law, even though it was part of domestic law, and they had applied English law. That did not mean, however, that the issues involved did not raise problems of international responsibility with which the Commission should be concerned.

47. The CHAIR, speaking as a member of the Commission, noted that little had been said about an essential feature that should be part of the definition of international organizations: their capacity to assume rights and obligations under international law. Responsibility was triggered when an obligation under international law was breached. Irrespective of how it was created or of its composition, the important point was that an international organization was one that assumed obligations under international law.

48. Mr. RODRÍGUEZ CEDEÑO said there were two entirely unconnected criteria within the definition of an

international organization: first, the organization must be created by a State, and second, the organization must have international legal personality. Such personality was usually explicitly set out in the constituent instrument or was conferred on the basis of the organization's activities. As the Chair had suggested, that meant that the organization had the capacity to assume rights and obligations at the international level. Not all organizations or entities created by States were necessarily international organizations with international legal personality: even though they were public entities, States could set up private enterprises.

49. Mr. FOMBA, congratulating the Special Rapporteur on the excellent quality of his report, said the Commission had already done work on the responsibility of international organizations, even if only incidentally. The Special Rapporteur's review of that work was useful, and the conclusion had been drawn that the responsibility of international organizations must be handled in a manner analogous to the approach taken to the responsibility of States. Personally, he would add that that must be done *mutatis mutandis*, and he noted in that connection Mr. Pellet's remark about similarity and comparability.

50. The Special Rapporteur had rightly drawn attention to the fact that the topic raised complex and controversial issues of doctrine. The Commission must accordingly move forward with imagination yet also circumspection, particularly in making comparisons between States and international organizations and drawing the appropriate conclusions.

51. Draft article 1, which covered the scope both *ratione materiae* and *ratione personae* of the study, seemed to present no difficulties, especially since he agreed with the Special Rapporteur's view that the scope of the study did not include international liability for activities not prohibited by international law. He had some questions about whether civil liability should be included and endorsed the objections raised by Mr. Pellet, but he agreed with the Special Rapporteur that questions such as the responsibility of an international organization for conduct performed by a State or another international organization and the responsibility of an international organization for the unlawful conduct of another organization of which the first organization was a member should come within the scope of the study. Those issues, and the related remarks by Mr. Pellet, deserved further consideration and should be reflected in some way, but he had no firm ideas as yet about whether it should be in the wording of the draft article itself or in the commentary. Mr. Pellet's proposal for revising the title of the article to take account of those issues likewise deserved consideration. He agreed that matters that concerned the responsibility of States and were related to the wrongful conduct of an international organization must also be included in the scope of the study.

52. In draft article 2, the Special Rapporteur proposed two criteria for the definition of an international organization. First, its membership must comprise States, reflecting the desire to concord with the Vienna definition but also to take account of recent developments in the lives of international organizations, some of which now included entities other than States. The second criterion was that of autonomy in the exercise of "certain governmental functions". The present wording in French, *certaines préro-*



*gatives de puissance publique*, had already given rise to extensive discussion: apparently, under French law, few organizations had the capacity to exercise such functions. Alternative formulations such as those proposed by Mr. Brownlie and Mr. Pellet would thus be preferable. While the criterion of international legal personality had been amply shown to be relevant, perhaps that of the exercise of certain governmental functions would prove to be a dead end. It was a delicate question, and the Commission should examine it further.

53. Mr. PAMBOU-TCHIVOUNDA said that the first report on the responsibility of international organizations was fittingly sober, even though certain subjects were emphasized while others were left undeveloped. The approach, which was outlined in paragraph 11 and which he endorsed, was to align the treatment of the topic upon the work done on the responsibility of States for internationally wrongful acts. The limitations inherent in basing the treatment of one subject upon that used for another should be kept in mind, however, as they had become apparent in the work on unilateral acts of States. The Special Rapporteur on the responsibility of international organizations should therefore take account of the particularities of international organizations when pursuing the parallels between that topic and that of State responsibility.

54. In the matter of substance, he queried the need to raise the question of what criteria should be used to define the international organization for the purposes of the present study. Surely it was answered in the literature as well as in the codification conventions cited in paragraph 28 of the report. Was there any reason to depart from the definition in those conventions? He thought not. Any international organization whose acts or omissions could engage its international responsibility was manifestly an intergovernmental organization. It would be prudent and appropriate to the Commission's past practice, he believed, to hew to that description of an international organization.

55. By referring to acts or omissions which might engage the responsibility of an international organization, he had been alluding to the source of the international responsibility of the international organization. One could agree with the Special Rapporteur in that regard that a functional definition of the international organization was appropriate, as was made clear in paragraph 25 of the report: "What seems to be significant for our purposes is not so much the legal nature of the instrument that was adopted for establishing the organization, as the functions that the organization exercises."

56. The reason for stressing the functional aspect was that, in pursuing the purposes and objectives which an international organization had assigned itself, specific functions were exercised in the form of acts or the failure to act, and those functions were at the origin of any prejudice that might be caused to other subjects of international law, whether States or international organizations. The concept of function was crucial, stemming as it did from the idea of international legal personality. It was the attribute that made the international organization a subject of international law, even if the organization did not have sovereignty, because an international organization was not a State, but it had legal personality, which was implicitly

conferred to it by the States that created it, thereby making that organization a subject of international law. But at the same time, an international organization had obligations towards other subjects of international law, and that included the obligation to be responsible for the possibly prejudicial character of the acts through which its functions were exercised. Mr. Pellet had rightly referred to the overriding importance of responsibility's being linked to international legal personality. Those key concepts must be defined in one of the draft articles.

57. The Special Rapporteur had asked the Commission to consider the scope of the criterion of legal personality since the *LaGrand* case. But it might be argued that ICJ had gone rather too far in some instances. It would not have occurred to anyone in the Commission to treat an international organization as an individual just because, in the *LaGrand* case, the Court had found that an individual had an international legal personality. Similarly, in its advisory opinion in the *Reparation for Injuries* case, the Court had had the idea of assimilating a State to the United Nations and, by extension, to an international organization. Everyone knew in what terms the Court had produced the advisory opinion: it had done so saying that the United Nations was neither a State nor a supra-State. Should the Commission say, on the basis of the *LaGrand* case, that the United Nations or an international organization was neither a State nor something less than an individual? That would be an affront, if not to States that created an international organization, then at least to the international organization as a subject of international law. Of course, nowadays anything was possible. What had just happened in Baghdad might lead some to conclude that the United Nations was worthless and that States could decide to do as they pleased.

58. Regardless of whether an international organization was established for the purpose of cooperation or integration, it was the product of those who created it and had assigned it its purposes and objectives and its powers. That was a point on which he disagreed with Mr. Pellet. Even in the case of regional integration organizations, it was the constituent instrument that defined what the organization could and could not do. It was not advisable to try to make too many distinctions.

59. Draft article 1 focused on the question of attribution. Yet, as it stood, it seemed to be meant as a reply to article 57 of the draft articles on State responsibility for internationally wrongful acts. Article 1 made two points, which should have been presented separately. The attribution to an international organization of responsibility that stemmed from its own conduct should form the subject of a separate paragraph, because in its present wording the article gave the impression that both sentences dealt with the same issue. A second paragraph should be inserted to meet that concern and address a question that had not been covered in the draft on State responsibility. Furthermore, the words "for acts that are wrongful under international law", at the end of the first sentence, should be replaced by "for acts which, owing to the conduct of that organization, are wrongful by virtue of international law": it was by reference to the international law of responsibility, which the Commission had already codified, that the responsibility of international organizations must be defined.

60. As to draft article 2, was it sufficient to pose questions of definition? Since legal personality and the functions exercised in accordance with an organization's purposes and objectives were taken into account, it would be better to include the scope of the subject in the title of article 2. For the sake of concision, article 2 should be recast to read: "For the purposes of the present draft articles, the term 'international organization' refers to an intergovernmental organization exercising, by virtue of its international legal personality, the functions required to realize the object and purpose defined in its constituent instrument." Such a wording would cover the whole discussion on the concept of governmental functions.

61. The CHAIR invited the Special Rapporteur to introduce draft article 3 of his report, which read:

*"Article 3. General principles*

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
  - (a) Is attributed to the international organization under international law; and
  - (b) Constitutes a breach of an international obligation of that international organization."

62. Mr. GAJA (Special Rapporteur) said that the main reason for separating the presentation of article 3 from the other two articles was that articles 1 and 2 considered the scope of the topic, while article 3 related to the substance of the rules and also raised different types of questions.

63. The draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session contained in Part One a short chapter consisting of three articles of an introductory nature. Pursuant to article 1, every internationally wrongful act of a State entailed the international responsibility of that State. The meaning of "responsibility" was not defined, but emerged from Part Two of the text. Article 2 gave the elements of an internationally wrongful act. They consisted of the attribution of conduct to a State and the breach of an international obligation. Article 2 contained an implied reference to Chapters II and III of Part One. He would return to article 3 of the text on State responsibility later on.

64. Introductory draft articles of the type adopted on State responsibility might prove useful with regard to international organizations. In the present articles, those provisions would be less prominent, because they would follow the articles on scope, whereas in the draft articles on State responsibility for internationally wrongful acts, they were placed at the very beginning.

65. The propositions contained in articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts were hardly controversial and could be transposed to international organizations. But a few questions arose. The first was whether the statement concerning the attribution of conduct was appropriate in view of

the possibility that an international organization incurred responsibility for conduct which was not its own but that of a State or another organization. Since those cases were of marginal importance and general principles did not exclude that responsibility could otherwise be incurred under certain circumstances, the statement concerning the attribution of conduct might be justified.

66. The second question arose if one accepted the proposal to include the issue of the international responsibility of a State for the conduct of an international organization within the scope of the draft articles, currently in the second sentence of draft article 1. There might seem to be an inconsistency between the provision regarding the scope, which mentioned questions of State responsibility, and the article on general principles, which referred only to the responsibility of international organizations. There again, it could be said that the general principle did not exclude the case of State responsibility, which might be dealt with in other provisions later in the draft.

67. As to drafting, was it necessary to state each general principle in a different article, as had been done in the text on State responsibility? Since the principles were closely interrelated, it might be preferable to combine them in a single article. Logically, the wrongful act occurred first, and then international responsibility arose. However, as had been done with State responsibility, it might be thought that in the draft articles on international responsibility, the stress should be on responsibility. Thus, the same order could be followed as in the draft articles on State responsibility, namely starting with the paragraph on responsibility, then explaining when a wrongful act arose and referring to attribution and the breach of an international obligation.

68. Another issue was whether the draft should include a text similar to article 3 of the draft articles on State responsibility for internationally wrongful acts. As the Commission had noted in its commentary on that article, the idea expressed in article 3—that the characterization of an act of a State as internationally wrongful was governed by international law—was already implicit in article 2: if there was a breach of an obligation, it was of an obligation under international law. Once it was stated that an internationally wrongful act constituted a breach of an international obligation, it hardly seemed necessary to say that that characterization depended on international law.

69. Some might want to follow closely the precedent of the draft articles on State responsibility for internationally wrongful acts and repeat what was arguably implicit. But, on balance, it seemed preferable not to do so, the main reason being that article 3 on State responsibility had been adopted mainly because of a rider, which created a number of problems with regard to international organizations. Article 3 went on to say that the characterization which was governed by international law was not affected by the characterization of the same act as lawful by internal law. A similar statement with regard to international organizations would be controversial, because it was by no means certain what was part of the internal law of an organization. At the previous meeting the Drafting Committee had briefly discussed whether or not the constituent instrument was part of the internal law of an organization. It could be argued that it was, but then one could not

ignore the fact that it was also part of international law. If it was a constituent treaty, as it was in most cases, how could that treaty, which the 1969 Vienna Convention regarded as such, not be part of international law?

70. The situation of international organizations was also different in another respect. It was clear that for a State, its internal law, which was the result of its unilateral choice, could not prevail over international law. That was the idea that article 3 was meant to convey. For a State, international law could not be derogated from by internal law. The same did not necessarily apply for international organizations, whose internal laws might well be the result of the collective choice of member States and might even affect treaties that were in force among them. One could not assume that States were bound *inter se* by treaties in such a way that the law of an international organization could not have any consequence for them. The question of the hierarchy between international law and the internal law of the organization did not need to be addressed at this stage, when it was not yet certain that it was relevant.

71. Everything contained in the draft articles on State responsibility had to be considered, and he agreed on the need for a parallel approach. However, it was not necessary for the Commission to state the same rules with regard to international organizations as it had done with regard to States. Such a course would make for a very long text and would not always be justified. The Commission should aim for a shorter text that only included issues that had to be dealt with specifically. His own suggestion was thus not to aim for an entirely parallel text. There was no parallel in draft articles 1 and 2, and draft article 3 could encompass all the general principles and say what was currently contained in articles 1 and 2 of the articles on State responsibility. Certain matters could be developed in the commentary.

*The meeting rose at 1.05 p.m.*

## 2754th MEETING

*Thursday, 8 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

## The responsibility of international organizations (*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOSKENNIEMI said that, as a new member, he was struck by how much the legal background of the members of the Commission influenced their approach to a subject. That cultural clash had been particularly evident in the discussions the day before on the question whether legal personality should be a criterion for defining an international organization. In his view, that was like putting the cart before the horse. Legal personality was the consequence of rights, obligations and powers, not their source. That was one of the lessons of the advisory opinion by ICJ on the *Reparation for Injuries* case, in which the Court had said that international organizations all differed in their nature, their rights and their duties. That was tantamount to saying that there was no *a priori* concept of legal personality, but that everything depended on what responsibilities the various sources of law conferred on a given organization.

2. He thanked the Special Rapporteur and congratulated him on his thought-provoking report. There was little to object to in the three draft articles.

3. The second sentence of draft article 1 was problematic, as Mr. Pellet had already indicated the day before. Although State responsibility might be incurred through the conduct of an international organization, that came within the scope of the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> and it was odd to refer to such problems in the first article on the responsibility of international organizations. It might be preferable to deal with the question by referring to the draft articles on State responsibility later on, either in the final articles or in a section entitled "Miscellaneous".

4. He agreed with the Special Rapporteur that an international organization did not necessarily have to be established by treaty in order to be regarded as such, but he took issue with the idea that "an organization merely existing on paper cannot be considered a subject of international law" (para. 19 of the report). Many lawyers had taken part in the establishment of paper organizations which might acquire a *de facto* existence if it proved useful; such operations were not necessarily shady and could take place for perfectly honourable motives. In the final analysis, the criterion of establishment by treaty, if present, ought to be sufficient. It could be said that it was perhaps not necessary, but sufficient.

5. He endorsed the substantive criterion discussed by the Special Rapporteur in draft article 2, namely, that the organization should include States among its members, but further thought needed to be given, for example, to the question of when a State could be considered to be a member of an organization. In some organizations, States

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st meeting, footnote 3.



did not participate directly, but through governmental agencies. Should they be excluded from the draft articles? The functional criterion, namely, the exercise of governmental functions, contained an unfortunate ambiguity: it could be understood in two ways, either as the exercise of functions analogous to those of national governments or as a form of participation in international governance. Moreover, the functional criterion was too restricted because it excluded from the scope organizations devoted solely to scientific research, such as the European Forest Institute, with headquarters in Finland, whose status as an international organization no one would think of contesting. It would be preferable to speak of “functions analogous to those of national governments or international governance functions”.

6. To delimit the scope of the draft articles, it would be better not to be restricted to a simple definition, but to establish a typology of as many international organizations as possible. Perhaps the Special Rapporteur could focus on that question in his next report.

7. He fully agreed with the content of draft article 3. He merely drew the attention of the members of the Commission to an important question raised the day before by the Special Rapporteur, namely, the relationship between the internal law of an organization and international law, which should be addressed later in greater detail. In the case of the European Union, a situation could easily be imagined in which an act of that organization was perfectly lawful under European law, but illegal under international law. The case of WTO could prove more complicated: WTO could very well take a decision that was lawful under “WTO law”, but illegal under international law. That raised the problem of the fragmentation of law, which had already come up in the Commission’s discussions: Could “WTO law” be conceived of as a special legal regime whose occasional deviations from international law did not constitute illegality? Finally, the Commission should examine the case of the normative hierarchy within international law. Although the principles that governed it were rather ambiguous, principles such as *erga omnes* and *jus cogens* were universally recognized.

8. Mr. DUGARD said that it was essential to delimit the scope of the draft articles by means of a definition, however elusive it might be. However, he took issue with the proposal to distinguish between international and national governmental functions in the definition. As international lawyers, the members of the Commission were probably prepared to accept that there was such a thing as international governmental functions, but many Governments still objected to the very suggestion that there was any form of international governance, and that might frighten the horses in the Sixth Committee. He was surprised that Mr. Koskenniemi should present organizations devoted solely to research as a special case; surely scientific research was a governmental function.

9. Mr. FOMBA, commending Mr. Koskenniemi on his excellent and thorough statement, requested clarification on a point that was unclear to him, namely, the idea that, in order to define the type of international organizations to which the draft articles applied, establishment by treaty was not necessary, but should be sufficient. Logically, it would be preferable to say that, although more formal and

sound from a legal standpoint, establishment by treaty was not an absolute or essential criterion. Did Mr. Koskenniemi take “sufficient” to mean that that was the only sufficient criterion, or that it was one sufficient criterion among others?

10. Mr. CHEE said that the expression used by ICJ in the *Reparation for Injuries* case was “international personality” and not “international legal personality”. That should be borne in mind when assessing decisions on reparations. Noting that all non-governmental organizations operated on the basis of terms of reference, he questioned whether the internal acts of such organizations should be characterized as legal or illegal under international law.

11. Mr. KOSKENNIEMI, replying to Mr. Dugard, said that, if scientific research was a “governmental” function, then the list of other activities that came within that category would be very long. If such a list were compiled, the very notion of “governmental function” would lose all meaning.

12. Concerning a comment by Mr. Fomba, he said that his choice of the word “treaty” as a sufficient but not necessary condition had been deliberate. That meant that, if an organization had been established by treaty, there was no need to ask whether it was an international organization: that was automatically the case. It was also possible to have international organizations not established by treaty, but to be established by treaty sufficed.

13. Mr. Chee’s comment on the question of the legality of the internal constitution of non-governmental organizations under international law raised a number of difficult problems and opened Pandora’s box. As those issues concerned the fragmentation of international law, it would be preferable to deal with them at a later stage.

14. Mr. BROWNLIE said that the subject being pursued raised some difficult questions. The first was the issue of the organization’s acting as an organ of one or more States in the context of State responsibility, referred to in paragraphs 27 and 33 of the report, which, according to the Special Rapporteur, should not be set aside, but referred to at least by way of illustration. He himself was a little uneasy about the general relationship between the topic of the responsibility of international organizations and the topic of State responsibility. It made sense to treat the latter as a sort of builder’s yard from which material could be extracted as the need arose. But the assumption that State responsibility and the responsibility of international organizations were somehow the same—an assumption that might or might not be one made by the Special Rapporteur—gave rise to a certain unease. If he himself preferred to use the very vague term “analogous”, that was because he felt that there was a problem and that the question of the role of international organizations acting on behalf of States should be treated separately, as a special category. It should not be allowed to impinge too much on the Commission’s general approach to the topic.

15. Regarding the issue of governmental functions, the question was what rationale lay behind the selection of such a criterion. In paragraph 20 of his report, the Special Rapporteur referred to the need to address only questions relating to a relatively homogeneous category of interna-

tional organizations. He himself did not find that argument very persuasive and believed that the Commission must face up to the fact that international organizations, even those consisting in whole or in part of States, were so protean that it was very difficult to get away from the multiplicity of types. Perhaps Mr. Rosenstock's suggestion that they should in a general way behave like States could be accepted as a working assumption as to the existence of a standard type of international organization. But it did not seem helpful to include an express restriction in article 2.

16. The question of the polarity between responsibility under international law and civil liability, referred to in paragraph 29 of the report, had been the subject of some criticisms by Mr. Pellet. Perhaps the source of the difficulty might be the determination of applicable law: in the way in which different organizations functioned, several applicable laws were often brought into operation for different purposes. For instance, the European multilateral conventions dealing with nuclear risk used civil liability as an instrument for the distribution of loss. The Commission should concern itself with questions relating to the identification of applicable law and should reserve at least some room for references to the role of civil liability. The basic problem seemed to be the individuality of international organizations. Each had its own internal applicable law. Of course, States too had their own internal law, but the interrelation between the internal law and the external relations of States was much more easily recognized and better established than the relationship between the external relations of international organizations and their "internal law". The Commission was thus stuck with a subject in which everything was in a sense *lex specialis*, and the question arose why international organizations were bound by international law. A possible suggestion was that they were bound for the same reasons of practicality and principle for which new States were so bound.

17. One more point no doubt merited further consideration. It had been acknowledged for some time that perfectly well-recognized international organizations of States had taken it upon themselves to suddenly change their characters. One of the more dramatic instances had been the gradual bringing about of a change of regime in the former Yugoslavia. The dear old European Union had detached itself from economic questions in order to play a major role in that change of regime. NATO had also stepped well outside the purposes stated in its constituent treaty (North Atlantic Treaty). In western Africa, ECOWAS had also changed its function. Perhaps such cases should be treated merely as political turbulence, but perhaps, too, they raised questions of principle to which a little thought should be given.

18. Mr. PELLET said he agreed with Mr. Brownlie that applicable law was a sound basis on which to proceed and that if, by proposing to exclude civil liability, the Special Rapporteur meant that the Commission should not deal with internal law, he appeared merely to be stating the obvious. But it was important not to throw the baby out with the bathwater by disregarding situations such as the bankruptcy of the International Tin Council which might entail the responsibility of the organization, under the pretext

that the problem could also be settled in the context of the internal legal order.

19. Mr. MOMTAZ said that, among the cases where an international organization acted as an organ of one or more States, one could cite, for example, the case where an international organization supervised elections at the request of a State. According to the Special Rapporteur, in that type of situation, the conduct of the international organization should be attributed to the State (para. 27 of the report). In other words, the international organization acted as an organ of the State. That was precisely the case provided for in articles 4 and 5 of the draft articles on State responsibility for internationally wrongful acts. If he had understood Mr. Brownlie correctly, a special category of international organizations was being referred to in situations of that type. The question was thus whether the act performed by such an organization on behalf of the State would be attributed not to the State but to the organization.

20. Mr. BROWNLIE said that the difficulty was that, at the time of the establishment of an organization, arrangements were not always made for the division of risks. For example, the European Space Agency (formerly ELDO and ESRO) appeared to have made no express arrangements for the losses that might be caused by its activities. But the real problem was that it was not always easy to know in advance whether an organization was not only a risk-taking organization but also one that had internalized those risks. In other words, it was difficult to know whether it was ready to pay up if non-members—or even members—were damaged. The ultimate problem about the individuality of international organizations was that they could be hired for different purposes, in the same way as a private organization could be selected and used by a State, and could become a State entity for certain purposes or for a period of time. It was very difficult to know that in advance because an element of pragmatism entered into play, and because international organizations were often willing to change their own objectives or to accept roles that nobody could have foreseen, at the behest of individual States or groups of States. Much depended on the particular relationship created.

21. Mr. YAMADA said he agreed with the Special Rapporteur that it would be unreasonable for the Commission to take a different approach from the one it had adopted on State responsibility unless there were specific reasons for doing so, and that the model of the draft articles on State responsibility for internationally wrongful acts should be followed both in the general outline and in the wording of the new text. Nevertheless, there were a number of differences between international organizations and States warranting a different approach in some areas.

22. In paragraph 15 of his report, the Special Rapporteur seemed to imply that his study would deal with secondary rules and not with primary obligations. It might thus be asked whether there was a sufficient accumulation of laws and practice on the responsibility of international organizations at the level of primary rules, as had been the case for State responsibility; whether those primary rules were so different as to justify the Commission's leaving them out and concentrating on the secondary rules; and whether it would not be more meaningful to examine and

codify, to the extent possible, the most important areas of primary rules concerning international organizations so as to contribute to the progressive development and codification of those rules.

23. While fully agreeing with the proposal to limit the scope of the study to questions of international responsibility for internationally wrongful acts, he nevertheless had the impression that instances of international organizations committing internationally wrongful acts were few and far between: there was no comparison with the number of instances of wrongful acts committed by States. It was more likely that harm would be caused by international organizations performing acts not prohibited by international law. For instance, technical assistance programmes and lawful acts of international organizations always carried a risk of causing harm. Currently, however, organizations obtained immunity by inserting "hold harmless" clauses in the agreements concluded with recipients, and the burden thus fell on the countries of the developing world. He was not for a moment suggesting that the liability aspect should be dealt with at the current stage; rather, it should be a separate topic. However, the Commission should at least have a rough picture of the relative importance of the responsibility and liability of international organizations.

24. Turning to the draft articles proposed by the Special Rapporteur, he said he had no further comment to add to those he had already made concerning the first sentence of article 1. As to the second sentence, he recognized the need to include the question of the international responsibility of the State for the conduct of an international organization in the scope of the draft articles. He assumed that question would be treated more fully at a later stage in the subsequent articles. It was already well covered in chapters II and IV of the draft articles on State responsibility for internationally wrongful acts. The question of the responsibility of a member State of an organization for a wrongful act committed by that organization called for careful study.

25. Regarding draft article 2, it was really too early to examine the question of the definition of international organizations, and this should be done only out of practical necessity, to establish a preliminary starting point for the study. The question should be re-examined after the study was further along. As a matter of principle, a simple and concise definition would be preferable. But as the responsibility of international organizations was at issue, the definition should be precise and free of all ambiguity.

26. The three main features identified by the Special Rapporteur in the definition that he was proposing, namely, that the organization must include States among its members, that it must exercise certain functions in its own capacity and that those functions must be comparable to governmental functions, were of the utmost importance and should be formulated more precisely. The first feature might need further refinement, for the fact that an organization was open to States was not sufficient. The organization must also have been created or established by States and not by non-State entities. States might even need to constitute the dominant majority of the membership. The second feature had to do with the question whether the organization was a subject of international

law. Further thought should be given to whether the term "in its own capacity" was appropriate. Third, the functions of the organization must be defined clearly. They must be comparable to governmental functions, but an international organization was not a government, and he did not know whether its functions could be described as "governmental". It exercised the governmental functions its member States delegated to it, and the appropriate term for that concept needed to be found. It was rather difficult to discuss the definition in the abstract. Perhaps, as Mr. Koskenniemi had suggested, the Special Rapporteur should provide a list of the major international organizations that he hoped to cover in his study, giving their basic data, such as membership and main functions. That would certainly help the Commission to define the international organizations to which the draft articles were to apply.

27. He had no comments on article 3.

28. On another matter, he noted that the Special Rapporteur, like himself and Mr. Dugard, had close personal contacts with members of ILA. The Association and the Commission had common undertakings, namely, to produce authoritative statements on the present status of international law and on its desired development. The promotion of a cooperation arrangement between the two bodies would be mutually beneficial. The Commission should perhaps consider what form such future cooperation with the Association, and with other bodies such as the Institute of International Law, might take. That issue should be discussed at an early date, either in the plenary or in the Planning Group.

29. The CHAIR said that consultations would be held on that subject.

30. Mr. PELLET said he personally thought that it would be absolutely disastrous to change approach radically and abandon the consideration of secondary rules at the present stage in favour of the consideration of primary rules. In the same spirit, he was utterly opposed to the idea put forward by Mr. Koskenniemi, and taken up by Mr. Yamada, of drawing up a list of organizations. What was important was to adopt an approach that was broadly similar to that followed with regard to States. The example of technical assistance used by Mr. Yamada to show that problems of the responsibility of international organizations arose more frequently with activities not prohibited by international law than with internationally wrongful acts seemed to be the worst that could be found. While an international organization could incur responsibility in the context of technical assistance, such responsibility would be incurred by a wrongful act, and it was hard to see why it would be incurred by activities that were not prohibited. However, in his statement Mr. Yamada had put his finger on a problem that the Commission would have to address at some time or another, that of the immunity of international organizations, which conflicted with the implementation of their responsibility. The problem of immunity and that of responsibility had common points, but the Commission would have to take care not to confuse the two.

31. Mr. KOSKENNIEMI said that what he had suggested was that, based on empirical studies, the Special



Rapporteur should draw up a set of types of international organizations on which the Commission might base its deliberations. He supported Mr. Yamada's proposal that cooperation should be established with ILA, as well as other associations.

32. Mr. BROWNLIE said he agreed with Mr. Koskeniemi. He emphasized that the suggestion was not to produce a complete repertory of international organizations, something that would be an impossible task, but to make a typology of some kind which, while not highly developed, might be helpful for the Commission's deliberations.

33. Mr. KEMICHA said that the approach taken by the Special Rapporteur was in line with the Commission's earlier work, in particular the draft articles on State responsibility for internationally wrongful acts, and seemed to meet with general approval. With regard to draft article 1, he supported the proposed drafting improvements, even though they might seem premature at the present stage. As to the definition given in draft article 2, he noted that all members seemed to agree that the text should apply only to intergovernmental organizations and not to non-governmental organizations, but he would prefer the term proposed by one member, namely, "organization established by States". The wording "in its own capacity certain governmental functions" also gave rise to problems, and the criterion of international legal personality seemed to be an adequate basis for the notion of the responsibility of international organizations. He had no criticisms of draft article 3 to make at the present stage.

34. Mr. BAENA SOARES said that he agreed with the approach taken by the Special Rapporteur and his decision to limit the scope of the draft articles to "the international responsibility of an international organization for acts that are wrongful under international law". Going back to the Special Rapporteur's review of the Commission's earlier work, he emphasized that the latter must be relied on purely for purposes of guidance, given the changes that had occurred in the meantime.

35. Turning to draft article 1, he noted that it envisaged two distinct situations which should perhaps be kept separate. That was a matter for the Drafting Committee. With regard to draft article 2, he emphasized the need to agree on a preliminary definition that could be altered later. There was general agreement that the draft articles must apply to intergovernmental organizations, which could be defined by retaining some of the suggested elements, such as the fact that the organization exercised in its own capacity certain functions analogous to governmental functions. The criterion, proposed by some members, of organizations established by States would remove any ambiguities. It would be possible to specify that the international organization must have a constituent instrument defining its goals, structure and functions.

36. He emphasized that, in order for provisions to be implemented effectively, they must be formulated clearly and objectively. Finally, the proposal to produce a kind of typology of international organizations seemed a prudent one.

37. Mr. SEPÚLVEDA said that the nature and functions of international organizations had evolved dramatically

since the time, 40 years previously, when distinguished legal experts had deemed it preferable to exclude from consideration subjects of international law other than States. It had since become a legal necessity to study the international responsibility of international organizations, for such organizations were now recognized as subjects of international law. In order to determine the scope of the draft articles, it should first be specified how the responsibility of an international organization was entailed. Taking the draft on State responsibility as a model, it could be said that any internationally wrongful act of an international organization entailed its international responsibility, as the Special Rapporteur in fact established in draft article 3. That principle was not clearly stated in draft article 1, however, where it was necessary to introduce the notion of attribution and a causal link between the wrongful conduct of an international organization and the existence of an internationally wrongful act. The first sentence of article 1 should therefore be combined with the first sentence of article 3, so that the draft articles would begin by stating general principles and defining the scope of the draft articles and article 3 would characterize the internationally wrongful act of an international organization. With regard to the question of the international responsibility of a State for the conduct of an international organization, as mentioned in article 1, the text should make it clear that a State was responsible only for the *wrongful* conduct of an organization. The draft articles must deal with that question, since, as the Special Rapporteur noted in paragraph 8 of his report, it had been omitted from the draft articles on State responsibility for internationally wrongful acts. It was true, however, that article 1 did not refer to another possible legal situation, that of the responsibility of an international organization for the conduct of another international organization of which it was a member.

38. Turning to the definition of an international organization, since the definition established in various multilateral conventions was, as the Special Rapporteur had said, concise but not necessarily precise, he suggested that a number of elements should be added to it. First, the organization must be intergovernmental, in other words, have been established by States and have States as its members, a definition that would exclude non-governmental organizations. There might be exceptions—for instance, organizations whose members included States and non-State entities—but a specific clause could be adopted to cover those special cases, the important issue being to establish a general principle that was applicable to the vast majority of international organizations. Second, the organization's constituent instrument must be a treaty, although here too there might be certain exceptions. Third, in order for an international organization's responsibility to be entailed, the organization must be a subject of international law with its own legal personality. Fourth, the organization must exercise functions analogous to governmental functions. In that connection, he felt that it would be preferable for the Spanish version of draft article 2 to use the term *ejercicio de atribuciones del poder público*, which was used in articles 5, 6, 7 and 9 of the Spanish version of the draft articles on State responsibility for internationally wrongful acts, rather than *ciertas funciones de gobierno*. Incorporating all those elements in the definition would make it possible to arrive at a set of common denominators for establishing a more homogeneous category of

international organizations for the purposes of attributing responsibility.

39. Finally, while the present draft articles dealt with the responsibility of international organizations for internationally wrongful acts, the Commission should consider at a later stage the liability of international organizations for acts not prohibited by international law. In so doing, it would establish a set of norms embracing the responsibility of States for internationally wrongful acts, the liability of States for acts not prohibited by international law, the responsibility of international organizations for internationally wrongful acts and the liability of international organizations for acts not prohibited by international law.

40. Mr. KABATSI said that he supported the Special Rapporteur's approach of closely following the model of the draft articles on State responsibility for internationally wrongful acts. He had no problem with the proposal that the title of the draft articles should be changed, even though, as it now stood, it was acceptable. If the title were to be changed, however, he suggested that it should read: "The responsibility of international organizations for internationally wrongful acts".

41. On article 1 relating to the scope of the draft articles, he supported the Special Rapporteur's proposal that the scope should be limited to responsibility for acts prohibited by international law, and that liability arising out of acts not prohibited by international law and civil liability should be left aside. The question whether the topic should also cover the responsibility of a State for the conduct of an international organization might well be dictated by the fact that it had not been given much consideration during the work on the topic of State responsibility. In fact, article 57 of the draft articles on State responsibility for internationally wrongful acts presumed such responsibility, and articles 16, 17 and 18 of those draft articles also applied to international organizations. That being said, and at the present stage, he thought it might be clearer to limit the scope to the responsibility of international organizations.

42. In article 2, the definition of an international organization should be recast to emphasize that the draft was dealing with organizations established by States which exercised functions similar to those of States. The international organization should, of course, also have legal personality of its own, separate from that of its States parties. The definition should thus make it clear that an international organization was an intergovernmental organization established by States to exercise certain governmental functions. Of course, such a definition did not resolve the problem of entities that were known as international organizations even though they had not been established by States such as ICRC. Such organizations constituted exceptions and could perhaps be given special treatment.

43. Finally, he supported the approach used by the Special Rapporteur for setting out general principles, namely, the transposition into a single article, article 3, of the content of articles 1 and 2 of the draft on State responsibility for internationally wrongful acts.

44. With regard to the supremacy of international law over internal law arrangements, he said it was unlikely

that the two legal orders would conflict. Nevertheless, cases might arise when the internal rules of international organizations ran counter to the provisions of international law, and it might be useful to provide for treatment similar to that given to States.

45. Mr. MOMTAZ said he thought that the approach to the topic under consideration should be no different from the one used for the responsibility of States, since similar questions arose in both contexts, even though the solutions were not always the same. In any event, the draft articles on State responsibility for internationally wrongful acts must at least serve as a reference. The Commission should accordingly not be concerned with primary rules and should focus on breaches of secondary rules by international organizations. He did not think that the Commission should catalogue the primary rules applicable to international organizations, as Mr. Yamada had proposed, since he believed that, despite their particular features, international organizations were obliged to respect the rules of international law in the same way as States were. There was also no need to go into the responsibility of international organizations arising from acts not prohibited by international law. That question, which was of the greatest importance, should be studied in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

46. With regard to the exclusion of the issue of civil liability from the scope of the study, he said that, like Mr. Pellet, he wondered whether the Special Rapporteur should not consider the matter further. In his own opinion, it should be included.

47. Turning to the draft articles contained in the report, he said he believed that the point of reference for article 1 was indeed the escape clause contained in article 57 of the draft articles on State responsibility. Accordingly, that ought to be reflected in the wording of article 1.

48. Regarding the definition of international organizations, he had difficulty understanding why the Special Rapporteur had abandoned the traditional and well-established terminology relating to intergovernmental organizations in favour of a new definition based on the criterion of function. The reasons given by the Special Rapporteur in paragraph 14 of his report did not seem very convincing. While he agreed with the Special Rapporteur that there was no reason today why non-State entities should not be considered fully fledged members of international organizations, he did not think that meant that the words "intergovernmental organization" could be taken as not covering that new category of international organizations. In his view, the authors of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention") had chosen to use that expression advisedly. He feared that the criterion of function discussed in paragraph 20 of the report might unduly restrict the scope of the draft articles. The reference to governmental functions reduced the number of international organizations that actually exercised functions that could be described as governmental. In addition, the use of that criterion might raise problems of interpretation and, consequently, of the application of the draft. The determining factor in the definition of international or-

ganizations should be that of legal personality. It was precisely because they had legal personality that international organizations had the capacity to acquire rights and had to respect international law. In short, all international organizations that had obligations under international law could have their responsibility come into play in the event of a breach of such obligations. Contrary to what the Special Rapporteur suggested in paragraph 26 of the report, he therefore saw no need to include in the topic international organizations that had no international obligations, since the issue of their responsibility would never arise.

49. Mr. CHEE said that, in attempting to characterize an international organization, the Special Rapporteur referred to the 1969 Vienna Convention, article 2, paragraph 1 (*i*), of which stated that “international organization” meant “intergovernmental organization”. He subscribed to that definition, which had also been used in other international conventions, even if it left non-governmental organizations out of the scope of the study. As he saw it, consideration of the topic would be easier if the concept of international organization was divided in two: non-governmental organizations and governmental organizations. If the international organization was characterized as an intergovernmental organization, that meant that it was a treaty-based institution as opposed to a non-governmental international organization.

50. The Special Rapporteur had wisely not taken up the question of civil liability because it was generally in the realm of domestic law and, as such, had never really entered into the corpus of public international law.

51. Turning to the draft articles proposed by the Special Rapporteur, he said that article 1 created a duality of responsibilities, those of the international organization and those of the State which was a member of it. That was not a sound approach, and a uniform legal regime should be envisaged.

52. The words “governmental functions” in draft article 2 should be avoided, as they gave rise to problems. In his opinion, the definition of an international organization should be in line with the traditional one based on article 2, paragraph 1 (*i*), of the 1969 Vienna Convention. There was a contradiction in stating clearly, on the one hand, that international organizations were intergovernmental organizations and then speaking of governmental functions, which might be carried out by certain non-governmental organizations.

53. He accepted the wording proposed by the Special Rapporteur for article 3.

*The meeting rose at 1 p.m.*

## 2755th MEETING

*Friday, 9 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### **The responsibility of international organizations (continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)**

[Agenda item 7]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. KAMTO said that he fully subscribed to the approach explained in paragraph 11 of the report (A/CN.4/532). But insofar as the scope of the study included the international responsibility of States for the conduct of an international organization, he thought the title should be recast to read: “The responsibility of international organizations, as well as of States, owing to the conduct of the former”.

2. One of the basic concepts at issue was the nature of the constituent instrument, which, according to the Special Rapporteur, could be not only a treaty but also a non-binding instrument of international law or one governed by municipal laws (para. 14 of the report). For the first such case, the report cited the constituent instrument of the World Tourism Organization, although the Commission had seen that it was not a good example. The report gave no example for the second case, but referred to a work by Seidl-Hohenveldern.<sup>2</sup> Although ICRC came to mind, it would have been useful if the Special Rapporteur had cited several examples so that the Commission could see whether the instance was an isolated one or part of a more widespread phenomenon. Since the first case was not relevant, and in view of the paucity of examples illustrating the second, he concluded that a treaty—an international legal act in written form—continued to be the instrument best suited to the establishment of an international organization. He was speaking of “treaty” within

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen, einschliesslich der Supranationalen Gemeinschaften*, 7th ed. (Cologne, Heymanns, 2000).



the meaning of article 2, paragraph 1 (a), of the 1969 Vienna Convention, which used the phrase “whatever its particular designation”—language that was similar to the wording in article 1 of the Regulations to Give Effect to Article 102 of the Charter of the United Nations, on the registration and publication of treaties and international agreements.<sup>3</sup> It would be noted that at the United Nations Conference on the Law of Treaties the United States of America had already proposed an amendment to article 2 of the Convention in order to define “treaty” as “an international agreement concluded between *two or more States or other subjects of international law*...”<sup>4</sup> Thus, once entities could be characterized as subjects of international law, there was no reason why they should not be able to establish an international organization.

3. International society had developed considerably over the past century. In a purely inter-State society, international organizations were strictly “intergovernmental”. In the past 50 years, however, many non-State entities had emerged, some of which sat alongside States in international organizations. Today there were international organizations which had mixed membership even though they had been created by States. For that reason, he agreed with the argument that the Commission should not take into account, for the purposes of the study, the “intergovernmental” character of the organizations concerned in the strict sense of the term. It was nonetheless necessary to retain the criterion of establishment by States, in other words, by means of a treaty, which brought States or other subjects of international law together. That criterion was preferable to the criterion of control, mentioned in paragraph 6.

4. A third substantive point concerned the personality of the organization and its characterization as a subject of international law. In his view, the terms “international personality” and “international legal personality” were synonymous, as could be seen in the advisory opinion of ICJ in the *Reparation for Injuries* case and also in the comments submitted by Governments to the Court, notably those of Philip Nichols, representing the United Kingdom. That seemed to be the Special Rapporteur’s opinion too, because he used the two terms interchangeably in paragraphs 15 to 20 of the report. The problem was not that the Special Rapporteur failed to address the question of the international legal personality of an international organization, but the way in which he did so. At first, he argued that international law could not impose obligations on an entity unless that entity had legal personality under international law and that, conversely, an entity had to be regarded as a subject of international law even if only a single obligation was imposed on it under international law (para. 15). That was a first criterion for characterization as a subject of international law. A second was given in paragraph 19, where the Special Rapporteur said that an organization merely existing on paper could not be considered a subject of international law. The entity needed to have acquired sufficient independence from its members

so that it could not be regarded as acting as an organ common to the members.

5. That was not at all clear. Actually, an international organization was a subject of international law because it had international legal personality, which it acquired by virtue of the fact that it had been established by a treaty, whatever its particular form or designation, which was a legal act formulated by subjects of international law. In other words, it was the States, the original subjects of international law, which, through the act of establishment, conferred upon the international organization—the new legal being—a functional international personality, regardless of whether that personality was “objective”. On the other hand, the personality must be legal and international. Only then could there be a subject of international law. In paragraph 19 of its advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, ICJ had stated that the “object [of constituent instruments of international organizations] is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals” [p. 75]. He disagreed with the Special Rapporteur’s assertion (para. 17 of his report) that, in the *LaGrand* case, the Court had stated that individuals were also subjects of international law: the Court had merely concluded that article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations set out the receiving State’s obligations with regard to an arrested person and required that State to inform the person concerned without delay of his rights. It was not the Court that declared that a person had rights; it simply took note of the rights States had created for that person in connection with a treaty instrument. Hence it could not be inferred that the Court recognized the characterization as a subject of international law for those persons, especially since the requirement—proposed by the Special Rapporteur—that an entity must have at least one obligation for it to be a subject of international law was not met in the current example.

6. The governmental function criterion, although tempting at first glance, was inappropriate and superfluous for a definition of an international organization, not because it would restrict the scope of the organizations concerned or of their activities, because even in administrative law, where it originated, the criterion of governmental function served to distinguish certain State acts, but could not be used to identify all such acts. The criterion should be left out because it was difficult to apply, even in internal law, and above all because it was not necessary, since it was sufficient for an entity to have international legal personality for it to be an international organization—in other words, one whose internationally wrongful acts would entail its responsibility.

7. The Special Rapporteur was right to say that the third general principle set out in article 3 of the draft articles on State responsibility for internationally wrongful acts<sup>5</sup> was unsuitable for the topic of the responsibility of international organizations, for the reasons cited in paragraph 37 of the report.

8. Draft article 1 did not pose any problems, assuming the Commission agreed that the subject should be

<sup>3</sup> United Nations, *Treaty Series*, vol. 859/860, p. XII.

<sup>4</sup> *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 111.

<sup>5</sup> See 2751st meeting, footnote 3.

extended to the aspects of State responsibility not covered by the draft articles on State responsibility for internationally wrongful acts. However, the wording in the first sentence needed to be modelled more closely on those draft articles, and draft article 1 must be divided into two paragraphs because it dealt with two different issues.

9. Draft article 2 should be reconsidered to take a number of elements into account: establishment of the organization by States and/or other subjects of international law; establishment by a treaty, namely an international agreement, whatever its particular form or designation; existence of international legal personality; and membership open to both States and other subjects of international law.

10. Draft article 3 should envisage not only the general principles applicable to the responsibility of international organizations but also those applicable to the responsibility of the State for acts by the international organization, unless the Special Rapporteur wanted to divide the report into two parts, the first on the responsibility of international organizations and the second on the responsibility of States, but such a course would be questionable. A third paragraph should therefore be inserted, with the following wording:

“An internationally wrongful act of an international organization may [also] entail the international responsibility of a State:

(a) Because the State has contributed to the internationally wrongful act of the organization; or

(b) Because the international organization has acted as a State organ.”

11. Mr. GALICKI said that the first three draft articles in the Special Rapporteur's excellent first report were indispensable for the codification of legal rules governing the responsibility of international organizations.

12. He endorsed the approach in article 1 of establishing the scope of the draft and limiting its application to the question of the international responsibility of an international organization for acts that were wrongful under international law. The Special Rapporteur also proposed that the draft articles should cover the question of the international responsibility of a State for the conduct of an international organization, but that did not change the basic approach to the question of responsibility as already set out in the draft articles on State responsibility for internationally wrongful acts, article 57 of which expressly left aside any question of the responsibility under international law of an international organization and also of any State for the conduct of an international organization.

13. However, that did not weaken the close linkage that should exist between the principal rules governing the responsibility of States and the responsibility of international organizations. Unifying those rules on the basis of the concept of an internationally wrongful act, either in the case of States or of international organizations, would clearly strengthen their position in the body of contemporary international law and in the practice of States. The wrongfulness of the act under international law was right-

ly stressed in article 1 and in the first general principle set out in article 3.

14. Limiting the scope of the future articles did not mean the Commission was ignoring the possibility of international organizations' being held liable for injurious consequences arising out of acts not prohibited by international law. On the contrary, at its fifty-fourth session, in 2002, the Commission had concluded that questions of the responsibility of international organizations were often coupled with those concerning their liability under international law.<sup>6</sup> For example, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on International Liability for Damage Caused by Space Objects provided for both the international responsibility of international organizations for violation of international law and their liability for damage deriving from activities not prohibited by international law.

15. The Commission should draw upon its earlier decision to separate the topics of responsibility and liability and apply a similar approach in the case of international organizations. That would mean including in the agenda a new topic relating to the international liability of international organizations for acts not prohibited by international law, by analogy with State liability for such acts. It was not clear, however, whether the topic was ready for codification. In any case, the Commission should not employ the term “civil liability” in speaking of the responsibility of international organizations and should avoid using it in referring to responsibility, which should be neither civil nor criminal but only international.

16. By and large, draft article 3, on general principles, followed the pattern in Chapter I of the first part of the draft articles on State responsibility for internationally wrongful acts. Nevertheless, the reason given by the Special Rapporteur in paragraph 37 of his report for omitting a third principle modelled on article 3 of the draft articles on State responsibility for internationally wrongful acts was not convincing, because such an omission might suggest that there were two very different systems, one for States and one for international organizations. The misleading term “internal law” might be clarified by adding the words “of the member States of the organization”. Suggestions to treat “internal law” as the internal law of international organizations were not in keeping with the original intention behind article 3 of the draft articles on State responsibility for internationally wrongful acts to differentiate between international and internal law systems. If it wished to speak of the “internal law of international organizations”, the Commission would in fact remain within the same realm of international law. It was not enough to include a crippled version of article 3 in the present draft.

17. The most controversial question had to do with how to define “international organization”, in article 2. Although the 1969, 1978 and 1986 Vienna Conventions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character had already formulated definitions stating

<sup>6</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 468.

rather simplistically that the term meant “intergovernmental organization”, many members were of the view that such a definition was not in keeping with the purposes of the draft on responsibility. The Special Rapporteur proposed fleshing out the definition of international organization by adding “which includes States among its members” and “exercises in its own capacity certain governmental functions”. According to the Special Rapporteur, it would then no longer be necessary to specify that the organization should be an “intergovernmental” organization.

18. The main problem was that a number of other criteria could also be used for the definition, but it was not clear which ones. Yet the general feeling was that neither conventional definitions nor the one proposed by the Special Rapporteur were appropriate. Many criteria were possible, including: the subjects establishing the organization, namely States; the instrument by which it was established, namely an international treaty; its membership—usually (but as practice showed, not exclusively) States; activities conducted on its own behalf (and not on behalf of States); legal personality, or the capacity to acquire rights and obligations under international law (it was important to differentiate between international legal personality and national legal personality, which was granted to virtually all organizations under the internal laws of their member States); and the capacity to exercise certain governmental functions. The Special Rapporteur had suggested the latter aspect, but the concept of “governmental functions” as exercised by international organization was not clear or precise.

19. To speak of “governmental functions” might create an illusion that powers similar to or replacing those possessed by State Governments were assigned to international organizations. Currently, however, very few such organizations possessed so-called supranational powers analogous to those of national Governments. The problem was further complicated by the Special Rapporteur’s proposal that the exercise of “certain” of such functions would be sufficient for it to constitute an international organization for the purposes of the draft articles. Given the extremely wide and differentiated nature of such functions under member States’ internal laws, that criterion did not seem to be appropriate for the purposes of article 2. A more promising one was that of international legal personality, especially as it might easily be tied in with the concept of international organizations as subjects of international law, and with the possibility of their bringing international claims, and of international claims being brought against them. That view was supported by a passage in the 1996 report of the United Nations Secretary-General on administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, which read:

The international responsibility [of an international organization] is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization)...<sup>7</sup>

<sup>7</sup> A/51/389, para. 6.

That opinion, albeit formulated not by a court or a jurist but by a high-ranking official of an international organization, should be borne in mind when the Commission attempted to finalize its work on defining the term “international organization” in a suitable manner.

20. Ms. ESCARAMEIA said the debate on which international organizations were to be included in the scope of the draft articles—namely, what “international” meant—was being made more difficult by a misguided attempt to assimilate the concept of an international organization to that of a State. Consequently, the debate was having recourse to vocabulary, legal concepts and regimes that were appropriate to States but not to organizations. Examples were the concepts of internal versus international law, and of governmental functions. The latter concept, for instance, was not appropriate, since international organizations in fact performed functions very different from those of Governments. Although the Special Rapporteur was right to use the draft articles on State responsibility as a guideline, it must be recognized that the present draft covered a very different area, since international organizations had different processes of creation from those of States, had different characteristics and were very diverse.

21. The fundamental issue in this draft was the decision on what organizations the Commission would want to cover. As Mr. Koskeniemi had pointed out, one could proceed by looking at the problems created by non-State international entities one would like to address and draft a list with types of organizations. Another way of proceeding would be to decide which characteristics an international entity must possess to be covered by this draft; this more formalistic path had been chosen by the Special Rapporteur.

22. The proposal to draw up an indicative list of organizations, stressing their functions, seemed the most attractive approach, although it would involve much research. Nevertheless, it would be helpful if the Special Rapporteur were to prepare a list of types of international organizations, singling out those that constituted borderline cases. The exercise would, however, merely postpone the problem of deciding whether—since the traditional definition of an international organization as an intergovernmental organization was inadequate for present purposes—to adopt a formal criterion, based on the organization’s constituent instrument and composition, or a substantive criterion, based on functions, applicable law and the exercise of rights and obligations. The simplest course might be to decide, not which organizations would fall within the scope of the draft, but which were to be excluded.

23. The question of primary and secondary rules, raised by Mr. Yamada, also merited further consideration. While questions of civil liability perhaps arose in a majority of relevant cases, she had doubts as to the feasibility of including civil liability issues in the draft. However, the situation of international organizations created by means of unlawful procedures—a category that was particularly prone to incur international responsibility—should also be addressed.

24. On draft article 3, she agreed with the Special Rapporteur’s view that internal law should be excluded, for,



in addition to the hierarchical problems to which it might give rise, the scope of the term itself was unclear.

25. In short, it would be useful to prepare a list of types of organization, on the basis of which a decision could then be taken on the criteria governing a definition. For reasons of practicality, a formal criterion might be more workable than a substantive one based on functions.

26. Finally, she supported Mr. Yamada's suggestion that ILA and the Institute of International Law should be involved in the exercise.

27. Mr. ADDO said that the Special Rapporteur's first report was lucid, well argued, comprehensive and painstakingly written. Given the object of the present exercise, its title was irreproachable and should be maintained. It was essential to settle on a definition at the outset, and that was precisely what the Special Rapporteur had set out to do. It could not be denied that, in its broadest sense, the term "international organization" could encompass organizations consisting not only of Governments but also of non-governmental organizations. Perhaps the most striking feature of the international scene was the tremendous growth of international organizations of all kinds. However, for present purposes the Commission must concern itself with international public organizations.

28. As a starting point, it must be determined what rights and duties, if any, the various international organizations were endowed with under international law. Both theory and practice suggested that the international organization must be an entity or personality distinct from its creators. Theory and practice further suggested that any "personality" international organizations might have in international law must be conferred upon them by States, or by other international organizations already expressly recognized by States as legal persons. In practice, it would seem that only international organizations created by States were treated as having rights and duties under international law. Admittedly, certain functions of ICRC with regard to prisoners of war might come close to implying the international legal personality of that non-governmental organization, but such personality was not expressly set out in its constituent instrument and must be left aside in the interim. The extent of the capacity of international organizations to incur rights and duties under international law depended on the constitutional documents—usually in the form of a multilateral treaty—under which they were created, and on the practice that had emerged around each organization. The question to be asked in each case was to what extent the organization acted as an entity in conducting international relations separate and distinct from the members that had established it. As a first step, it was important to establish that the organization possessed international personality, because that was what invested it with duties or obligations a breach of which might entail international responsibility.

29. Again, the possession of such international personality invariably involved the attribution of power to conclude agreements with other subjects of international law. Indeed, the Special Rapporteur covered all those cases by stating that the international organization must, for the purposes of the topic, be a subject of international law, and that for such organization to be held potentially re-

sponsible, it should have legal personality and some obligations of its own under international law.

30. He agreed with the Special Rapporteur that the scope of the study should be delimited to make it clear that the draft articles were to consider questions of international responsibility for wrongful acts. In addition, he fully agreed that, in approaching the question of a definition for the purposes of the draft, the weight of precedent could not be ignored. Precedent must also serve as a guide and had provided a good, albeit concise definition, but the Special Rapporteur's view was that the definition did not go far enough. Yet to take it further might only complicate matters and lead to disputation. He personally favoured sticking to the definition that precedent had provided. However, in order to make it clear that the organizations covered had been set up by Governments of States, he favoured rewording the definition in draft article 2 to read: "refers to intergovernmental and inter-statal organizations". The purpose was to ensure that the definition encompassed all the organs of the State, including the judiciary and the legislature, as well as the executive and its agencies. He was proposing that addition *ex abundanti cautela*, but if the term "intergovernmental" was subsequently deemed to cover all the organs of a State, he would not press the point. Finally, draft article 3 simply stated the obvious.

31. Mr. MANSFIELD said that the survey of the Commission's previous work on the topic was instructive and the conclusions drawn from it in paragraph 11 of the report were more or less inexorable. Rightly, the Commission should make no assumptions that the issues to be considered under the topic should lead to conclusions similar to those arrived at in respect of State responsibility, yet history surely suggested that, where the Commission's work indeed produced similar conclusions, it should follow closely the model provided by the draft articles on State responsibility for internationally wrongful acts.

32. The scope of the study and the definition of international organization were obviously closely intertwined. In a very elegant and condensed piece of writing, the Special Rapporteur pointed out in paragraphs 12 to 28 that, were it to adopt the traditional definition of an international organization as an intergovernmental organization, the Commission would find the scope of its exercise encompassing a much greater variety of organizations than those that would have been included when that definition was first made. It was simply a function of the rapid expansion of the range of international organizations for which obligations under international law were now considered to exist.

33. Did that matter? If one took a long enough view, maybe not. But the Special Rapporteur convincingly argued that if the Commission's work on the topic was to be developed as a sequel to the draft articles on State responsibility—and that was the course on which it had embarked—then a way or ways must be found of limiting the scope of the work (and therefore the definition of international organizations) to organizations that functioned in ways broadly analogous to the ways in which States functioned. He was in broad agreement with the Special Rapporteur on that score. What he had difficulty with was the process whereby the Special Rapporteur moved from that point to a new definition—though he had no quarrel

with the analysis or the conclusions to which it led, or even, at the present juncture, with the drafting.

34. Yes, for the purposes of the exercise, an international organization had to be one that included States among its members. But then again, the definition must be broad enough to cover at least some organizations that included non-State entities among their members. He had already made the point, at the previous session, that the trend towards increased involvement of civil society in its various forms, as well as of the private sector, in many aspects of international life was one that was likely to continue and even gather pace. As a result, more organizations operating at the international level in ways that were analogous to those of States were likely to have a mixed or hybrid character.

35. Again yes, the organizations to be covered needed to be ones that had a legal personality at international law. But, as the Special Rapporteur himself pointed out, that requirement did not really help to narrow the scope of the work adequately, and, as Mr. Koskenniemi had noted, it begged the question of what were considered to be the relevant powers, functions, rights and duties that gave rise to international legal personality.

36. Incidentally, at one level it sounded almost axiomatic that the draft should cover all international organizations that might be said to be subject to international legal obligations, but at another level it might prove much less helpful. Some high-level obligations at international law might well apply in principle to any organization that was established by States and had at least one or two States or State agencies among its members. But equally, the powers and functions of some such organizations meant that they might not operate in any way analogous to that of Governments, and there was little or no possibility they could in practice act in breach of the high-level obligations that might in theory apply to them. Was it necessary to cover such organizations in the current study? Probably not.

37. And yes, ultimately, it was likely that the types of organization deemed appropriate to cover would be the ones that operated like States in a functional sense and, of course, did so independently of their members.

38. But the process whereby those conclusions were reached was too abstract to generate confidence in them. That might be one of the reasons why a number of members had expressed concern about the apparent looseness or open-endedness of the criterion in draft article 2, namely, "[exercising] in its own capacity certain governmental functions". At that level of abstract discussion, it seemed impossible to be clear as to which types of organization would fall on which side of the line on the basis of that criterion. To one like himself, who tended to err on the side of an unduly practical approach, the Special Rapporteur's approach of working towards a definition—and hence towards the essential scope of the exercise—by abstract analysis seemed counter-intuitive.

39. By contrast, a more fertile approach might be for the Working Group to classify international organizations in three categories: those which, by common consent, were to be included in the study; those which, by common consent, should be excluded; and those about which

there were doubts or differing views. An exercise of that kind would rapidly throw up the common factors linking the organizations in each of those three categories. The object of such an exercise or typology would certainly not be to produce a definitive set of the various types of international organization, still less a definitive listing of organizations within each category. Doubts might in any case remain as to whether the categories were exhaustive and the boundaries between them watertight or porous. Yet such an exercise would provide a reasonably sound basis for discussions on the definition, making it clearer which types of organization would be included or excluded under the various criteria.

40. For his part, he was happy to accept the Special Rapporteur's new definition as a kind of working hypothesis, but was unlikely to feel any more comfortable with it until he was much clearer about which types of organization it actually encompassed.

41. As to the other issues on scope raised in paragraphs 29 to 33 of the report, the Special Rapporteur's general conclusions were acceptable, at least at the present stage. Mr. Pellet, however, had raised a doubt in his mind as to whether the Commission could entirely avoid looking at some aspects of civil liability, and, in the long run, Mr. Yamada might well turn out to have speculated accurately that, in respect of international organizations as opposed to States, there might be relatively few examples of internationally wrongful acts but rather more situations that raised questions of liability for the consequences of acts that were not unlawful. Perhaps, as Mr. Galicki had suggested, a new topic might in due course be needed to address those questions.

42. An additional advantage of a typology was that it might help to clarify the nature and dimensions of the problem the Commission was endeavouring to address, namely, what kinds of wrongful act might conceivably be committed, by which types of organization, and the likelihood of their occurrence. In any event, it might be a useful supplement to whatever information the Special Rapporteur received from the organizations that had been approached for statements about their practice.

43. The reasons that had led the Special Rapporteur to propose his particular formulation of general principles in draft article 3, and in so doing to depart to some degree from the State responsibility model, were compelling. The two general principles seemed relatively straightforward, but it would be interesting to see whether the Special Rapporteur found it necessary to examine in more detail the difficult questions referred to in paragraph 37 of the report.

44. Finally, he wished to express support for Mr. Yamada's suggestion regarding the participation of ILA in the study.

45. Mr. PELLET, noting that Mr. Mansfield had congratulated the Special Rapporteur for showing that the traditional definition of an international organization, namely, as an "intergovernmental" organization, should not be retained in the present draft articles, said that he was far from convinced by what either Mr. Mansfield or the Special Rapporteur had said. In fact, matters had been

considerably complicated by trying to add to the traditional definition. He was not at all convinced by the reasoning given in paragraphs 12 *et seq.* of the report for restricting the categories of international organization to be covered by the draft. He was curious to know what organizations the Commission might want to exclude. Obviously, non-governmental organizations would be excluded, but the retention of “intergovernmental” would automatically achieve that. The term “inter-State” could be substituted for “intergovernmental”, as suggested by Ms. Escameia, but the meaning would remain the same.

46. He would like to hear just one example of an international organization that the Commission might want to exclude. His preference would be not to exclude any, to be all-inclusive, but if a member of the Commission could identify one such organization and give a convincing reason for excluding it, he would be prepared to consider a typology for determining which organizations to exclude. It was amazing that none of the members who had taken issue with the Special Rapporteur’s abstract approach had bothered to give an example of an international organization that might pose problems with regard to the issue of responsibility of international organizations. If there was no such organization, there was no need for a typology, or for a list of organizations as suggested by Mr. Koskeniemi. A typology might be useful for other reasons, in that different rules might apply to different types of organization: an integration organization, for instance, was very likely to raise different problems from a traditional cooperation organization. However, he failed to see why a typology was necessary for exclusion purposes if no organization needed to be excluded.

47. His own approach was much more empirical. Broadly speaking, members knew what an international organization was—“I know because I can see it”—and the only purpose of a definition was to ensure that no international “thingamabob” was excluded. Ultimately, international organizations must know what rules of responsibility applied to them.

48. He basically supported the Special Rapporteur’s views on draft article 3. In addition, it was essential to reproduce articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts unchanged. Those articles were superbly concise and were the fundamental contribution of Roberto Ago—and also of the Commission, which had had the intelligence to follow one of the pre-eminent legal experts of the twentieth century—to significant progress in international law. In fact, he was rather shocked that no one, not even the Special Rapporteur, had paid tribute to Mr. Ago during the current debate.

49. The only real problem, which the Special Rapporteur had analysed with his customary concision in paragraph 37 of the report, was whether the principle in article 3 of the draft articles on State responsibility for internationally wrongful acts, namely, that the characterization of an act as internationally wrongful was exclusively a matter of international law, must also be transposed to the present draft. He agreed with the Special Rapporteur that it must not, and had strong feelings on the subject.

50. If he understood the Special Rapporteur’s characteristically dense reasoning, it was basically that, since an international organization was itself a creature of international law, it would not make much sense to say that its internal law could not conflict with general international law, as referred to in article 3 of the draft articles on State responsibility for internationally wrongful acts, of which it was actually a part. It was not a question of legal systems. Internal law had nothing to say about the international responsibility of a State or anyone else: that was the whole point of article 3 of the draft articles on State responsibility for internationally wrongful acts. In the present case, however, the Commission’s task was not to distinguish between internal and international law but to establish a hierarchy of norms within the international legal system. With regard to the conduct of an international organization, the question was whether or not that conduct was consistent with the organization’s obligations, which might stem from its constituent instrument, which provided the link between general international law and the organization’s internal law; higher norms—for instance, the peremptory norms of general international law; rules deriving from treaties the organization was bound to observe; or ordinary norms of international law by which the organization was bound, to the extent that its constituent instrument did not derogate from those, it being understood that, in the relations between an international organization and its members, there could be derogations from such general rules of international law by virtue of provisions of the constituent instrument that might be very broad in scope, such as Article 103 of the Charter of the United Nations, or articles 306 and 307 or even the new article 292 (ex-article 219) of the Treaty on European Union (numbering revised according to the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts).

51. In his view, those considerations were sufficient reason not to transpose article 3 of the draft articles on State responsibility for internationally wrongful acts to the present draft. The law of an organization was anchored in general international law and had far too complex a relationship with it for the Commission to reasonably say in the present draft that the characterization of an act as internationally wrongful was not affected by the characterization of the act as lawful by internal law. At some point, however, the Commission would have to tackle two questions. First, when it came to the question of the nature and the existence of the obligation whose breach gave rise to the organization’s responsibility, the Commission would not be able to avoid a thorough discussion of the complex interplay of applicable legal norms. While that question was dispatched in article 12 of the draft articles on State responsibility because it did not raise very serious problems, in the present case it could not be dealt with so easily. When the Commission came to the equivalent article in the current draft, the Special Rapporteur would have to reflect very precisely on the difficult question of the nature and existence of the breached obligation.

52. Second, the Special Rapporteur’s solution to the question of the relationship between general international law and the internal law of an international organization, namely, not to discuss it, was satisfactory if one was ap-



proaching the question from the standpoint of general international law. From the standpoint of the organization's internal law, however, any organization, and not just the European Union, created its own legal system which was a particular kind of international law. Within that system, problems of responsibility arose, including, very frequently, that of the organization's responsibilities to its staff and, less frequently, that of the staff's responsibilities to the organization. How should those problems of the organization's own legal system, of which the law of the international civil service was just one example, be approached? In his view, they should be left aside, but the Commission must take a decision as to whether it wanted to exclude them and why. If it did, it should say in draft article 1, and not just in a commentary, that problems of responsibility under an organization's internal law were not dealt with in the draft. If the Commission discussed the law of the international civil service in the present context, it would be heading in the wrong direction.

53. He suggested to the Special Rapporteur and the Commission that that question should be discussed, and if possible solved, at the current session, while the Commission was dealing with draft article 1 and the scope of the draft.

54. Mr. KAMTO said that, in his view, "intergovernmental" had ceased to be a relevant criterion in defining an international organization, since subjects of law other than States could be parties to the instrument establishing an international organization. Many organizations had not only States but also non-State entities among their members. The "treaty" criterion, on the other hand, was fundamental, since treaties were open to other subjects of international law in addition to States.

55. Mr. KATEKA commended the Special Rapporteur on his report and said that the starting point for defining an international organization in draft article 2 should be the traditional definition, namely, "intergovernmental". As stated by the Special Rapporteur, the main difficulty in arriving at a satisfactory definition of an international organization was the great variety of organizations in existence. Elements of uncertainty made the criteria of the membership—whether by States alone or States and other entities—and constituent instrument problematic. The Commission should start with the criteria of membership by States and establishment by treaty. Control was also among the criteria one could use, for there was a safety net when the majority of the members were States.

56. Because international organizations had become so numerous and so diverse, he was tempted by Mr. Koskeniemi's suggestion for a list and Mr. Mansfield's suggestion for a typology. The Commission should indeed classify organizations into those it wanted to include, those it wanted to exclude and those that fell between the two. There were simply too many organizations for the draft to cover them all.

57. International personality was yet another criterion. Some members of the Commission contended that some international organizations had more personality than others, the latter presumably being non-governmental organizations. It might be problematic to establish such a characterization. In the *Reparation for Injuries* case, ICJ

had said that the legal personality of the United Nations was different from, and less than, that of States. While the legal personality of international organizations could be characterized *vis-à-vis* that of States, however, the Commission could not grade the relative legal personality of international organizations among themselves.

58. He had some doubts about introducing the concept of international governance for international organizations. If that meant situations such as the transitional administrations established by the United Nations in Namibia or East Timor, there was no problem. Otherwise, the concept could be problematic. Some international organizations were already very powerful, indeed more powerful than some countries, over which they exerted considerable influence. That was also true of some transnational corporations and even some non-governmental organizations.

59. The mushrooming of international organizations in recent years complicated the consideration of the topic of international responsibility, which was why a typology was needed to rationalize it. Mr. Brownlie had suggested at the previous meeting that the Commission should look into the phenomenon of some regional international organizations that had changed their original aims, for instance, the European Union and ECOWAS. There were others, such as SADC, that had also done so. It might be that the failure or imperfect implementation of the security system set up by the United Nations was prompting some regional organizations to fill the vacuum. In the case of the European Union, however, as early as the 1960s, in a case involving a Dutch company, the European Court of Justice had reasoned not only on the basis of the Treaties Establishing the European Communities but also by reference to a grand vision of the kind of legal community it expected for the future, one that transcended the original intention of economic integration.

60. He shared the concerns expressed by some members about the criterion of "certain governmental functions". Furthermore, issues of civil liability should be excluded, for the topic was complicated enough already. Finally, he agreed with the inclusion in the second sentence of draft article 1 of a reference to State responsibility for the conduct of an international organization, although it might be more appropriate to put it in a separate sentence.

61. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur on an excellent report and said he agreed that the definition of an international organization was important because it had a bearing on the scope of the draft articles. However, in the present case, the consequences of adopting a new definition were not very clear. He understood the need for a more inclusive definition but disagreed that the traditional definition used in so many treaties, including the 1969 and 1986 Vienna Conventions, should be sacrificed. No single definition would succeed in encompassing the diversity of international organizations.

62. The Special Rapporteur might consider the viability of linking the issue of definition to the notion of legal personality by indicating the most relevant criteria pertaining to such personality. That might require identifying the tricky problems of fact and law related to the legal personality of international organizations, but it would

ultimately permit the inclusion of the largest possible number of international organizations. There would be another advantage in doing so. The very important issues of responsibility raised by the International Tin Council case had never been adequately addressed, and it would be useful if the Commission could tackle them. Those issues had to do with the relationship between an international organization and its member States or third parties, including other international organizations. A very clear distinction also needed to be made between the responsibility and the immunity of international organizations. In the International Tin Council case, the decisions adopted had depended heavily on English law, but the overall case had illustrated the problems involved under international law.

63. The content of draft article 1 appeared to be in line with article 57 of the draft articles on State responsibility for internationally wrongful acts. He had no objection to it, but wondered whether that was the right place for it. Article 2 should comprise two paragraphs, the first giving the traditional definition of an international organization and the second covering a new category of organizations that were mixed and hybrid in nature and composition. Article 3 should be split in two, with the first paragraph becoming a new article 1 and the second constituting what was now article 3.

64. In paragraphs 30 and 31 of his report, the Special Rapporteur, probably correctly, took the position that matters of international liability for injurious consequences arising out of acts not prohibited by international law should be excluded from the scope of the draft. However caution was needed on that point. Regimes of strict liability were already incorporated in legal instruments and applied to some international organizations, for example, the treaty regimes relating to outer space. Perhaps a provision acknowledging that situation should be envisaged.

65. Mr. Sreenivasa RAO said the Special Rapporteur had provided a scholarly and thought-provoking report. After some useful background on the topic, he attempted to carefully delineate the scope of the topic through a series of propositions. The recommendation that issues already settled in the work on State responsibility should not be reopened must be kept in mind.

66. Clearly, an international organization must be an intergovernmental organization: that was recognized in the 1978 and 1986 Vienna Conventions and in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. But he agreed with the Special Rapporteur that a less concise and more precise definition was required at least in order to determine the scope of the study. While there might be differing opinions on the type of organization that should be included, non-governmental organizations should undoubtedly be excluded. Mr. Rodríguez Cedeño was right to say that the organizations should normally be those established by States. Whether it was to be done by an international instrument, and, if so, whether it should be binding, were separate issues.

67. He agreed with Mr. Pellet that the scope of the topic should not be unduly restrictive. Moreover, it should not matter whether an organization was established by an in-

strument that was only recommendatory, non-binding, or by parallel acts pertaining to municipal laws. It might also be possible to cover issues arising from the contractual obligations of international organizations and administrative matters, for example, service problems of staff members. Mr. Pellet had brought up the case of organizations established by a group of international organizations, and that could also be envisaged in the context of organizations with treaty-making capacity. All organizations with a headquarters agreement automatically had, and exhibited, such treaty-making capacity, as did international organizations that routinely concluded agreements with States on their privileges and immunities.

68. Dag Hammarskjöld and Boutros Boutros-Ghali, both former Secretaries-General of the United Nations, had spoken of its parliamentary diplomacy and peace enforcement functions. Such functions involved a network of arrangements between the United Nations and other international organizations to discharge various specific functions ranging from the supply of food, medicine and clothing, the operation of refugee camps and the maintenance of law and order to the establishment of international criminal courts. In more recent times, the wholesale administration of a territory before it was handed over to the elected Government, as in the case of East Timor, was another example of functions an international organization could perform.

69. International organizations established by States, such as the Centre for Science and Technology of the Non-Aligned and Other Developing Countries set up in 1989, offered another example of functions that could be of interest for the study. The fact that the organization had never materialized was a separate matter: indeed, an organization could be established but fail to function effectively. As he understood paragraph 19 of the report, the Special Rapporteur was recommending that organizations that were never established despite the conclusion of a constituent instrument should not be included within the scope of the draft.

70. The Special Rapporteur rightly recommended that a homogeneous category to serve as the source of the study should be identified. The exercise could be facilitated by following Mr. Brownlie's suggestion that the functions performed by the organization should be given greater attention than the existence of a constituent instrument establishing it. His own brief listing of functions of international organizations did not bring the Commission any closer to identifying a homogeneous category. Perhaps the functions could be listed in an illustrative manner or categorized broadly as "governmental functions", as in draft article 1, or perhaps the two techniques could be combined.

71. Other important points had to be taken into account. The organization must exercise functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that its obligations and the wrongfulness of any impugned conduct could be attributed to it. If that criterion was met, it should not matter if the international organization was made up of States and other international organizations. As was noted in paragraph 24 of the report, it was useful

to say that international organizations to which the draft articles applied could include other international organizations. The issues noted in paragraph 32 should certainly fall within the scope of the study.

72. Again, the study should exclude issues of civil liability. The Commission could well revert to the topic in future, after sufficient progress had been made with the topic of international liability. While certain issues connected with private international law could be better studied by other institutions, the Commission could deal with the allocation of loss in the event of harm or damage arising from the activities of international organizations. International organizations, like States, were liable for any damage they caused, irrespective of the legal status of the activity in which they were engaged and, he would add, of the immunity from judicial process in a national tribunal that they might otherwise enjoy, unless the State which had agreed to provide such immunity had also agreed to underwrite any liability arising from its activities within its territory.

73. As to draft article 1, when an international organization entered into an agreement on privileges and immunities with a State and responsibility was thereby incurred by that State for the conduct of an international organization, the matter should come within the scope of the study. Accordingly, such agreements were numerous enough to warrant retention of the second sentence.

74. The Drafting Committee would undoubtedly give suitable attention to the many other useful points made. In the articles themselves, some governmental functions should be specified in an illustrative manner, as that would obviate the need to refer to "certain" governmental functions in draft article 2. It was a word that seemed to imply some sort of limitation, which presumably was not the intention. He was not in favour of specifying to which international organizations the draft articles would apply. The Commission had tried that kind of technique in other topics, without success. A more general approach with greater attention to the functions performed by the organizations should be the basis for delimiting the scope. He agreed entirely with the general thrust of draft article 3 and endorsed the Special Rapporteur's view that there was no need to enter into the characterization of a wrongful act, whether at the international or national level. Characterization at the national level of an act of an international organization was at variance with the status of such an organization and the fact that its constituent instruments were rarely governed by national laws. The Drafting Committee might wish to look into that issue.

75. Mr. AL-MARRI thanked the Special Rapporteur for his valuable report. It would be impractical to try to differentiate among or categorize international organizations; rather, common criteria must be identified, general norms put forward. The treaty criterion was one that might need to be reconsidered, as it could prevent subjects of international law from undertaking functions that might prove important in the future. Finally, he fully agreed with the comments made by Mr. Sreenivasa Rao and Mr. Pellet.

76. The CHAIR, speaking as a member of the Commission, said the excellent first report on the topic had sparked a stimulating debate.

77. He fully endorsed the wording of the first sentence of article 1 but thought the second should be deleted or placed in square brackets pending further elaboration of the topic. The draft must not give the impression that there was a special normative regime, separate from the one set out in the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session, in 2001, that covered the responsibility of a State for the wrongful acts of an international organization. That might raise problems of attribution of responsibility or of joint, residual or shared liability which should be elucidated in the context of the law of international organizations. In any event, nothing could substantially alter the general features of the regime for responsibility of States developed in 2001.

78. Draft article 2, in addition to explaining the use of terms, sought to define a fundamental aspect of the scope, namely which international organizations would be covered. In view of the proliferation and variety of international organizations, for practical reasons, and as had been done in other instances, the Commission would have to confine the study to responsibility for the wrongful acts of a single category of organizations, those that were sufficiently visible and identifiable. He accordingly agreed that the study should concentrate on the responsibility of intergovernmental organizations. In the interests of progressive development and in the light of ongoing events in the international arena, however, he could agree to including mixed organizations in which, together with States, entities other than States were members, as the Special Rapporteur proposed. It should also be possible to include a "without prejudice" clause stating that the rules set out in the draft applied to intergovernmental or mixed organizations, without prejudice to their application to other international organizations.

79. He was sceptical, on the other hand, about the functional aspect to be included in the definition. Like other members, he considered "certain governmental functions" to be vague, not always a prerequisite and difficult to pinpoint. He would prefer to see the emphasis placed on another precondition that was essential, namely that, on the basis of the capacity granted to them by their constituent instruments or developed through their functioning, the international organizations in question should be subjects of international law, capable of assuming rights and, most importantly, of being bound by obligations the breach of which would trigger international responsibility.

80. He fully agreed with the Special Rapporteur's proposal to set out in the first paragraph of draft article 3 the principle that international responsibility was entailed by a wrongful act of an organization and to incorporate in the second paragraph two essential elements of that responsibility, namely attribution of the wrongful act to the organization in conformity with international law and the existence of a breach of an international obligation. On the other hand, he had some reservations about the advisability of not stating the principle that an act must be characterized as wrongful on the basis of international law and that such characterization could not be affected by the fact that in other legal systems the same act might be considered lawful. He would prefer the principle to be set out very clearly since, in view of the wording of the draft articles on State responsibility for internation-



ally wrongful acts, omitting it might raise doubts about whether it applied to the responsibility of international organizations, something about which he personally had absolutely no doubt.

81. Mr. GAJA (Special Rapporteur), summing up the discussion, expressed his gratitude for the kind words and thoughtful comments of many members. There had been criticism, too, which he did not intend to underrate, but the general approach in the report and the structure of the proposed draft articles had emerged relatively unscathed. Even on the most controversial point, the definition of international organizations, most of the criticism concerned the way the definition should be drafted rather than the identification of the core organizations whose practice would be relevant to the study.

82. The main purpose of draft article 1 was to define the scope of the topic as accurately as possible by making it clear that the draft applied to questions of responsibility in relation to acts that were wrongful under international law. Several members had expressed the view that the question of liability for injurious consequences arising out of the acts of an international organization that were not prohibited by international law should be dealt with in the context of, or as a sequel to, the study now being undertaken with regard to States. References had been made to harm that was caused or might be caused by space organizations or organizations engaged in technical assistance or disarmament control. If the resulting harm did not imply a breach of an obligation under international law, questions of liability should not be regarded as part of the current topic. He was aware, as had been pointed out in the course of the debate, that there were treaty regimes which seemed to combine the two aspects, but these regimes provided special rules. This situation would have to be referred to in the draft, but in the meantime enough progress might well be made in the study of the fragmentation of international law to give a clearer idea of what *lex specialis* meant.

83. The proposal to leave out matters of civil liability had also met with significant support, together with some dissent, although that dissent did not concern the exclusion of matters governed by private law, in other words, within the realm of civil liability, or of administrative law in civil-law countries. International law did not generally regulate such matters: as had been pointed out, there were very few treaties and, he would add, hardly any other instruments of international law that had specific provisions thereon.

84. It had been suggested that the study should be extended to rules of international law that could affect the responsibility of member States for the wrongful act of an organization, even if that act was connected with a contract and the dispute was submitted to a national court for commercial arbitration. While he did not wish to commit himself before gaining an idea of the Commission's views, he thought that consideration could indeed be given to whether there were rules of international law that might be relevant in private litigation. That would be in line with the approach taken by the Institute of International Law at its 1995 session in Lisbon in dealing in a similar context with issues of civil liability and international law.

85. The international responsibility of States for the conduct of international organizations was central to the study: the bulk of the writings on responsibility of international organizations and the best-known instances of practice related to that very question, not to questions of attribution to international organizations. Irrespective of whether the Commission concluded that States could be responsible for such conduct, it could not ignore that central question, which was no doubt also one of the most difficult. It had been left out of the draft articles on State responsibility for internationally wrongful acts, in which State responsibility for aid or assistance to an organization in the commission of a wrongful act and other aspects of Chapter IV of Part One had likewise not been considered. In article 1, paragraph 1, he had simply reproduced what was said in article 57 of the draft articles on State responsibility. Several members had suggested transposing the second sentence of that paragraph to a separate paragraph, and he had no difficulty with that suggestion, despite the similarity of the issues mentioned. The phrase "acts that are wrongful under international law" in the first sentence had been criticized for not reflecting the language of article 1 of the draft articles on State responsibility, namely "internationally wrongful acts". The reason, as was stated in paragraph 32 of his report, was that if the definition was to be comprehensive and accurate, one could not speak only of the responsibility of an organization for its own conduct, since such responsibility could also arise for the conduct of another organization of which the first organization was a member.

86. To conclude his summary of the discussion on draft article 1, his preference for the provisions on the scope of the topic was to have as accurate a description as possible of the questions covered. Certain members of the Commission appeared to prefer a less comprehensive description, focusing on the main issues, but that, together with the other points he had raised so far, could be left to the Drafting Committee.

87. The CHAIR said that Mr. Yamada's suggestion, supported by others, that consideration should be given to establishing contact with ILA in connection with the responsibility of international organizations, could be taken up by the Planning Group once it was established.

*The meeting rose at 1 p.m.*

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## 2756th MEETING

*Tuesday, 13 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia,

Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Election of officers (*concluded*)\*

1. The CHAIR welcomed the three newly elected members of the Commission, Mr. Economides, Mr. Kolodkin and Mr. Melescanu. As the Group of Eastern European States was now complete, it could propose a candidate for the position of first Vice-Chair.

2. Mr. GALICKI proposed Mr. Melescanu for the position of first Vice-Chair on behalf of the Group of Eastern European States.

*Mr. Melescanu was elected first Vice-Chair by acclamation.*

### The responsibility of international organizations (*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

3. The CHAIR invited Mr. Gaja, Special Rapporteur on the responsibility of international organizations, to continue his summary of the discussion on the topic.

4. Mr. GAJA (Special Rapporteur), addressing the more controversial part of his report, noted that Mr. Koskenniemi had spoken of the question of an international organization's legal personality as an example of a "cultural clash" (2754th meeting, para. 1) and had referred to two opposing views: according to one, legal personality existed *a priori*, and, according to the other, it resulted from the organization's rights and obligations. His own view lay somewhere between the two. If an organization had a right or an obligation under international law, it must necessarily possess legal personality. That was not to say that all the rights and obligations of an international organization fell under international law. That depended above all on the organization's capacity. An organization might act under the law of a particular State—for example, when concluding a contract—and it might also act as an organ of a State. He noted in passing that it was hardly revolutionary to hold that some rights and obligations under international law accrued to individuals. They thus had legal personality, although their capacity was limited.

5. In the definition of "international organization" contained in draft article 2, legal personality was clearly im-

plied in the words "in its own capacity". The French and Spanish translations (*en son nom propre* and *a su propio nombre*) were less clear than the English. In any case, it would make little sense to speak of the international responsibility of an entity which did not possess legal personality. He had no objection whatsoever to referring expressly to the existence of the legal personality of an international organization in the definition, as many members of the Commission had suggested.

6. Many members had also proposed that the definition should mention that the organization's constituent instrument was a treaty, or, at any rate, that the organization had been established by States. Most of them recognized that non-State entities sometimes participated in establishing an organization and that the constituent instrument might not be a treaty. He cited as examples OSCE and OPEC. In other cases such as that of the World Tourism Organization, no formal treaty existed. The Commission might follow the suggestion by Ms. Escameia and Mr. Sreenivasa Rao that reference should be made to an international instrument, although that term would also need to be defined. As Mr. Mansfield had emphasized, moreover, a reference to States alone as creators or members of an international organization would not correspond to a significant trend in practice. The prevailing view seemed to be that the draft articles should also deal with organizations which included non-State entities among their members. An accurate definition should reflect that in a less succinct way than in draft article 2.

7. The reference in draft article 2 to "governmental functions" had attracted considerable criticism, partly because of the difficulty of translating that expression into French and Spanish. An organization's functions were usually defined in its constituent instrument. But if an organization acquired new functions in practice, as was the case with NATO, ECOWAS and the European Union, its international responsibility could not be excluded simply because it had committed a wrongful act in the exercise of functions not covered by the treaty establishing the organization. For example, if an organization took military action and that constituted a wrongful act under international law, it could not be said that the organization escaped responsibility simply because it had exercised functions not originally provided for. Thus, the definition should take into account the functions that the organization actually exercised, rather than those contained in its constituent instrument.

8. The reference to governmental functions had been designed to encompass those organizations that had some legislative (in the broad sense) executive or judicial functions of the type that were part of the core activity of States. That approach had been approved by certain members and criticized by others, who had stressed that it was difficult to determine the meaning of "governmental functions". Admittedly, the criterion was a vague one, and various members had expressed a preference for the traditional definition of an international organization as an intergovernmental organization. There were two reasons to limit the scope of the draft articles to a defined category of international organizations. The first was that, given the great variety of international organizations, the application of rules developed on the model of the draft articles on State responsibility for internationally wrong-

\* Resumed from the 2751st meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

ful acts<sup>2</sup> should be limited to entities that had some characteristics in common with States. The second was that known practice with regard to issues of the responsibility of international organizations was limited to a few organizations such as the United Nations, NATO and the European Union. The practice of other organizations was probably limited, but it was also very difficult to ascertain. With regard to the key questions of attribution and member State responsibility, the difficulty was that it was not certain that the principles that could be developed with regard to the major existing organizations could apply in the same way to all existing organizations. According to some members of the Commission, it was necessary to establish a typology. However, in order to choose among the various organizations, a sufficiently precise criterion was needed, and no such criterion was currently available. If a functional definition was unacceptable or impossible, he therefore proposed falling back on a general definition of international organizations, to be formulated by updating the traditional definition to be found in the 1969 Vienna Convention and in other conventions. In so doing, it would also be necessary to clarify the meaning of the term “intergovernmental”, in the light of the requirement to come up with an exact definition applicable at least to all the major organizations.

9. In view of members’ comments, draft article 2 clearly needed rewriting. Accordingly, he suggested that an open-ended working group should be convened for that purpose and that the Commission should consider the results of that group’s work before referring the article to the Drafting Committee.

10. Draft article 3 had attracted few comments. No objections had been raised with regard to the text. The only issue discussed concerned the deliberate omission from the current text of a paragraph that appeared in article 3 of the draft articles on State responsibility. Only Mr. Khabat-si, Mr. Galicki and Mr. Candioti had criticized that decision. Since the current draft articles were not intended to parallel faithfully the draft on State responsibility, that omission should not give rise to any major difficulties, particularly given that the point was arguably superfluous. It would be strange to make a reference in article 3 to the internal law of States, as had been suggested.

11. Mr. Koskeniemi and Mr. Pellet had briefly examined the question of the relationship between international law and the law of international organizations. They had referred to the hierarchy of norms and to the key distinction between obligations of an organization towards its member States and its obligations towards non-member States. In his view, as Article 103 of the Charter of the United Nations showed, that distinction was not always conclusive. It would thus be difficult to formulate a general rule in that regard. However, he shared the view of Mr. Pellet that the issue should be examined in the context of the objective element—in other words, when considering a breach of an obligation under international law.

12. With regard to Mr. Kamto’s suggestion to add a paragraph on the responsibility of member States of the organization, either because they had contributed to the wrongful act or because the organization had acted as an

organ of a State, he pointed out that the latter case was covered, at least implicitly, in the draft articles on State responsibility for internationally wrongful acts. The issue of the responsibility of member States was too problematic to be dealt with at the stage of formulation of general principles. Once the relevant draft articles had been discussed, it would be possible to add something to draft article 3.

13. In conclusion, he proposed that articles 1 and 3 should be referred to the Drafting Committee and that article 2 should be dealt with in the way he had suggested.

14. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the Special Rapporteur’s suggestion that an open-ended working group should be established to deal with unresolved issues relating to article 2 and that articles 1 and 3 should be referred to the Drafting Committee.

*It was so decided.*

### **Diplomatic protection<sup>3</sup> (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>4</sup> A/CN.4/L.631)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR**

15. Mr. DUGARD (Special Rapporteur) said that, before introducing his report, he wished to comment on the treatment currently accorded to special rapporteurs. First, the Fifth Committee had decided arbitrarily to discontinue the payment of honoraria to special rapporteurs. Second, conference services had laid down strict new rules concerning the date of submission and the length of reports and the time needed for their translation and publication. Special rapporteurs now had to write their reports without any financial reward while continuing to perform their other functions. Only the knowledge that the Commission could not function without their reports compelled them to complete those reports on time.

16. The decision of the Fifth Committee was unfair, discriminatory and exploitative. He trusted that the Commission would again voice its complaints on that score, but, knowing that delegations would pay little attention, he appealed to members of the Commission who had the ear of their Governments to persuade them to raise the matter in the Fifth Committee.

17. His fourth report on diplomatic protection (A/CN.4/530 and Add.1) dealt with only one kind of legal person, namely, the corporation. That was because it was the most important kind of legal person for current purposes and most of the relevant judicial decisions dealt with it. Other draft articles would be added to those in the report, however, applying the principles expounded in respect of corporations to other legal persons. For the time being, he would limit himself to introducing draft articles 17 and 18. Draft articles 19 and 20, which also appeared

<sup>3</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>4</sup> See footnote 1 above.

<sup>2</sup> See 2751st meeting, footnote 3.



in the report, would be introduced at a later stage in the debate.

18. One decision dominated all discussions on the subject: the judgment of ICJ in the *Barcelona Traction* case, which was introduced in paragraphs 4 to 10 of the report. In that case, the Court had stated the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office (in that case, Canada) and not to the State of nationality of the shareholders (in that case, Belgium). The Court had acknowledged that there was a certain amount of practice relating to bilateral or multilateral investment treaties that tended to confer direct protection on shareholders, but that that did not provide evidence that a rule of customary international law existed in favour of the right of the State of nationality of shareholders to exercise diplomatic protection on their behalf. It had dismissed such practice as constituting *lex specialis* (see para. 6 of the report).

19. In reaching its decision, ICJ had ruled on three policy considerations, which were set forth in paragraph 10 of the report. First, where shareholders invested in a corporation doing business abroad, they undertook risks, including the risk that the corporation might in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Second, if the State of nationality of shareholders was permitted to exercise diplomatic protection, that might result in a multiplicity of claims because, in multilateral corporations, the shareholders were nationals of many countries. Third, the Court had said that it would not apply by way of analogy rules relating to dual nationality of natural persons to corporations and shareholders, which would allow the States of nationality of both to exercise diplomatic protection.

20. There had been widespread disagreement among judges over the reasoning of ICJ, as was evidenced by the fact that 8 of the 16 judges had given separate opinions, of which 5 had supported the right of the State of nationality of shareholders to exercise diplomatic protection. Among the judges who had supported the Court's reasoning, Mr. Padilla Nervo had really captured the ideological dimension of the debate when he stated that it was not the shareholders in those huge corporations who were in need of diplomatic protection, but rather the poorer or weaker States where the investments took place which needed to be protected against encroachment by powerful financial groups or against unwarranted diplomatic pressure.

21. The decision of ICJ in the *Barcelona Traction* case had been subjected to a wide range of criticisms, the most notable of which were listed in paragraphs 14 to 21 of his report. First, had the Court paid more attention to State practice as expressed in bilateral and multilateral investment treaties and to arbitral decisions interpreting such treaties, instead of dismissing them as *lex specialis*, it might have concluded that there was a customary rule in favour of the protection of shareholders. Second, the Court had established an unworkable standard since, in practice, States would not protect companies with which they had no genuine link. He had quoted at length from reports sub-

mitted to ILA by Bederman and Kokott,<sup>5</sup> in which they pointed out that the traditional law of diplomatic protection had been to a large extent replaced by dispute settlement procedures provided for in bilateral or multilateral investment treaties, meaning that what the Court had categorized as *lex specialis* had become very common. Third, the Court's reasoning occasionally lacked coherence. On the one hand, the judgment appeared to reject the application of the "genuine link" to companies; on the other, it concluded that there was "a close and permanent connection" [p. 42, para. 71] between Canada and the company. Finally, the Court had failed to justify its statements on policy mentioned in paragraph 10 of the report.

22. With regard to the authority of *Barcelona Traction*, the decisions of ICJ were not binding on the Commission, and the Commission might well decide not to follow that judgment. The Commission might also feel that, in the case in question, the Court had not been laying down a general rule, but had been resolving a particular issue. Moreover, in the *ELSI* case, a chamber of the Court had ignored *Barcelona Traction* when, as was described in paragraphs 23 to 26 of the report, it had allowed the United States to exercise diplomatic protection on behalf of two American companies which held all the shares in an Italian company. That having been said, it must be acknowledged that, 30 years on, *Barcelona Traction* was viewed as a true reflection of customary international law on the subject and that the practice of States in the diplomatic protection of corporations was guided by it.

23. Before proposing rules on the nationality and diplomatic protection of corporations or their shareholders, it was necessary to clarify the options open to the Commission with respect to the State that was entitled to exercise diplomatic protection. That was what he did in paragraphs 28 to 46 of his report, where he proposed seven options. Option 1, that of the State of incorporation, might be described as the *Barcelona Traction* rule, whose advantages and disadvantages had already been indicated. Option 2 was that of the State in which the company was incorporated and with which it had a genuine link. It might more accurately reflect State practice, since many States would prefer to protect only those corporations with which they had a genuine link. The main problem with that option, particularly if it was seen as an additional factor, was that many corporations were incorporated in a State for tax advantages and had no genuine link with that State. For the purposes of diplomatic protection, such companies would become stateless. Option 3 was that of the State of *siège social* or domicile, which, in practice, was not very different from that of the State of incorporation. The terms *siège social* and "domicile" were used in private international law, however, and perhaps the Commission should avoid using them. Option 4 was that of the State of economic control. Whether the standard of majority shareholding or of a preponderance of shares was used, in practice it was very difficult to prove economic control. The decision in the *Barcelona Traction* case illustrated how difficult it was to identify with certainty the share-

<sup>5</sup> D. J. Bederman, "Lump sum agreements and diplomatic protection", provisional report, and J. Kokott, "The role of diplomatic protection in the field of the protection of foreign investment", provisional report, ILA, *Report of the Seventieth Conference* (see 2751st meeting, footnote 7), pp. 230 and 259 respectively.

holders of a company. Option 5 was a combination of the criteria of State of incorporation and State of economic control. There might be something to be said for allowing dual protection, but, if one accepted the criticism of the concept of economic control, it made little sense to recognize that form of dual nationality. Option 6 was to use the State of incorporation in the first instance, with the State of economic control enjoying a secondary right of protection. In addition to the difficulties with the concept of economic control, there was another difficulty with determining at what stage a State of incorporation was unwilling or unable to exercise its right and when a secondary right came into existence. Option 7 would allow the States of nationality of all shareholders to bring legal action. In other words, it would allow a multiplicity of actions, and that raised dangers that would best be avoided.

24. At the end of the day, the *Barcelona Traction* rule was probably the one that should be considered seriously and codified, subject to the exception that the decision itself recognized. In draft article 17, he tried to draft a provision that gave effect to that rule. Paragraph 1 of the draft articles said that a State was entitled to exercise diplomatic protection, but that it was for the State to decide whether to do so or not. The discretionary nature of the right might mean that companies that did not have a genuine link with the State of incorporation went unprotected. That was why investors preferred the security of bilateral investment treaties, a shortcoming which ICJ itself had recognized. In paragraph 2 of the draft article, he suggested that the State of nationality of a corporation was the State in which the corporation was incorporated, adding in square brackets the phrase “and in whose territory it has registered its office” because some members wished reference to be made to the corporation’s office. In the *Barcelona Traction* decision, the Court had emphasized both requirements. He was not sure that the two conditions were necessary. They seemed to amount to the same thing in practice.

25. Draft article 18 dealt with exceptions to the rule that it was the State of incorporation that could exercise diplomatic protection. The first exception was when the corporation had ceased to exist in the place of its incorporation. The phrase “ceased to exist”, which had been used by ICJ in the *Barcelona Traction* decision [p. 41, para. 66], did not appeal to all writers, many preferring the lower threshold of intervention on behalf of the shareholders when the company was “practically defunct” [*ibid.*]. His own view was that the first solution was probably preferable. The criticisms dealt mainly with the way in which it had been applied by the Court in the *Barcelona Traction* case, rather than with the term itself. The other problem that might arise was that of the place in which the corporation had ceased to exist. The Court in *Barcelona Traction* had not expressly stated that the company must have ceased to exist in the place of incorporation, but that was clear from the context of the proceedings. The Court had been prepared to recognize that the company had ceased to exist in Spain, but it had emphasized that that did not prevent it from continuing to exist in Canada, where it had been incorporated, and that had influenced the Court’s finding that the company had not ceased to exist.

26. The other exception was the one that allowed the State of nationality of the shareholders to intervene when

a corporation had the nationality of the State responsible for causing the injury. It was the most important exception to the rule established by ICJ in its judgment in the *Barcelona Traction* case. It was not unusual for a State to insist that foreigners in its territory should do business there through a company incorporated under that State’s law. If the State (often a developing State) confiscated the assets of the company or injured it in some other way, the only relief available to that company at the international level was through the intervention of the State of nationality of its shareholders. The rule was not free from controversy. Some had suggested that it should be recognized only when the injured company had been compelled to incorporate in the State which had injured it or in which it was “practically defunct”. The Court, in the *Barcelona Traction* decision, had raised the possibility of such a rule, but had not given a definitive answer either on its existence or on its scope. To examine the arguments for and against that exception, one should look at the support it had received pre-*Barcelona Traction*, in *Barcelona Traction* and after the decision had been handed down in that case.

27. Before *Barcelona Traction*, the existence of the exception had been supported in State practice, arbitral awards and doctrine. Practice and judicial decisions were far from clear, however. The strongest support for such an exception was to be found in three cases in which the injured company had been compelled to incorporate in the wrong-doing State: *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company*.

28. In *Barcelona Traction*, ICJ had raised the possibility of the exception and then had found that it was unnecessary for it to pronounce on the matter since it had not been a case in which the State of incorporation (Canada) had injured the company. It was quite clear, however, that the Court had been fairly sympathetic to the exception, as had been emphasized by a number of judges such as Fitzmaurice, who had stated that the rule was clearly part of customary international law. On the other hand, Judges Padilla Nervo, Morelli and Ammoun had been vigorously opposed to the exception.

29. Post-*Barcelona Traction*, some support for the principle could be found, mainly in the context of the interpretation of investment treaties. In the *ELSI* case, a Chamber of ICJ had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, but it had clearly been present in the minds of some of the judges, as was shown by an exchange between Judges Oda and Schwebel in their separate opinions, with Judge Schwebel expressing strong support for the exception. It was difficult to know what to conclude from the *ELSI* case, but it would seem to strengthen the outlook of the majority of judges who had expressed their opinions in favour of the exception proposed in the *Barcelona Traction* case.

30. Thus, before *Barcelona Traction*, there had been some support for the proposed exception, although opinions had been divided. The *obiter dictum* of ICJ in the *Barcelona Traction* case and the separate opinions of some of the judges had added to the weight of arguments in favour of the exception. Subsequent developments, albeit in the

context of treaty interpretation, had confirmed that trend. Moreover, both the United States and the United Kingdom had declared their support for the exception. Writers remained divided on the issue. He himself proposed that the Commission should accept the exception and that the latter should not be limited to situations in which the injured company had been compelled to incorporate in the wrong-doing State, but should apply in situations where the company was not “practically defunct”. If the Commission had reservations about the exception, however, it would be very difficult to dismiss situations where a corporation had been compelled to incorporate in the wrong-doing State in order to be allowed to do business there.

*The meeting rose at 11.30 a.m.*

## 2757th MEETING

*Wednesday, 14 May 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) was helpful and well documented and that its quality was matched by that of the introduction by the Special Rapporteur, who had made it clear that he was confining his study to that of

corporations. Personally, he could see little justification for such a restriction and hoped that it would not be too strongly emphasized. Other bodies—cities, local authorities, universities, professional associations, non-governmental organizations—might require diplomatic protection, and some important cases—Ratibor, for example—involved universities and cities.

2. Numerous bilateral investment treaties were now being concluded, and one might ask to what extent a pattern of such treaties constituted proof of the development of customary international law. There were currently well over 2,000 bilateral investment treaties, but large numbers did not necessarily make for quality, and there was still a need to discover *opinio juris*. It was his impression that when bilateral investment treaties actually led to arbitration in which the applicable law was a mixture of the law of the respondent State and public international law, they had an extraordinarily unbalancing effect. A recent arbitral decision, not yet in the public domain, illustrated that proposition. Bilateral investment treaties thus raised very serious policy problems.

3. The *Barcelona Traction* case was an important part of the literature on diplomatic protection. The Special Rapporteur asked in his report whether the decision of ICJ in the case bound the Commission, but no such problem should arise: the decision had been carefully argued by two important teams of international lawyers, was part of the literature and simply had to be taken very seriously. The *ELSI* case also had to be taken seriously. It was quite clearly based on a cause of action relating to a bilateral treaty of friendship, and the alleged inconsistencies between the *ELSI* and *Barcelona Traction* cases should not worry the Commission unduly.

4. A central element in *Barcelona Traction* was the policy question. ICJ, sometimes accused of not taking policy into account, had on that occasion quite clearly done so: taking the view that if the holder of bearer shares, which were on the market for extended periods, could emerge from under the carapace of the corporation to make a claim, that would create considerable instability. It would be difficult for States and others to have clear expectations as to who their economic visitors actually were, and there would be a constantly changing population of holders of bearer shares. That was clearly a central point of policy and of public order as well. Judging from paragraph 10 of the report, the Special Rapporteur seemed to have accepted the broad policy lines of *Barcelona Traction*.

5. The first part of draft article 17 posed serious problems that would have to be dealt with by the Drafting Committee. Draft article 18 contained the proposition that shareholders did not receive diplomatic protection and their claims were not admissible in isolation from their relationship with a corporation. Subparagraph (a) set out the exception: that the corporation should have ceased to exist in the place of its incorporation. He had no difficulties with the exception, which was not controversial and seemed to be based on common sense. In some quarters, however, a more flexible approach was preferred, allowing the shareholder separate protection and recognition of his or her interests when the corporation existed in principle but was practically defunct. While he had no strong feelings on the matter, there did seem to be room for debate.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



6. A second exception, set out in draft article 18, subparagraph (b), namely that the corporation had the nationality of the State responsible for causing injury to the corporation, was highly controversial, and he was opposed to including it. All the evidence was carefully considered in paragraphs 65 to 87 of the report, but the authority for the exception was very weak. In a passage from his own publication, *Principles of Public International Law*, partly quoted in paragraph 85 of the report, he had written that the exception, if it existed, was anomalous, since it ignored the traditional rule that a State was not guilty of a breach of international law for injuring one of its own nationals, and that if one accepted the general considerations of policy advanced by ICJ in *Barcelona Traction*, then the alleged exception was disqualified.<sup>3</sup>

7. Subject to those observations, he thought that draft articles 17 and 18 were ready to be referred to the Drafting Committee.

8. Mr. PELLET said he was a fervent supporter of draft article 18, subparagraph (b), but would outline his views later. For the moment, he would like clarification from Mr. Brownlie about the statement that certain municipalities or universities might require diplomatic protection. Some universities were not public but private, of course, but municipalities were always emanations of the State and hence could suffer no direct harm, nor have need of diplomatic protection, since they were part of the State and it acted on their behalf.

9. Mr. BROWNLIE said that for an institution which was under the direct control of the State, what Mr. Pellet said was quite true. That was not the case of many universities, however, or of lower-level institutions in which the State might have a very indirect interest but which, at least for the purposes of local law, were private institutions. If litigation in the courts of Ukraine had been possible at the time of the Chernobyl disaster, for example, it would have proved difficult, as the institution responsible for the reactor was in fact a private-law institution. There were many other institutions that were difficult to classify as being part of the public sector or the private sector.

10. In response to a follow-up question by Mr. Pellet, he said there was no easy way, even in terms of comparative public law, to define the legal status of local authorities. Under English law, local authorities were by no means simply an emanation of the State: other than in London, they were not controlled by the State.

11. The CHAIR said that if the local authorities were acting as a State organ, then the State could act directly in the exercise of its responsibility, and diplomatic protection did not come into play. Diplomatic protection was an indirect route for providing protection for individuals or legal persons that were of the nationality of the State.

12. Mr. KOSKENNIEMI said that two opposing policy rationales were being applied to the problem. With reference to paragraph 85 of the report, he would like to know why Mr. Brownlie thought the general policy of the *Barcelona Traction* case overrode the particular concern outlined by the Special Rapporteur in paragraph 65, in

which he defended the exception in draft article 18, subparagraph (b), by outlining a different policy rationale in a very clear fashion: "A capital-importing State will not infrequently require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law." The Special Rapporteur went on to say that the State might then engage in dubious actions *vis-à-vis* that company, opening the door to evasion of the law, unless an exception like the one proposed in subparagraph (b) was made.

13. Mr. BROWNLIE said that the more serious cases involved a direct attack on the interests of the shareholder, but if the shareholder was of the same nationality as the corporation, a major problem of principle arose. There were two levels of argument, one relating to the parameter of protection or non-protection of shareholders, and the other to the more global parameter of how the State dealt with its own nationals. It was not surprising that the question had resulted in great divergences of view among the authorities: many international lawyers found the exception to be unattractive.

14. Mr. KAMTO said the Special Rapporteur had submitted a comprehensive and rigorous report on a difficult subject, the diplomatic protection of corporations.

15. Paragraph 10 spoke of the risk that the corporation might, in the exercise of its discretion, decline to exercise diplomatic protection, but surely it was the State of nationality of the corporation, not the corporation itself, that was meant. Paragraph 27 was so beautifully balanced that it was hard to know which way the Special Rapporteur was leaning. If, as he stated further on and as draft article 17 implied, the *Barcelona Traction* case was superannuated and no longer reflected the contemporary law of international investments, then that law must be developed on the basis of the practice followed in bilateral and multilateral investment treaties, with a view to codifying the diplomatic protection of shareholders, albeit with some conditions attached. If, however, *Barcelona Traction* today remained an accurate statement of the relevant customary law, a balancing act would have to be performed.

16. It was difficult to imagine that, for the purposes of obtaining compensation, foreign investors would prefer diplomatic protection over the protection offered by investment treaties. Such protection was often extremely extensive, couched in arbitration clauses that recent arbitral decisions characterized as riddled with traps for States. In any case, it was much easier to set in motion than was diplomatic protection: witness the recent decisions by ICSID.

17. One could not reason today as Judge Padilla Nervo had in his separate opinion in the *Barcelona Traction* case. At the time, he had undoubtedly been correct in saying that it was the poorer or weaker States in which investments were made that needed protection. They still stood in need of protection, but the economic context had changed. With the help of globalization, investments were now being made in every direction: indeed, many investors from developing countries were investing in other developing countries.

<sup>3</sup> See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), especially p. 495.

18. The Special Rapporteur had spoken of the danger of statelessness if the genuine link criterion was retained. It had, however, been incorporated in the *Barcelona Traction* decision, though in different terms from those in the *Nottebohm* case, which was understandable in that the latter had concerned an individual, not a legal person. The question was whether the Commission wished to encourage the phenomenon of tax havens, even indirectly, by formally denying the existence of a genuine link. He for one hoped not, especially since the *Barcelona Traction* decision went in the opposite direction.

19. Protection of shareholders in line with the exception envisaged by ICJ in the *Barcelona Traction* case was essential when the State that had caused injury to the corporation was the State of nationality of that corporation. The Special Rapporteur was proposing that the Commission should allow such a case as an exception, where the corporation had been forced to incorporate under the domestic law of the State in which the investment was made. It seemed an unnecessary requirement except in the sense that, without it, the investor could have gone elsewhere. It was always open to an investor not to invest in a particular country, but what was important was to provide a final legal safety net for the shareholder, who would otherwise be completely robbed without even a chance to present his or her case before an objective third party, namely an international court.

20. Sometimes an investor could not expect any help from the State, as could be seen from the *Biloune* case. Mr. Biloune, of Syrian nationality, had resided in Ghana for 22 years before being expelled in 1987. He had created a company of which he had held 60 per cent of the shares. The company had concluded agreements with its Ghanaian partners to build a hotel complex in Accra. Invoking the absence of a building contract, the authorities had stopped the construction and demolished part of the building. Mr. Biloune had then been arrested and held for 13 days before being expelled. Was it conceivable for Mr. Biloune's company, which had since gone bankrupt, to have obtained the diplomatic protection of its State of nationality? In such a case, the shareholder, and certainly a majority shareholder, should be able to request the diplomatic protection of his or her State of nationality, which for Mr. Biloune was Syria. Such a possibility should be encouraged, especially since under certain inter-State legislation, such as that of the Organization for the Harmonization of Business Law in Africa, it was now possible to have a company consisting of a single shareholder with a legal personality different from that of the sole shareholder.

21. Mr. Brownlie was right to raise the question of the protection of shareholders in international law, but protecting foreign shareholders was not the same as protecting nationals. It was the company, and not the foreign shareholder, that had the nationality of the host State of the investment. As for national shareholders, they should be able to protect their rights in the State of nationality, in accordance with domestic legislation. National shareholders came under existing law for nationals. Thus, there were different procedures, depending on the nationality of the shareholder; it was the only way to avoid the question of principles raised by Mr. Brownlie. However, that

should not prevent the Commission from envisaging diplomatic protection for foreign shareholders.

22. He agreed with the wording of draft article 17 but was in favour of deleting the phrase in brackets. Draft article 18 was acceptable, but a time limit should be set in subparagraph (a). If a company went bankrupt, it should not have recourse to diplomatic protection indefinitely. Perhaps the time limit could be set from the date on which the company announced bankruptcy. Likewise, subparagraph (b) should include the requirement of a "reasonable time limit" for exercising diplomatic protection.

23. Mr. PELLET said that he agreed almost entirely with Mr. Kamto's comments, in particular his defence of draft article 18, subparagraph (b). But he was somewhat puzzled as to why the question of time limits with regard to the protection of the shareholders of a company suddenly had to be addressed. Such a question could easily be posed for the whole subject of diplomatic protection. The issue was whether diplomatic protection could be exercised indefinitely. However, the legal impact of determining whether time had run its course was such a general problem in international law that he was not certain it had to be reflected in the draft articles.

24. Mr. KAMTO said that, as the article concerned an exception to the rule, the Commission should at least call for a reasonable time limit. Such a remedy should not be available to foreign shareholders indefinitely. Nevertheless, if members were not convinced, he would not press the point.

25. Mr. MOMTAZ said that the purpose of specifying a reasonable time limit was presumably to prevent a proliferation of claims by the States of nationality of the shareholders.

26. Mr. Sreenivasa RAO said that, as he understood it, Mr. Kamto was arguing that, if a company was incorporated in a particular State, it had that State's nationality, and if there was an injury to that company by virtue of an action of the State of incorporation, remedies must be sought in the domestic courts of that country. Yet draft article 18, subparagraph (b), concerned the extent to which a foreign State should be allowed to provide diplomatic protection to its nationals who were shareholders in a company that was incorporated in a foreign State. A State could provide diplomatic protection only if the person injured was its national. Shareholders should not be treated as a separate group or provided with separate protection. The Commission was not talking about individuals separately from the company itself. The Special Rapporteur had rightly stressed that the personality of a corporation was different from that of its shareholders. Thus, if diplomatic protection was tied to the personality of the company, how could foreign nationals who were shareholders of a company be provided separate diplomatic protection? If the Commission decided that a State had a right to provide diplomatic protection to nationals who were shareholders in a company incorporated in a foreign country, that would pose problems, as Mr. Kamto was aware.

27. Mr. KAMTO, replying to Mr. Sreenivasa Rao's comments, said that the Special Rapporteur had sought to provide for the exceptions envisaged in *Barcelona Traction*.

tion. It was the right approach, because it was consistent with the situation in the international community today. The Commission could not pretend that investment law did not have particular rules. Foreign investment did not have the same status in the legal system of the host State. It could have the same status if the corporation had been established in accordance with the rules of international law, but the fact remained that foreign investment always enjoyed special protection, whether through bilateral or multilateral investment agreements or through diplomatic protection. The question was how a corporation could exhaust local remedies if it was injured by the host State, as in the *Biloune* case. It was difficult to imagine how someone who had been thrown in prison and then expelled could exhaust local remedies.

28. Even assuming that local remedies could be exhausted and that the rights of the corporation were not sufficiently protected, foreign shareholders should have recourse to their State of nationality to obtain the protection not available to them under the rules of domestic law. In the *Biloune* case, perhaps the Ghanaian nationals holding the remaining 40 per cent of the shares in the company could have instituted legal proceedings in Ghana; Mr. Biloune might have tried to do so from abroad, but it was highly unlikely that he would have been successful. There must be some way to provide protection under international law for such cases.

29. Mr. PELLET said that Mr. Kamto's comments did not clarify the problem. It would be preferable to introduce the possibility of the exhaustion of local remedies. The Commission must consider the circumstances in which diplomatic protection was possible—in which recourse to local remedies had no chance of success—which was what Mr. Kamto had in mind with the *Biloune* case. Another example was the *Diallo* case pending before ICJ. The point under discussion was a corporation which had the nationality of the host State. In principle, diplomatic protection could not be exercised, because the condition set out in draft article 17, which reaffirmed *Barcelona Traction*, was not met. The question arose only when a foreign shareholder, who might or might not have a majority holding, was prosecuted by the authorities and could not exercise his or her rights. In such instances draft article 18, subparagraph (b), was an essential safety net. However, at issue was not the exhaustion of local remedies but rather the other condition for the exercise of diplomatic protection, namely nationality. If the Commission confined itself to the *Barcelona Traction* principle, reflected in draft article 17, the shareholder would not enjoy any protection, and the corporation was perfectly opaque. If the corporation that was the victim of the internationally wrongful acts of the host State had the nationality of the host State, then draft article 18, subparagraph (b), was justified. The Commission should proceed as though local remedies had been—or could not be—exhausted.

30. Ms. ESCARAMEIA said that she endorsed the Special Rapporteur's suggestions for draft articles 17 and 18 and was in favour of deleting the phrase in brackets at the end of draft article 17, paragraph 2, because it followed logically from the requirements of the provision.

31. The Special Rapporteur's justification for choosing the *Barcelona Traction* rule was that it was still the prac-

tice of most States. In analysing the *Barcelona Traction* case, the Special Rapporteur stressed that ICJ had been divided and that it could have taken into account the treatment of enemy companies in time of war, State practice in settlements through lump-sum agreements, investment treaties and arbitral awards, including the *Delagoa Bay Railway* case. There had also been a discussion of the practice of bilateral investment agreements, studies by Bederman and Kokott<sup>4</sup> and the *ELSI* case, which in substance addressed the same situation. The many examples given were confusing and could have led to precisely the opposite conclusion. Even legal arguments such as equity, harmonization with the *Nottebohm* genuine link and questions of analogy with dual nationality of individuals could have been cited. She nonetheless agreed with the Special Rapporteur's choice for draft article 17, because it was the best alternative in today's world. It was a choice based on policy rather than on legal necessity.

32. In her opinion, long and complex proceedings, if not chaos, could result from using the option of the State of nationality of shareholders. The State of nationality of shareholders would also create problems with the rule of continuity of nationality, given that shares changed hands so quickly.

33. The option involving the State of economic control (para. 32 of the report) was not clear. The Special Rapporteur had spoken in that connection of the majority shareholders, but sometimes a 1 per cent holding was more important for one State than a 30 per cent holding for another State. It depended on the State. Thus, the State of economic control rule might be unfair, because it might have a greater impact on the economies of States that did not have economic control and would be more likely to seek protection.

34. If the idea of the genuine link of the State of incorporation was adopted, most corporations would become stateless, because in practice they would have no possibility of obtaining diplomatic protection. As Mr. Kamto had rightly noted, surely the Commission did not want to encourage the use of tax havens, but it did not want to deprive corporations of the possibility of diplomatic protection. Dual protection of the shareholders—by the State of incorporation and by the State of nationality of the shareholders—would also cause many problems. *Barcelona Traction* was still the safest, clearest, most readily applicable and least confusing alternative.

35. As for draft article 18, subparagraph (a), the requirement that a corporation had ceased to exist might be too high a threshold. It would be preferable to use the words "practically defunct", as in the *Delagoa Bay Railway* case, or the phrase "deprived of the possibility of a remedy available through the company", as in the *Barcelona Traction* case [p. 41, para. 66]. In that way, the corporation would not have actually ceased to exist, but simply become non-functional, leaving no possibility of a remedy.

36. She agreed that draft article 18, subparagraph (b), involved an issue of equity. If the company was compelled to acquire the nationality of the State in which it

<sup>4</sup> See 2756th meeting, footnote 5.



was incorporated, that would bring an equivalent of the Calvo clause<sup>5</sup> into play, because the company would be deprived of any kind of protection. This was a frequent occurrence, and the report cited many examples, such as the *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company* cases. Those important exceptions should be retained; to do otherwise would be unfair to corporations. If the exceptions were recognized and the Commission decided that the State of nationality of the shareholder was entitled to exercise diplomatic protection, the question then arose which State: all of them or just those with economic control? The Special Rapporteur seemed to have in mind any State of any shareholder. In principle, she was not opposed to that view, but it might be better to include a reference to the economic control of the company, which would then need to be defined.

37. Mr. BROWNLIE, raising the question of equity as touched upon by Ms. Escameia when she referred to the second exception in draft article 18, said it was difficult to see how equity applied in that instance. Was the world one in which the importing of foreign capital was compulsory? On the contrary, investors were free agents and could choose to invest as they saw fit. If they were told that a local company must be formed, he did not think it was inequitable for investors to be required to meet certain conditions. Equity cut in different directions. As a result of bilateral investment treaties and other influences, the local remedies rule was in any case frequently inapplicable, and the host State of foreign capital often had to face compulsory arbitration. It was a strange proposition to assert that the matter was one of equity. Investors must take some risks. The attitude of claimant investors under bilateral investment treaties was that they had some sort of guarantee and that if things went wrong, they were going to receive massive damages, which might amount to a considerable percentage of the local economy. Thus, it was important to be very careful when bringing in considerations of equity.

38. Mr. Sreenivasa RAO said he agreed with some of Mr. Brownlie's remarks. The Special Rapporteur's concern about the statelessness of some companies, to which Ms. Escameia had referred, was a problem in isolation. However, in the context of economic development, and given the policies of countries seeking investments; the contractual arrangements currently being entered into, either as investment agreements or in other forms; the strict contractual conditions imposed on the host State; and the threat of massive damages in arbitration cases, the question of statelessness did not seem to pose a problem. Statelessness was a situation in which no other remedy existed and no one was prepared to promote the cause of the injured person, who was left without any way of receiving compensation for a serious injury.

39. How often did nationalization take place nowadays, and how serious was the problem in connection with statelessness? Some analysis was needed if the Commission was to speak of equity. In some cases, heavy damages were sought from States, to the detriment of the local economy—hence the need to be careful about making a case for statelessness in draft article 18, subparagraph (b).

40. Mr. SEPÚLVEDA said he agreed with Mr. Sreenivasa Rao that the question of statelessness was irrelevant, because the corporation was required to have the nationality of the State in which it was incorporated in accordance with the State's legislation. Such a corporation was not defenceless and had a number of forms of recourse, including compulsory international arbitration provided for under bilateral treaties on foreign investment guarantees and protection. But another element had not been taken sufficiently into account: the State in which the corporation was incorporated provided a legal system for settling disputes. Mr. Kamto had cited an extreme case in which the domestic legal system did not apply, but in the overwhelming majority of cases that system operated well, and, as a result, corporations which were incorporated, registered and domiciled in the host State had domestic remedies available to them. Only in exceptional cases was it necessary to apply to an international arbitration court or seek diplomatic protection.

41. Mr. DUGARD (Special Rapporteur), endorsing Mr. Sepúlveda's remarks in response to Mr. Sreenivasa Rao, said that the Commission was not dealing with an issue of statelessness: the corporation was incorporated in the State in which it did business, so it had the nationality of that State. Similarly, the shareholders were not stateless, having the nationality of the State of which they were natural persons. As Mr. Sepúlveda had pointed out, in most cases the corporation would indeed have remedies under the law of the host State. Only where those remedies had been exhausted and no justice obtained would draft article 18, subparagraph (b), come into play.

42. Mr. PELLET supported the Special Rapporteur's reasoning. In the normal situation covered by *Barcelona Traction*, corporation A had the nationality of State B and sustained injury in State C, the shareholder being a shareholder of State B. In the scenario covered by draft article 18, subparagraph (b), the shareholder was still a shareholder of State B, but corporation A had the nationality of the State in which it sustained injury. The difference was that, to draw an analogy with *Barcelona Traction*, the corporation was no longer a Canadian corporation but a Spanish corporation, and, if the corporation was Spanish, the scenario changed completely. Raising the issue of statelessness only complicated matters, as no corporation could be stateless. If the issue of statelessness was left aside, Ms. Escameia was right and, from a purely formalistic standpoint, it was, as Mr. Sepúlveda argued, an internal matter for the State that injured the corporation. If, however, one were to venture beyond such purely formalistic considerations, the problem was no longer merely internal, because the presence of a shareholder internalized an international problem. In such circumstances it was equitable to have recourse to the scenario covered by draft article 18, subparagraph (b), *Barcelona Traction* no longer being applicable because the corporation was Spanish and the shareholder continued to be Belgian.

43. Ms. ESCAMEIA said that her point—one made by the Special Rapporteur in his report—had been that such a situation would *virtually* amount to one of statelessness, in the sense that the corporation would have no State to protect it. Draft article 18, subparagraph (b), applied to a very extreme case, where local remedies could not be exhausted, or had been exhausted; where there could

<sup>5</sup> See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 206–208.

be no recourse to compulsory arbitration; and where the corporation enjoyed absolutely no protection, because it had the same nationality as the State that had injured it. Did the Commission seek, or did it not seek, to protect the capital and investment of a corporation in that situation? That was the policy decision it faced.

44. Mr. Sreenivasa RAO said he had been speaking figuratively in raising the issue of statelessness. If the scenario envisaged under draft article 18, subparagraph (b), was excluded, according to some members, as he understood, a situation tantamount to statelessness might arise.

45. Mr. KOLODKIN said that the Special Rapporteur had correctly defined the scope of his report and of the draft articles. The report provided a relatively clear formulation of an aspect of customary international law that was ripe for codification. He was not sure, however, whether the same could be said of diplomatic protection of other entities. In his view, the report devoted adequate space to an analysis of *Barcelona Traction*, since it was the case in which the general principles governing diplomatic protection of corporations were formulated. Justifiably little space was devoted to the *ELSI* case—a case on the consequences of the specific application of a concrete international treaty, and thus essentially an application of *lex specialis*.

46. The Special Rapporteur's analysis of hypothetical variant formulations of the norm on diplomatic protection of corporations was very useful and made it possible to assess the existing approaches to the question, primarily in doctrine. Last but not least, the Special Rapporteur's conclusions deserved to be supported as a whole.

47. First, he agreed with the general approach and methodology adopted, and could support the Special Rapporteur's proposal, in paragraph 47 of his report, to draft articles on the basis of the principles formulated in *Barcelona Traction*. It was important that that approach should also be consistent with the views of States, at least as formulated in the Sixth Committee.

48. Second, on the substance, it would be correct to start by codifying the rule whereby the right to exercise diplomatic protection of corporations was held by the State of their nationality, before going on to formulate exceptions—cases where such a right might be held by the State of citizenship of the shareholders. He had no problems with draft article 17, but a few doubts as to the exceptions. As the Special Rapporteur had rightly noted, the exceptions had been recognized by ICJ in *Barcelona Traction*, albeit to differing degrees. It must, however, be noted that that part of the Court's decision had given rise to differing opinions. The exceptions were formulated in draft article 18, but perhaps also provided for in draft article 19. In that case, it might be useful not to separate the presentation of draft articles 18 and 19. However, others might take a different view, and he would defer to the Special Rapporteur with regard to the issue of presentation.

49. He had no fundamental doubts about the exception in draft article 18, subparagraph (a), other than for a few minor drafting points. However, he had a few doubts with regard to draft article 18, subparagraph (b). The possible scope of application of the exception should perhaps be

limited to a situation in which the legislation of the host country—the country in receipt of the investments—might require the creation of a corporation. In that regard the exception under subparagraph (b) would be quite justifiable. In his view, the Commission would also be right to limit itself to a codification of the principles found in the *Barcelona Traction* case, as noted by the Special Rapporteur in paragraph 27 of his report, as that case reflected customary international law. Accordingly, draft articles 17 and 18 could be referred to the Drafting Committee.

50. Mr. GAJA said that, in spite of the Special Rapporteur's professed reluctance to take up the subject of diplomatic protection of legal persons, his fourth report was his best yet. He particularly welcomed the Special Rapporteur's clear statement of the options open to the Commission, and of the policy arguments for and against each possible solution.

51. His own claim to expertise in that field rested solely on the fact that he had assisted Roberto Ago in his pleadings on the question of diplomatic protection of shareholders in the *Barcelona Traction* case and had later been one of the counsel in the *ELSI* case, though on that occasion he had not pleaded on the issue currently under discussion. On both occasions he had been engaged on behalf of the respondent State—a fact that might affect his attitude to the present matter.

52. He agreed with the Special Rapporteur's approach of taking the *Barcelona Traction* judgment as guidance for his own proposals. In spite of certain commentators' attempts to draw elements from the *ELSI* judgment on the basis of which to reconsider what ICJ had said in the *Barcelona Traction* case, he found that little could be gleaned from that case for the Commission's purposes. The Court's jurisdiction in the *ELSI* case had been limited to the interpretation and application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy<sup>6</sup>—one of the many concluded by the United States in the period immediately following the Second World War. The applicant and respondent States had agreed that the treaty granted rights to shareholders, but they had differed about the extent of those rights. For instance, did the shareholders' rights to organize, control and manage a corporation under article III of the treaty include the right that the assets of the corporation should not be the object of requisition? The Chamber of the Court had not found it necessary to reach a conclusion on the extent of rights, but had hinted in some passages of the judgment that the wider interpretation of the treaty provision was more acceptable. The *Barcelona Traction* judgment, which concerned general international law, had indeed been referred to, albeit in passing, in the parties' pleadings, but it could hardly be considered as decisive for the interpretation of the relevant treaty. It was quite understandable that bilateral investment treaties and also treaties of friendship, commerce and navigation set out to give shareholders wider protection than was otherwise available under general international law.

53. Regarding the basic rule drawn from *Barcelona Traction* by the Special Rapporteur in draft article 17,

<sup>6</sup> Signed in Rome on 2 February 1948 (United Nations, *Treaty Series*, vol. 79, no. 1040), p. 171.

he had no objection to suppressing one of the two formal criteria listed in that judgment, namely, the criterion, currently placed in square brackets, of the registered office. As the Special Rapporteur noted, the registered office was generally located in the State of incorporation. In his view, the main reason why the Court had mentioned that both the place of incorporation and the registered office should be located in the State exercising diplomatic protection was that civil-law countries tended to give relevance to the place of the seat, whereas common-law countries preferred the criterion of the place of incorporation, particularly where conflicts of laws arose. The Commission could well accept one single criterion, and the choice of place of incorporation seemed justified, in view of its growing dominance in other areas of law.

54. On the other hand, he would hesitate before eliminating from the general rule any reference to the existence of an effective link between the corporation and the State of nationality. First of all, he understood the *Barcelona Traction* judgment as having asserted that requirement, only finding that “no absolute test of the ‘genuine connection’ has found general acceptance” [p. 42, para. 70]. Thus, the test had in fact also been used by the ICJ, as had been noted in particular in Judge Fitzmaurice’s separate opinion.

55. Furthermore, as a matter of policy, the reasons militating in favour of dropping a reference to effectiveness with regard to the nationality of individuals did not fully apply to the case of corporations. In many States incorporation was not made conditional on any substantial link between the corporation and the State of incorporation. Thus, incorporation was a much more tenuous relationship than citizenship as between the individual and the State. Admittedly, as the Special Rapporteur noted, in the absence of an effective link the State of nationality of incorporation was in any case unlikely to exercise diplomatic protection. However, that did not seem sufficient reason for saying that the State of incorporation *could* exercise diplomatic protection. Thus, he would favour the introduction of some element to that effect.

56. On the exceptions, like other members he had no particular problems with draft article 18, subparagraph (a), although it raised some questions of drafting and of substance. As to article 18, subparagraph (b), he noted, first, that ICJ had been much less affirmative with regard to that exception in the *Barcelona Traction* judgment. With regard to subparagraph (a), some elements in paragraph 66 of the judgment conveyed, albeit implicitly, that the Court favoured the existence of that exception. However, as to the second exception, in a passage cited in paragraph 75 of the fourth report, the Court had not endorsed that exception in the same way as the separate opinions of Judges Fitzmaurice, Tanaka and Jessup had. It might also be recalled that Judge Padilla Nervo had affirmed that the passage in question did not imply the existence of an exception of a more general scope—an understandable view, given that judge’s attitude to general international law concerning protection of shareholders. Thus, the exception under subparagraph (b) did not have a strong basis in the *Barcelona Traction* judgment.

57. As for the policy aspects, the exception, if it was to be retained, needed to be qualified. Most investments that

gave rise to wrongful acts were made by companies incorporated in the State of investment, although they might be part of a group of corporations based elsewhere. Hence, in a majority of cases the exception, rather than the rule, would apply. It was true, as had been mentioned in the report and in the debate, that in many cases foreign would-be investors were required to establish a corporation in the host State. That might be one of the elements of equity. However, if an exception as stated in draft article 18, subparagraph (b), were adopted and came to be accepted as an expression of general international law, the host State would be wise to make it a condition for an investment, not that the company should be incorporated locally, but that it should be incorporated elsewhere, so that it would not come under the exception that would open up the way for the protection of all the shareholders.

58. Finally, he shared the doubts voiced by Ms. Escarameia regarding the general reference to “shareholders”. That reference, understandable in the context of draft article 18, subparagraph (a), should perhaps be narrowed down in the context of article 18, subparagraph (b), so as to obviate the possibility of intervention by the national States of minority shareholders.

59. Mr. PELLET said it appeared to be generally accepted that determination of the nationality of corporations was a problem of internal law. Mr. Gaja had explained that internal laws varied in that regard and fell into two major systems: common-law countries favoured the criterion of the place of incorporation, while countries espousing civil or Romano-Germanic law favoured the criterion of the place of the registered office. What he failed to understand was the conclusion drawn by Mr. Gaja from that observation, namely, that the registered office criterion should be abandoned in favour of the incorporation criterion. That position was all the more regrettable in that Mr. Gaja hailed from a country that had seen the birth of Roman law. He was at a loss to understand why Mr. Gaja wished to throw himself voluntarily to the lions and place himself under the protection of common-law imperialism. There was no reason to accord precedence to either one of the two alternative systems. It was absolutely indispensable to retain the words “and in whose territory it has its registered office”, in draft article 19, paragraph 2, amending the conjunction “and” to read “or”, so as to reflect the fact that the two systems were equally valid.

60. Mr. GAJA said that not all the “Latin” countries adopted the criterion of the seat. In Italian law, for instance, article 25 of Law 218 (1995) on private international law used the criterion of incorporation.

61. As for the alternative nature of the two criteria, the *Barcelona Traction* judgment referred to “the State under the laws of which it is incorporated *and*\* in whose territory it has its registered office” [p. 42, para. 70].

62. It was questionable whether it was really internal law that conferred nationality on corporations. He had some doubts as to whether that was true with respect to legal, as opposed to natural, persons. The system of attribution of nationality to corporations varied, depending on whether, for instance, taxation, investment or corporate law issues were involved.



63. Mr. MELESCANU noted that Mr. Gaja had endorsed Ms. Escameia's idea of possible actions for diplomatic protection by shareholders of the State representing the majority shareholders. If the Commission pursued that idea, it would come up against a problem posed by the legal systems of all countries that had a functioning market economy, namely, the existence of special laws protecting minority shareholders. If the Commission wanted to introduce the concept of majority shareholders, it would have to deal with other issues that included the rights of minority shareholders.

64. He was impressed by Mr. Gaja's reasoning with regard to paragraph 24 of the report. He agreed strongly that, if the Commission chose to establish a clear exception like the one in draft article 18, subparagraph (b), it would face exceptional situations. For instance, in order to avoid actions for diplomatic protection based on that exception, States might be tempted to require corporations to incorporate in another country. That could also affect the proposed approach, which he supported, of using the principles enunciated in the *Barcelona Traction* case as a basis for the present draft.

65. Mr. KAMTO, referring to the suggestion to delete the wording in square brackets in draft article 17, paragraph 2, said that the criteria of State of incorporation and territory of registered office were cumulative, not alternative. Both criteria were stated clearly in the *Barcelona Traction* judgment, where the conjunction "and" was used rather than "or". The Commission could not use internal law as a starting point; it must start from the problem created in international law in order to solve it. If it retained only the criterion of State of incorporation, the indirect effect would be to encourage tax havens: companies would incorporate in one State and conduct their operations in another. The Commission should not encourage such practices by adopting a rule that departed from the clear criteria set in *Barcelona Traction*, which must be the point of departure for the draft articles.

66. The exception in draft article 18, subparagraph (b), might prompt States to require foreign companies to incorporate elsewhere in order to avoid actions for diplomatic protection. He did not see what States would gain from doing so, however, since the country in which the company had its registered office would be able to exercise diplomatic protection. States might escape actions for the diplomatic protection of shareholders, but they would not escape actions for diplomatic protection completely.

67. Not only did the idea of restricting protection to majority shareholders complicate matters, it was also discriminatory. He supported Mr. Momtaz's suggestion to impose a reasonable time limit for instituting diplomatic protection proceedings under draft article 18, subparagraph (b), and felt that the Commission should consider that idea.

68. Mr. CHEE, referring to draft article 18, subparagraph (b), asked Mr. Gaja what State, other than the host State, could cause injury to shareholders. From his own experience—for instance, with the Agreement between the Government of the Republic of Korea and the Government of the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments—it

seemed that the practice was for the parties to go directly to arbitration if there was a disagreement over interpretation, making diplomatic protection unnecessary.

69. Mr. GAJA, responding to Mr. Chee, agreed that in most, although not all, cases it was the host State that caused the injury. Mr. Kamto hoped to discourage companies from incorporating in countries with which they had no ties. However, the establishment of a registered office was entirely formal. If the Commission were to admit diplomatic protection on the part of States where companies were actually based and from which they were effectively controlled, it would be applying the opposite criterion from that identified in *Barcelona Traction*. If a company could be protected by the State of nationality of its shareholders, the host State would not gain much by requiring the company to take its nationality. A host State's interest would be to impose the condition that the company must not be incorporated in the State of nationality of the shareholders. Again, a company might feel that an action for diplomatic protection was sufficiently remote for it to stand to gain more from a taxation standpoint by incorporating in a country that was friendly to it.

70. Mr. MANSFIELD thanked the Special Rapporteur for his very thorough report and excellent introduction. The report made it clear that the *Barcelona Traction* judgment must be the starting point for any codification exercise. The criticisms made of that judgment, as detailed in paragraphs 14 to 21 of the report, were certainly important factors. In essence, the rule expounded in the judgment had become increasingly divorced from how States actually behaved, because companies continued to incorporate themselves, for tax reasons, in places with which they had little or no connection. They had effectively decided that tax advantages were more important to them than the possibility of recourse to diplomatic protection and had found it more useful to rely on the arrangements established through their States in bilateral investment treaties.

71. That situation confronted the Commission with a dilemma: either it codified rules on the basis of *Barcelona Traction*, knowing that such rules were irrelevant to current State practice, or it tried to develop a new or supplementary basis for the exercise of diplomatic protection of corporations and shareholders, but without there being any firm grounding for such a new rule in current State practice or any indication that such a rule would make diplomatic protection more relevant to the lives of States and companies or would even be desirable.

72. He agreed with the Special Rapporteur's conclusion that the wisest course was to draft articles based on the principles of *Barcelona Traction*. If future changes in the commercial world prompted corporations to attach more importance to diplomatic protection than they did at present, it would be for them and their shareholders to choose to incorporate in a country with which they had a genuine link and which might be willing to exercise diplomatic protection on their behalf. If, however, they preferred to obtain tax advantages by incorporating in countries with which they had little or no connection, and to rely on the protections available under bilateral investment treaties, that was their choice. If Governments themselves saw advantages in changing the basic rule of *Barcelona Traction*, they could always consider a multilateral treaty

to that effect. One advantage of basing the Commission's draft articles on *Barcelona Traction* was that it might encourage Governments to consider whether they wanted to propose a change based on the wide variety of bilateral investment treaties in existence. Thus far, the debate in the Sixth Committee seemed to suggest that they did not.

73. As to the draft articles, his initial reservations about the exception envisaged in draft article 18, subparagraph (b), had been strengthened by what Mr. Brownlie and other members had said. On the face of it, as the Special Rapporteur noted in paragraph 87 of the report, there was a basis in equity for such an exception where a company had been compelled to incorporate in the wrongdoing State. However, investors had a choice as to whether they accepted such a requirement. He was not sure that there was a significant point of equity underlying the issue, and he was still not fully persuaded of the need for the exception. That point aside, he was in favour of referring draft articles 17 and 18 to the Drafting Committee. For the reasons given in paragraph 56 of the report, he thought there was a strong case for deleting the words in square brackets in draft article 17, paragraph 2. However, the Drafting Committee could consider whether, in terms of the different possibilities under civil and common law, there was merit in including both criteria.

74. Mr. KATEKA said that, in introducing a stimulating report, the Special Rapporteur had asked the Commission to decide whether or not it wanted to follow the *Barcelona Traction* judgment. He personally felt that the *Barcelona Traction* judgment should be the starting point for the Commission's discussion of draft articles on diplomatic protection of corporations and shareholders. Despite the many criticisms of that judgment, most notably that it established an unworkable standard, that it overlooked policy considerations such as dual protection and multiplicity of claims and that ICJ had mishandled the relevance of the *Nottebohm* case, he shared the view expressed in paragraph 27 of the report that *Barcelona Traction* was an accurate statement of the law on the diplomatic protection of corporations and was a true reflection of customary international law.

75. The *Barcelona Traction* judgment also reflected the ideological and cultural differences among the eight judges who had given separate opinions. The judges from capital-exporting countries had supported the right of the shareholders' State of nationality to invoke diplomatic protection, while the judges from developing countries had contended that it was not the shareholders who needed protection, but the poorer or weaker States where the investment took place. Such States needed protection from powerful financial groups or against unwarranted diplomatic pressure from governments of the economic North.

76. In that connection, he acknowledged that globalization was inevitable and that, as a result, the situation had changed since *Barcelona Traction*. That did not alter the fact that globalization was inequitable for weak countries, however. To take foreign direct investment as just one example, sub-Saharan Africa received less than 2 per cent of global foreign direct investment, and 80 per cent of that went to South Africa and Nigeria. Globalization could not

be halted, but it was essential to make sure that no one was left behind.

77. Support for capital-exporting countries had also been expressed by Bederman and by Kokott, who was quoted in paragraph 17 of the report as having concluded that diplomatic protection had been sidelined by bilateral investment treaties because investors distrusted its political uncertainty and discretionary nature and preferred to opt for international arbitration. He felt that investors' fears were misplaced. Bilateral investment promotion and protection agreements, coupled with national legislation on investment guarantees, continued to attract investors, and recourse to international arbitral proceedings under those arrangements need not supplant diplomatic protection. He was concerned, therefore, that Kokott was quoted in paragraph 51 of the report as saying that, "in the context of foreign investment, the traditional law of diplomatic protection has been to a large extent replaced by a number of treaty-based dispute settlement procedures".<sup>7</sup> He disagreed that treaties replaced custom: the two existed side by side. In any case, ICJ had held in *Barcelona Traction* that investment treaties belonged to the realm of *lex specialis*, a subject on which the Special Rapporteur had said he would produce a separate report.

78. In paragraph 22 of his report, the Special Rapporteur appeared to be inciting the Commission to rebel against ICJ by saying that decisions of the Court were not binding on the Commission and that the Commission had severely limited the scope of one decision by the Court and expressly rejected another. He suspected that the intention of the Special Rapporteur's punchline—"Barcelona Traction is not sacrosanct, untouchable"—was to see how the Commission reacted. His own view was that paragraph 22 might have overstated the case. The limitations suggested by the Commission had been mainly in the form of commentaries, and the Special Rapporteur's apparent frontal attack on the Court reminded him of Judge Fitzmaurice's lament that the drafters of the Charter of the United Nations, and hence of the Court's Statute, had been wrong to label judicial decisions, including those of the Court, as subsidiary means for the determination of the rules of law in Article 38 of the Statute. If judicial decisions had been put on a par with treaties and customary law, the Court might have been shown more respect. Notwithstanding Mr. Brownlie's comments about the Court and how it took decisions, he felt that it was inappropriate for the Commission to openly challenge the Court.

79. In his report the Special Rapporteur had suggested seven options for the proposed articles, some of which—2 and 5, for instance—overlapped. He welcomed the Special Rapporteur's focus on option 1, involving the State of incorporation, which was based on the rule in *Barcelona Traction*. He had no problems with paragraph 1 of draft article 17 and would prefer to delete the wording in square brackets in paragraph 2. His preference was not influenced by the Commission's debate on civil versus common law, however. With regard to the exception in draft article 18, subparagraph (a), it was to be hoped the Special Rapporteur would make it clear in a commentary that the interpretation of "ceased to exist" was that given in paragraph 67 of the *Barcelona Traction* judgment, namely, that, a

<sup>7</sup> *Loc. cit.* (2756th meeting, footnote 5), p. 277.

company continued to exist even if it was in receivership; it ceased to exist only when it went into liquidation. The Special Rapporteur considered the exception in draft article 18, subparagraph (b), to be the most important one, and it was the one that three judges in *Barcelona Traction* had said reflected customary international law. He wondered how two contradictory rules of international law could be said to exist, and he was therefore opposed to including that exception in the draft articles. Presumably the third exception, covering cases in which the direct rights of shareholders were infringed, was addressed in an article that had yet to be introduced. Draft articles 17 and 18 could be referred to the Drafting Committee.

80. Mr. DUGARD (Special Rapporteur) confirmed that the third exception was dealt with in draft article 19.

81. Mr. CHEE, expressing surprise at Mr. Kateka's preference for deleting the wording in square brackets in draft article 17, paragraph 2, said it was his understanding that the wording was drawn directly from the *Barcelona Traction* judgment.

82. Mr. DUGARD (Special Rapporteur) confirmed that that was so, but said that the Commission needed to decide whether or not it wanted to follow that judgment in the present draft articles.

*The meeting rose at 1 p.m.*

## 2758th MEETING

*Friday, 16 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR invited the Chair of the Planning Group, Mr. Melescanu, to announce the composition of the Group.

2. Mr. MELESCANU (Chair of the Planning Group) said that the Planning Group would be made up of the following members: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Koskeniemi, Mr. Mansfield, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda and Mr. Yamada. He urged the special rapporteurs and the Rapporteur of the Commission to take part in the Group's work.

## Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. Mr. KOSKENIEMI said that the fourth report of the Special Rapporteur (A/CN.4/530 and Add.1) examined in depth two rather contentious issues, the first one being that of the nationality of a corporation. On that point, the Special Rapporteur urged the Commission to adopt the *Barcelona Traction* principle, namely, that the State of nationality of a corporation was the State in which it was incorporated. The second issue related to the case covered in draft article 18, subparagraph (b): when the corporation had the nationality of the State responsible for causing injury to it. One's position on those problems depended on one's view of corporate activity today and the particular situation in question. The more he thought about big multinational corporations with global strategies, the more he was in favour of ensuring that the host State was not beset by a large number of claims from foreign shareholders. On the other hand, if he looked at the case of small companies in developing economies, he was inclined to say that the shareholders needed protection. As big corporations dominated today's global economy, he tended to prefer the first position, perhaps to the detriment of the protection of the shareholders of small companies. He would have liked to find language to introduce the ideas of "equity" and "reasonableness" in draft article 17 or 18, but, as the Special Rapporteur pointed out, such rules were largely covered by bilateral investment treaties, so that the rules being considered by the Commission were merely residual in nature. He did not believe that the Commission was bound by the decisions of ICJ and, in particular, by the *Barcelona Traction* judgment. Those judgments had only the value that the Court's reasoning in them had. He also

\* Resumed from the 2751st meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



doubted that, in defining customary law, any conclusions could be drawn from lump-sum agreements or the provisions of bilateral investment treaties because such treaties were the result of bilateral negotiations and trade-offs and thus not amenable for generalizations.

4. Draft article 17, paragraph 1, was a reformulation of the principle contained in the *Barcelona Traction* judgment, pursuant to which the State of nationality was the State in which the corporation was incorporated. That principle had been criticized because a genuine link between the corporation and the State of nationality had been considered necessary. The Special Rapporteur's options were reformulations of the idea that the nationality of the corporation should be consistent with a social and economic context. In his view, the Special Rapporteur should have examined in greater depth the criterion of the domicile or *siège social* (see para. 31 of the report, option 3), which was the practice in international private law. The importance of the economic and social context for deciding on the nationality of the corporation was underscored by the global nature of the activities of big corporations and the fact that the place where they were incorporated could be chosen, for example, solely on the basis of tax considerations. In such a case, however, the corporation deprived itself of the possibility of diplomatic protection. He therefore endorsed the principle embodied in paragraph 1 and the rationale behind it. The words in brackets in paragraph 2 were unnecessary and could easily be deleted, whereupon draft article 17 could then be referred to the Drafting Committee.

5. He had no objection to the wording of draft article 18, subparagraph (a), which could be referred to the Drafting Committee. On the other hand, he had reservations about subparagraph (b), because, in the case in which a big corporation decided to be incorporated in a State and its shareholders suffered an injury owing to activities which that State had undertaken because of economic problems, he saw little reason to make life for the host State more difficult by allowing the State of nationality of the shareholders to exercise diplomatic protection on their behalf. He was thus opposed to referring subparagraph (b) to the Drafting Committee.

6. Mr. MOMTAZ said that the Special Rapporteur had dealt in depth with the important question of diplomatic protection of foreign corporations and their shareholders. It was no longer possible to study that question without taking account of contemporary economic realities. The time was long past when developing countries had shown distrust of foreign investors, fearing interference in their internal affairs by large financial groups. States now wished to attract foreign investment in order to promote their economic development and were ready to provide the necessary guarantees to achieve that objective. That concern was demonstrated not only in bilateral and multilateral foreign investment treaties, but also unilaterally, in foreign investment codes, which might usefully be studied in order to identify State practice in that area. Regardless of their level of development, all States were dependent on foreign investment, and international law must thus offer investors the necessary guarantees. The Commission must seek to ensure that the law coincided with the facts while maintaining a balance between the interests of States and those of investors. That was the background against which

the report defended the right of the State to exercise diplomatic protection on behalf of a corporation that had its nationality and also, subsidiarily, on behalf of shareholders who had its nationality. He thus endorsed draft article 17, paragraph 1, which reaffirmed the principle set forth in the *Barcelona Traction* judgment, but nonetheless thought it necessary to retain the text enclosed in square brackets in paragraph 2, replacing the conjunction "and" by the conjunction "or", since several countries did not require corporations incorporated under their law to have their registered office in their territory.

7. Article 18, subparagraph (b), provided for an exception to the nationality rule, for example, in the case where the host State required the foreign corporation to be incorporated in accordance with its internal law. Shareholders injured by a wrongful act of the host State must then be able to enjoy the diplomatic protection of their national State. However, that exception might jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State, thereby contravening the international rules governing treatment of foreigners. Admittedly, if foreign shareholders had no remedies other than those open to nationals, they would run up against the difficulties already identified in cases where there was no voluntary link between the injured persons and the State responsible for the wrongful act. But that rule remained controversial and could thus not be considered to be a customary rule. Instead, it belonged to the domain of progressive development of the law and, as such, deserved closer consideration. That exception was necessary, for shareholders could not be left defenceless and deprived of any possibility of protection by the State of which they were nationals. However, he preferred not to support it at that early stage, considering that the matter merited more reflection, perhaps in order to consider a saving clause aimed at limiting the consequences of its implementation—in other words, limiting the number of claims submitted by States whose nationals had been injured.

8. Furthermore, he noted a contradiction between paragraphs 22 and 25 of the report. In paragraph 22 it was stated that, in the *Barcelona Traction* judgment, ICJ was not codifying international law but resolving a particular dispute, with the result that its "rule" was to be seen as a judgement on particular facts and not as a general rule applicable to all situations; whereas paragraph 25 stated that the Court was concerned with an evaluation of customary international law. The latter point of view should prevail, since it strengthened the authority of the *Barcelona Traction* judgment, which constituted the basis for draft article 17 and draft article 18, subparagraph (a).

9. Mr. YAMADA said that the Special Rapporteur had endeavoured to modify the principles set forth in *Barcelona Traction*, taking account of the criticisms to which it had been subjected. Nevertheless, despite its shortcomings, that judgment was an accurate statement of the contemporary state of the law with regard to the diplomatic protection of corporations and a true reflection of customary international law in that regard.

10. Drawing attention to recent foreign investment protection practices through procedures provided for in bilateral and multilateral treaties, the Special Rapporteur

wondered whether the Commission might feel compelled to formulate rules according more fully with the reality of foreign investment and encouraging foreign investors to turn to diplomatic protection rather than to the protection offered by investment treaties. In his view, diplomatic protection should not be accorded precedence, since it posed difficult political and diplomatic problems for the State entitled to exercise it. During his 40 years in the Japanese Ministry of Foreign Affairs, he had never encountered any case in which Japan had exercised diplomatic protection or in which a foreign State had exercised it against Japan. On the other hand, consular protection was a much more widespread practice. He thus considered that investors were better protected by the special arrangements under their investment treaties than by diplomatic protection.

11. The distinction between a corporation and its shareholders was now more important than it had been in the past. There were significant instances of aggressive takeovers, mergers and liquidations, while shares constantly changed hands at a very rapid pace. In such circumstances, it would assist the orderly conduct of economic activity to shield shareholders behind the veil of the company.

12. He had no criticism to make on the substance of draft articles 17 and 18 but thought that they might need some drafting amendments. The text of draft article 17, paragraph 1, should also be aligned with that of draft article 3, paragraph 1, which the Commission had provisionally adopted at the preceding session.<sup>3</sup> He thus proposed the following wording: “The State entitled to exercise diplomatic protection in respect of an injury to a corporation is the State of nationality of that corporation.” Similarly, the definition of the State of nationality of a corporation, in draft article 17, paragraph 2, might be reformulated. It might also be useful to explain in the commentary that “corporation” meant a limited liability company whose capital was represented by shares. He had no strong views concerning the bracketed phrase. However, if it was to be kept, it should be a cumulative condition.

13. He had no problems with the two exceptions provided for in article 18. Accordingly, he proposed that draft articles 17 and 18 should be referred to the Drafting Committee.

14. In conclusion, he asked the Special Rapporteur whether, in the third part of the report, dealing with legal persons, he intended to examine the case of other entities such as other types of commercial corporation or entities with non-commercial purposes and, if so, whether he thought there was enough case law and practice to warrant codification.

15. Mr. DUGARD (Special Rapporteur) confirmed that he intended to include a provision dealing with other legal persons in that part of the report. At the current stage of his work, he envisaged a provision stating that the rules enunciated in the articles dealing with corporations also applied, *mutatis mutandis*, to other legal persons.

16. Mr. Sreenivasa RAO said that the Special Rapporteur had squarely raised the question of the rights of the

State of nationality of the shareholders in a company registered or incorporated in a foreign jurisdiction and had rightly accorded the dictum of ICJ in the *Barcelona Traction* case primary attention in his analysis. His own view was that many of the criticisms of the Court’s judgment were beside the point: the main point at issue was not who deserved diplomatic protection more—the developing countries or the shareholders of a company—but how the institution of diplomatic protection operated in the case of legal persons and under what circumstances the State of nationality of shareholders should be entitled to espouse their claims.

17. First, it was clear that a company which was registered or incorporated in a country had the nationality of that country. Moreover, companies did not register or incorporate in more than one country, even if they operated effectively from another country. Second, it was equally well understood that the personality of the company thus constituted was different from the personality of its shareholders, who bore only limited liability. In those circumstances, when an injury was caused to the corporation, the basic principle was that the State of incorporation would be entitled to exercise diplomatic protection in accordance with international law. The point had been made that many countries did not espouse the claims of companies, even if they were incorporated in their jurisdiction, unless some special bond or common interest existed between them and the companies concerned. That was not unusual, however, and did not apply only in the case of legal persons. As the Special Rapporteur noted in paragraph 76 of his report, ICJ had emphasized in *Barcelona Traction* the discretionary nature of the exercise of diplomatic protection by the State of nationality. It was difficult, therefore, to envisage any exception to the basic principle on grounds of special circumstances affecting the incorporation of companies.

18. The argument that a “genuine link” was a valid basis for the country with preponderant or effective control of the company to espouse the claims of its shareholders as shareholders was equally unconvincing. The genuine link principle arose under the law of diplomatic protection only in the case of persons with more than one nationality. It could not be extended to corporations or legal persons, which could not have dual nationality, and this possibility should not be envisaged. For that reason, he agreed with the many speakers who had suggested that the words in square brackets in draft article 17, paragraph 2, should be deleted. He agreed, in that connection, with the comment in paragraph 53 of the report that the presence of a registered office in the State of incorporation was a consequence of incorporation and not independent evidence of a connection with that State. For the reasons noted, he had no difficulty with draft article 17, paragraph 1, or with paragraph 2, subject to the deletion of the words in square brackets.

19. The next issue for consideration was the extent to which the Commission should entertain an exception or exceptions to the basic rule that the State of nationality of the shareholders in a corporation was not entitled to exercise diplomatic protection on their behalf. The exception in draft article 18, subparagraph (a), was based on the dictum of ICJ in the *Barcelona Traction* case and had the support of most members of the Commission, including

<sup>3</sup> See footnote 1 above.

himself. In that regard, he joined Mr. Kateka in recommending that the Commission should show the same caution as the Court and allow the right to diplomatic protection only in the event of the “legal demise of a company” [p. 41, para. 66] and not in the event of its “paralysis” or “precarious financial situation” [*ibid.*]. On the question as to which law should determine the fact of legal demise, the Special Rapporteur indicated in paragraph 64 of his report that a company “died” when it was wound up according to the law of its State of incorporation.

20. Turning to the exception in draft article 18, subparagraph (b), some members of the Commission were—rightly, in his opinion—hesitant to endorse it. With regard to the reasons of equity invoked in favour of that exception, particularly where the company’s nationality did not result “from voluntary incorporation” but was “imposed on it by the government of the country or by a provision of its local law as a condition for operating there, or of receiving a concession” [separate opinion of Judge Fitzmaurice, p. 73, para. 15], it had rightly been pointed out that the company had a choice not to invest in such a country. If it did so, in full knowledge of the consequences, there appeared to be little compulsion. In addition, it should be noted that most recent investment protection agreements provided effective legal remedies for investors in the case of any denial of justice or wrongdoing by the State of incorporation resulting in injury to the corporation. That trend towards recourse to international arbitration, including ICSID, raised the question whether any additional remedy at the international level in the form of diplomatic protection was needed. He therefore tended to agree that the exception in draft article 18, subparagraph (b), could be safely excluded without in any way compromising the position of corporations. The deletion of that exception would also obviate the need for the Commission to speculate on the conditions or limitations under which it should be applied.

21. He therefore supported referring only draft article 18, subparagraph (a), to the Drafting Committee.

22. Mr. DUGARD (Special Rapporteur), referring to Mr. Sreenivasa Rao’s comments on draft article 18, subparagraph (b), asked what would happen in a situation where the foreign shareholder had no access to any alternative remedy. The shareholder did have such a remedy if his State of nationality was a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, but many countries were not. Should one simply accept a situation of that kind?

23. Mr. Sreenivasa RAO said that the Special Rapporteur was right in pointing out that many countries were still not parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. However, if one looked at the investment agreements concluded in recent years, such as those concluded by India, they invariably provided for foreign applicable law and compulsory arbitration clauses. The ICSID mechanism was one of the alternatives and applied automatically when both countries were parties to it, but there were other arbitration procedures available to the company.

24. Mr. DUGARD (Special Rapporteur) said that Mr. Sreenivasa Rao was referring to the progressive Indian

system, but the fact remained that there were many countries which did not have laws of that kind, with the result that the shareholder in a company incorporated in a foreign country was frequently left without any remedy at all. That was why he had suggested that there should be a residual right of protection.

25. Mr. CHEE said he agreed with Mr. Sreenivasa Rao that provision for arbitration under bilateral investment treaties was the usual practice. However, arbitration was just one of several possibilities. It was possible that, in addition to arbitration clauses, other legal language that was common to different countries might be included in such treaties, since applicable law also played a role. If so, the interpretation and application of the treaty could give rise to differences.

26. Mr. Sreenivasa RAO, while acknowledging that such clauses were not easy to apply, said that investment treaties were nevertheless favourable to most investors. Moreover, some of those treaties also envisaged possibilities of diplomatic protection whereby, rather than going to court, the State of nationality of the shareholders could approach the Ministry of Foreign Affairs of the country causing the injury in order to present their grievances.

27. Mr. SEPÚLVEDA congratulated the Special Rapporteur on his excellent report, which was not only conceptually rich and intellectually precise but also innovative in many respects. He was particularly glad to see that the Special Rapporteur had offered the Commission a number of options, together with a critical analysis. He likewise endorsed the idea of preparing draft articles embodying the principles laid down in the *Barcelona Traction* case. However, he had none of the doubts that regularly plagued the Special Rapporteur, who first recalled that the decisions of ICJ were not binding on the Commission, then emphasized that the *Barcelona Traction* decision was not sacrosanct and subsequently invited the reader to consider a range of possibilities for departing from the course followed by the Court. He acknowledged that *Barcelona Traction* was undoubtedly a significant judicial decision, only to downgrade its significance by saying that the underlying reasoning was hardly persuasive and that it showed a lack of concern for the protection of foreign investment. Instead of such soul-searching, he himself frankly preferred the Special Rapporteur’s conclusion that, 30 years on, the *Barcelona Traction* decision was widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but also as a true reflection of customary international law.

28. The principle embodied in that decision was reflected in draft article 17, which he endorsed, although he would make a few comments that might help to define its scope.

29. First, as was indicated in article 1 of the draft articles provisionally adopted by the Commission at its previous session, it must be assumed that the injury that prompted the State of nationality to exercise diplomatic protection of a corporation was caused by an internationally wrongful act committed by a State, something which was linked to the topic of State responsibility.



30. Second, the nature and consequences of the injury could vary considerably. The draft articles on State responsibility for internationally wrongful acts<sup>4</sup> created a special category of offences, namely, serious breaches of peremptory norms of international law. Without going so far as to transpose that type of provision, it would be useful, perhaps in the Special Rapporteur's commentary, to mention that there was such a thing as particularly serious injury. For example, confiscation of the property of a company carried out with no view to the public interest, in violation of the law and without appropriate compensation, could not be placed on the same footing as the pressure that might be brought to bear by a host country on a company to compel it to appoint someone of a given nationality to an executive position. Hence the usefulness of differentiating between injury arising from a serious and systematic breach of an international obligation and injury which was comparatively less serious. Obviously, the consequences of such a classification would also have to be specified, particularly with regard to compensation.

31. Third, the nature of the injury could differ radically depending on whether it was to a legal person (economic loss, for example) or to a natural person (the violation of a fundamental right or an attack causing bodily harm, for example). A natural person could also suffer economic loss, although evaluating the non-material damage done to a legal person would be more difficult.

32. It was important to retain the two criteria stated in article 17, paragraph 2, namely, that the corporation must both be incorporated and have its registered office in the territory of the State that granted it nationality, so as to avert artificial situations such as flags of convenience and the use of tax havens. True, it was difficult to establish the existence of a "genuine link", and that was why the Special Rapporteur might give examples in his commentary of particular instances such as the payment of taxes to the State where the office was located or the employment of nationals of that State.

33. As far as terminology was concerned, it would be more accurate to use the words *está facultado para ejercer* rather than the words *tendrá derecho a ejercer* in the Spanish text of draft article 17.

34. He fully endorsed the introductory part of draft article 18 and the first exception provided for in subparagraph (a), but he thought that the second exception should not be retained because, as was indicated in paragraph 5 of the report, there was a clear-cut distinction between the shareholders and the company: a legal relationship was established solely between the company and the State that granted it nationality, and, according to a general principle of law, that State could not bear responsibility for damage caused to its own nationals. It could also not be said that the only relief available to a company on the international plane was action by the State of nationality of the shareholders, and it was wrong to say, as Mervyn Jones did in the quotation in paragraph 65 of the report, that if the normal rule was applied, foreign shareholders were at the mercy of the State in question; they might suffer serious

loss and yet be without redress.<sup>5</sup> That would imply that there was no domestic legal system and that the rule of law had given way to power-based rule. That system did exist in many countries, of course, and a number of examples could be given, but it must be borne in mind that the investor must assume some responsibility for risk assessment. Concern to ensure equitable treatment to nationals and foreigners should be reason enough to do away with the exception in draft article 18, subparagraph (b).

35. In conclusion, he said that bilateral or multilateral investment treaties usually provided that recourse to international arbitration ruled out all other recourse procedures. In order to shed new light on the Commission's work, the Special Rapporteur might review the major arbitral awards which related to foreign investment and in which diplomatic protection was frequently mentioned.

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

[Agenda item 2]

36. The CHAIR said that he had completed his consultations on the subject and suggested that Mr. Koskenniemi should be appointed Chair of the Study Group on the Fragmentation of International Law. If he heard no objection, he would take it that the Commission agreed with that suggestion.

*It was so decided.*

*The meeting rose at 11.30 a.m.*

## 2759th MEETING

*Tuesday, 20 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

<sup>4</sup> See 2751st meeting, footnote 3.

<sup>5</sup> See M. Jones, "Claims on behalf of nationals who are shareholders in foreign companies", *BYBIL*, 1949, p. 225, especially p. 236.

**Diplomatic protection<sup>1</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)**

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ADDO, commending the Special Rapporteur on a comprehensive and scholarly report (A/CN.4/530 and Add.1), said he agreed entirely with the comments concerning draft article 17, which in his view represented *lex lata* and must be codified. He also concurred with the statement in paragraph 47 of the report that, despite much criticism, *Barcelona Traction* enjoyed widespread acceptance on the part of States. Draft article 17 should therefore be referred to the Drafting Committee.

2. Draft article 18, however, posed problems. As to its subparagraph (a), perhaps the Special Rapporteur would clarify why, at the mere demise of a corporation in its place of incorporation, the State of nationality of the shareholders would automatically have to exercise diplomatic protection on their behalf. He would have thought that the shareholders had the right to share in the residual or surplus assets of the corporation in liquidation and that the company's liquidator would take care of matters following its demise. Shareholders could and should have direct access to the liquidator to settle any residual issues. Indeed, shareholders could bring action against the liquidator and vice versa. If the shareholders directly affected in their right to share in the surplus assets of the corporation in liquidation could approach the liquidator themselves to take care of such matters, he saw no need for the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Only when the shareholders had unsuccessfully exhausted whatever remedies they might have at the hands of the liquidator could their State of nationality step in on their behalf.

3. Like Mr. Brownlie, he was opposed to including draft article 18, subparagraph (b), which was far too controversial to be codified and lacked a firm foundation. In paragraph 73 of his report, the Special Rapporteur cited a number of cases as supporting intervention by the State of nationality of the shareholders, yet those cases had been shown not to be authoritative. According to Moore's *Digest of International Law*, the *locus standi* of the claimants in the *Delagoa Bay Railway* case had been conceded by Portugal in the *compromis* and the award had therefore been based on the corresponding agreement and not on international law.<sup>3</sup> Since the *El Triunfo Company* case had been one of protection of shareholders directly affected in their rights, it too could not be invoked in support of draft article 18, subparagraph (b). Jiménez de Aréchaga, writing in Sørensen's *Manual of Public International Law*, had cited several arbitral awards expressly rejecting

claims on behalf of the shareholders against the State of nationality of the company.<sup>4</sup>

4. The Special Rapporteur himself said in paragraph 66 of his report that the existence of such a rule was not free from controversy. In paragraph 68 he affirmed that there was evidence in support of such an exception before *Barcelona Traction* in State practice, arbitral awards and doctrine, but went on to say that State practice and arbitral decisions were far from clear. In paragraph 69, after citing several disputes in which the United Kingdom and/or the United States had asserted the existence of such an exception, he commented that none of those cases provided conclusive evidence in its support and concluded, like Jiménez de Aréchaga, that no certain argument could be made on the basis of such limited and contradictory State practice. In paragraph 70, a number of judicial decisions were cited as being likewise inconclusive, but the summing up in paragraph 72 averred that, while the authorities did not clearly proclaim the right of a State to take up the case of its nationals, as shareholders in a corporation, against the State of nationality of a company, the language of some of those awards lent some support, albeit tentative, in favour of such a right.

5. Given the limited and contradictory State practice, inconclusive judicial decisions and uncertain arbitral awards, it was rather bewildering to find in paragraph 87 of the report that the Special Rapporteur supported the exception in draft article 18, subparagraph (b), because it enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Personally, he disagreed with that assessment. Rather than attempt to codify the exception, the Commission should leave States to pursue bilateral investment treaties, as well as multilateral treaties. He concurred with Kokott's assertion, quoted in paragraph 17, that the analysis of the bilateral investment treaty regime, as well as multilateral approaches, had shown that diplomatic protection did not play a major role among the available means of dispute resolution.<sup>5</sup> That was a reality: investment promotion and protection treaties were a feature of current international practice.

6. In 1981, writing in the *British Year Book of International Law*, Mann had cited Germany, Switzerland, France and the United Kingdom as countries that had concluded bilateral investment treaties which allowed investors to settle their investment disputes with the host State before *ad hoc* arbitration tribunals or ICSID.<sup>6</sup> As of October 1995, the United Kingdom had concluded BITS with some 35 States, most of them developing countries. At the same time, the Multilateral Investment Guarantee Agency (MIGA) offered investment guarantee mechanisms that provided insurance protection for private investments abroad, its main task being to guarantee investments against non-commercial risks in host countries. Four categories of risk were mentioned in the Convention Establishing the Multilateral Investment Guarantee Agency: (a) transfer of risk, which occurred when the host country

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> See J. B. Moore, *Digest of International Law*, vol. VI (Washington, D.C., U.S. Government Printing Office, 1906), pp. 647 *et seq.*

<sup>4</sup> See E. Jiménez de Aréchaga, "International responsibility", M. Sørensen, ed., *Manual of Public International Law* (London, Macmillan, 1968), p. 531.

<sup>5</sup> See J. Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 276.

<sup>6</sup> F. A. Mann, "British treaties for the promotion and protection of investments", *BYBIL*, 1981, p. 241.

decided to impose restrictions on currency conversion and transfer; (b) expropriation, which deprived the investor of ownership or control; (c) breach of contract; and (d) war or civil disturbance in the host country. MIGA currently had 161 members, 139 of them developing countries, and was open to all members of the World Bank. That showed there was another way of approaching the issue that might not entail codification.

7. Mr. Kamto had cited the *Biloune* case to explain his support for draft article 18, subparagraph (b). However, after reading the case himself, he could say that it was not one of diplomatic protection. It was an investment dispute that had been submitted to the Permanent Court of Arbitration. The important fact that Mr. Kamto had lost sight of in that case was that the investment agreement between the Marine Drive Complex Ltd. company and the Ghana Investment Centre had included a dispute settlement and arbitration clause. Article 15 of the agreement had provided for an amicable settlement procedure and, failing that, for recourse to arbitration in accordance with UNCITRAL rules. Ghana's Investment Code had contained similar provisions. It was wrong, therefore, to assume that Mr. Biloune and his company had been left without a remedy. Consequently, the case could not be used to buttress the argument for including draft article 18, subparagraph (b). On the contrary, it justified its exclusion. In his view, State practice inclined overwhelmingly towards bilateral investment agreements accompanied by multilateral investment guarantee mechanisms. Finally, the Special Rapporteur's claim that the exception in subparagraph (b) enjoyed a wide measure of support in State practice was based on two States, the United Kingdom and the United States, yet even those countries had, in certain significant cases, rejected claims based on that exception.

8. In summing up, he would echo Kokott's conclusion, cited in paragraph 17 of the report, that the more realistic option was to accept that, in the context of foreign investment, the traditional law of diplomatic protection had been to a large extent replaced by a number of treaty-based dispute settlement procedures. For the reasons he had given, he could not support draft article 18, subparagraph (b).

9. Mr. KAMTO said that, as far as he was aware, Mr. Addo had known nothing of the *Biloune* case until he himself had mentioned it. He had never denied that the case had been settled by arbitration or that dispute settlement procedures had been available. His sole purpose in citing the facts of the case had been to show what could happen to a shareholder if he did not have some kind of safety net.

10. Mr. MOMTAZ, noting Mr. Addo's suggestion that there was another way of approaching the issue of exceptions that might not entail codification, asked what approach Mr. Addo was suggesting.

11. Mr. ADDO said that he had not suggested another approach. All he had said was that the Commission should abandon the exceptions it was attempting to codify since States were more likely to use bilateral investment treaties and multilateral agreements to solve any problems that might arise.

12. Mr. DUGARD (Special Rapporteur) asked whether Mr. Addo was suggesting that what was currently *lex specialis* should become *lex generalis* and that the issue should be regulated simply by bilateral investment treaties.

13. Mr. ADDO said that, in his view, it was sufficient to codify draft article 17. Draft article 18, subparagraph (b), had no firm foundation that could be codified and should be abandoned. He might be able to accept draft article 18, subparagraph (a), if he received an explanation concerning the role of the liquidator.

14. Mr. RODRÍGUEZ CEDEÑO, congratulating the Special Rapporteur on his introduction of an excellent report, said the basic issue facing the Commission was whether it should follow *Barcelona Traction* in particular and, if so, to what extent. Despite subsequent criticisms, including those reflected in the separate opinions of some judges and detailed in paragraphs 8 *et seq.* of the report, that judgment had been a milestone in the consideration of the issue of the protection of legal persons.

15. In drafting rules, account must be taken of developments since 1970 in international economic relations in general and in the matter of foreign investments and their protection in particular. The internal legal system created in response to those developments had a major influence on international legal relations, as reflected in bilateral and multilateral protection agreements. Such agreements had become important and in some cases indispensable for attracting capital to developing countries, although such countries were no longer the only recipients of foreign investment. As investments in the United States by the Venezuelan corporation CITGO demonstrated, investments could flow in either direction.

16. There was an important relationship between the internal legal system and investment protection agreements on the one hand and the general rules of diplomatic protection on the other. Unlike other members, however, he believed that the relationship should not be residual, since that would give a greater role to internal legal systems and bilateral agreements in establishing norms for the protection of foreign investments. Instead, the relationship should be complementary. The development of treaty mechanisms to protect foreign investors should not replace diplomatic protection, which was still the overall legal framework.

17. The Special Rapporteur was proposing several options on which the Commission might base the draft articles. The most acceptable, option 1 reaffirming the *Barcelona Traction* principle that only the State of nationality was entitled to exercise diplomatic protection, was reflected in draft article 17, paragraph 1, which could be referred to the Drafting Committee. The Committee could incorporate into the Spanish version the change proposed by Mr. Sepúlveda, namely, to replace the words *tendrá derecho a ejercer* by *está facultado para ejercer*. Paragraph 2, which should be placed in a future article on definitions, was also acceptable. The State of nationality of a corporation was the State in which it was "incorporated", rather than "registered". The two words might appear to be synonymous, but ICJ had rightly used the former in various paragraphs of the *Barcelona Traction* judgment.



He believed that the square brackets in paragraph 2 should be removed, although that would not resolve the important issue of whether the criteria of incorporation and registered office were cumulative or alternative. The Special Rapporteur believed that they were cumulative, but other members of the Commission, such as Mr. Momtaz, had suggested that they were alternative. Clearly, the matter needed to be given more thought.

18. The issue of the diplomatic protection of shareholders, discussed in paragraphs 57 *et seq.* of the report, differed significantly from that of the protection of the corporation as a legal person. The relevant general principles of international law, confirmed by widespread practice, did not allow the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Draft article 18, paragraph 1, reproduced that principle and was based on the ruling by ICJ in the *Barcelona Traction* case that the Belgian Government could not intervene on behalf of Belgian shareholders in a Canadian company, even though the shareholders were Belgian. To accept, as a principle, the possibility that the State of nationality of the shareholders might intervene on their behalf, thereby paving the way for a multiplicity of competing claims, could create a climate of confusion and uncertainty in international economic relations. The principle could be subject to exceptions, however. In *Barcelona Traction*, the Court had considered whether an exception could be made for the Belgian Government on grounds other than the legal personality of the corporation. In the present case, the proposed exceptions were based on bilateral agreements between the investor and the host State, or between the latter State and the State of nationality of the corporation, agreements that contained provisions on jurisdiction and on the settlement of disputes arising from the host State's treatment of corporations that invested in it.

19. The Court had clearly stated that the first exception, reflected in draft article 18, subparagraph (a), was when the corporation had ceased to exist or been rendered economically defunct, a significant expansion of the criterion. The second exception envisaged in the *Barcelona Traction* decision was when the corporation's State of nationality was not entitled to act on its behalf. Subparagraph (a) was generally acceptable, although a corporation's "ceasing to exist" should be construed in a broad sense, namely, as going beyond bankruptcy to include situations in which it could no longer act for other reasons, and that should be specified in the commentary.

20. Like others, he favoured doing away with the second exception, despite the recommendation in paragraph 87 of the report. He did not agree with the Special Rapporteur's statement in paragraph 65 that the only relief for a company on the international plane lay in action by the State of nationality of the shareholders. It was in the context of a company under internal law, governed by a domestic legal regime, that claims and compensation should be envisaged. To open the door to the possibility that a State might intervene in such cases would be dangerous, even though some conclusions could be drawn from international judicial decisions like the *ELSI* case, in which the shareholding companies were foreign companies. Nevertheless, he had trouble accepting the usefulness of such an exception, especially in the context of foreign investment in developing countries.

21. Mr. GALICKI congratulated the Special Rapporteur on a report addressing one of the most controversial problems connected with the topic of diplomatic protection. Draft article 17, paragraph 1, formulated the principle that States had the right to exercise diplomatic protection for corporations that held their nationality, and that principle was largely uncontested, but there was a lack of unified State and judicial practice to support a similar principle of non-exercise of such protection on behalf of the shareholders of corporations, or possible exceptions from such a principle.

22. In paragraph 22 of the report the Special Rapporteur underlined the fact that the *Barcelona Traction* decision was not sacrosanct, but in paragraph 3 admitted that the decision dominated all discussion of the topic and no serious attempt could be made to formulate rules without a full consideration of the decision, its implications and the criticisms to which it had been subjected. Paragraph 96 of the decision contained the crucial point that, by "opening the door to competing diplomatic claims", the adoption of the theory of diplomatic protection of shareholders could "create an atmosphere of confusion and insecurity in economic relations" [p. 49].

23. In paragraph 70 of the decision, the Court stated that the right of diplomatic protection of a corporate entity was traditionally attributed to the State of incorporation and in which it had its registered office, two criteria that had been confirmed by long practice and numerous international instruments. It also admitted, however, that "further or different links are at times said to be required in order that a right of diplomatic protection should exist" [p. 42]. The Special Rapporteur had presented a broad review of the possible options regarding which State could be entitled to exercise diplomatic protection in respect of injury to a corporation. The choice of the State of nationality criterion, reflected in draft article 17, paragraph 1, seemed fully justified. Indeed, the Commission's article 3 on the diplomatic protection of natural persons, in the second part of the draft articles,<sup>7</sup> designated the State of nationality as the State entitled to exercise diplomatic protection. Logically, the same criterion of a legal bond of nationality should be applied to any legal person directly affected by an injury arising from an internationally wrongful act. Such a unified approach would make it possible to apply other rules to be formulated by the Commission to both natural and legal persons in respect of diplomatic protection.

24. The definition of the State of nationality of a corporation proposed in draft article 17, paragraph 2, seemed acceptable, with perhaps one correction. The bracketed phrase mentioning the State in whose territory the corporation had its registered office should be retained, in addition to the State in which it was incorporated: in *Barcelona Traction* ICJ had used both those criteria on an equal basis. As part of the progressive development of international law, however, the conjunction "and" could be replaced by "or". To require that both criteria be fulfilled together seemed impractical, especially in the light of the different internal legal regulations of States on the basis of which such incorporation or registration was usually carried out. In addition, as Mr. Sreenivasa Rao had correctly

<sup>7</sup> See footnote 1 above.

noted, the terms “registration” and “incorporation” were often used alternatively.

25. By accepting that the link of nationality between a corporation and the State of its incorporation or registration was sufficient to entitle that State to exercise diplomatic protection, the Special Rapporteur left aside all the other options presented, such as those of the State of genuine link, the State of domicile and the State of economic control. As Mr. Sreenivasa Rao had rightly emphasized, States did not often present claims on behalf of corporations unless conditions other than incorporation or registration were fulfilled. Perhaps all the criteria other than incorporation or registration should not be rejected *in toto*. The possibility of combining criteria was supported by scholars and even some judges in their separate opinions in the *Barcelona Traction* case and would obviate the lack of effectiveness for which the criterion of place of incorporation had been criticized by Mr. Koskenniemi.

26. In the *Barcelona Traction* case ICJ had ruled that a State whose nationals held the majority of shares in a company could not present a claim for damage suffered to the company itself. Draft article 18 followed the Court’s approach, and subparagraphs (a) and (b) reflected the two exceptions, also laid down by the Court, in which the State of nationality of the shareholders was entitled to exercise diplomatic protection. Despite all the criticism of the Court’s position in *Barcelona Traction*, it should still be treated as the foundation for the Commission’s codification work. The opposite stance taken by the Court in the *ELSI* case might be justified for a number of reasons given in paragraph 25 of the report, but should not serve as a basis for a general principle of codification. General recognition of the possibility that the State of nationality of shareholders could exercise diplomatic protection could lead to the serious problem of competing competencies among the two categories of States entitled to exercise diplomatic protection: the State of nationality of a corporation and the State of nationality of its shareholders. The problem might be additionally complicated by the possibility of competing competencies among different States of nationality of different groups of shareholders.

27. Again, the nationality of shareholders or of a majority of shareholders could change and hence could not serve as a stable criterion for granting the right to exercise diplomatic protection. Finally, recognition of the general possibility of the exercise of diplomatic protection by the State of nationality of shareholders would have a strong negative economic and political effect. It could give some categories of persons specific international protection based on economic grounds, namely the ownership of shares, and not on the traditional grounds of nationality. In extreme situations, it could favour the right of the State of nationality of shareholders to exercise diplomatic protection, to the detriment of that of the State in which corporations were incorporated or registered.

28. While the possibility of diplomatic protection of shareholders could be rejected as a general rule, it seemed reasonable and practical to accept the existence of some exceptional situations in which protection could be exercised by their States of nationality. He fully agreed with that stance, reflected in subparagraphs (a) and (b) of draft article 18, which covered two different situations in which

States of nationality of corporations could exercise diplomatic protection of those corporations. The exercise of diplomatic protection in a complementary way by the States of nationality of shareholders that could otherwise be left without any State protection of their just interests seemed fully warranted in such cases. Mechanisms offered by bilateral and even multilateral agreements for the protection of foreign investments might not always be sufficient.

29. The criticism voiced regarding draft article 18, subparagraph (b), was difficult to accept, since it was hard to imagine that a State that had caused injury to a corporation possessing its nationality would be eager to exercise diplomatic protection of that corporation. In the *Barcelona Traction* case, ICJ had signalled its general support for the exception set out in subparagraph (b) by saying that considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. As was said in paragraph 87 of the report, that exception enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Even if it was still not fully ripe for codification, the exception should be considered favourably in the context of progressive development of international law.

30. He reserved the right to give a final evaluation of draft articles 17 and 18 once draft articles 19 and 20 had been presented. In no way, however, did that reservation change his favourable opinion about the proposals made by the Special Rapporteur. He was convinced that draft articles 17 and 18 should be referred to the Drafting Committee.

31. Mr. GAJA, referring to Mr. Galicki’s proposal to use the word “or” in the bracketed portion of draft article 17, paragraph 2, thereby transforming the *Barcelona Traction* criterion into two alternative criteria, noted that in that case the State concerned could choose one of the two criteria. Even then, however, the possibility would be open for a corporation to have double protection, thereby creating the situation of conflicting interventions to which Mr. Galicki had referred. A corporation, if it was keen on having diplomatic protection, could then have a registered office in a State that used the registered office as a basis for diplomatic protection but be incorporated in a State that used the place of incorporation for that purpose. The danger of introducing the alternative would be that a plurality of States would be entitled to exercise diplomatic protection on the basis of nationality.

32. Mr. PELLET said he entirely agreed with Mr. Galicki and remained unmoved by Mr. Gaja’s arguments. He was firmly convinced that the single criterion of incorporation was not sufficient. In a draft like the present one, of merely marginal importance in terms of the essential problem of the nationality of corporations, there was no reason to compel States to apply the registered office or the incorporation system. Mr. Gaja’s reasoning could be inverted: if the conjunction currently in the text, “and”, was retained, there was a risk of denial of justice, in that, if a company did not meet the two criteria, it could not receive diplomatic protection.

33. Mr. GALICKI said he endorsed those points. In extreme situations, the cumulative requirement might mean that no State was entitled to exercise diplomatic protection

of a corporation incorporated in one State with registered offices in another.

34. Mr. KAMTO said he was entirely in agreement with Mr. Gaja. In considering the possibility that the criteria might be combined, the Commission had to envisage situations in which a corporation might not be able to benefit from diplomatic protection. One such situation was when a State that had capitalized on its investments in a given country had every interest in establishing its registered office elsewhere, for fiscal or other reasons. As currently formulated, draft article 17, paragraph 2, had the merit of taking a stance against that practice, in which States were engaging more and more frequently. Reliance on domestic legislation did not entirely solve the problem. A State's domestic legislation could proclaim that if a corporation was registered in that State, it had the right to exercise diplomatic protection, while that of the State of incorporation might say the same thing. That was why he believed the Commission was facing a choice based on principle, not merely legal considerations: What signals did it wish to send to countries that were incorporated in Bermuda but had their registered office in London? Personally he thought the *Barcelona Traction* decision could be used as a basis, since it envisaged the combination of criteria, not their application as alternatives.

35. Mr. GAJA said he was one of many who favoured deleting the bracketed words altogether. He was not in favour of combining the two criteria. However, States generally had no obligations under international law with regard to national corporations, so there was no question of denial of justice. One did not necessarily have to identify a State that could in all circumstances exercise diplomatic protection of a corporation.

36. Mr. ADDO said he supported Mr. Gaja's views. If a company, after incorporation in one country, was registered in another, what form should that registration take? The State of registration should not, in his view, be able to provide diplomatic protection to the company.

37. Mr. CHEE commended the Special Rapporteur on a well-organized report containing a wealth of references to authority and precedents. Thirty years had now passed since the ruling in the *Barcelona Traction* case, and it had been held to represent confirmation of the traditional rule of public international law that diplomatic protection should be extended only to the national companies of the protecting State, not to foreign shareholders. As the Special Rapporteur pointed out in paragraph 22 of the report, the decisions of ICJ were not binding on the Commission. The *Barcelona Traction* ruling had been subjected to much criticism, especially by academics. In the meanwhile, international economic relations had greatly developed owing to the free flow of foreign investment.

38. Briggs had rightly pointed out in 1970 that international law had not evolved further in the protection of shareholders' interests, particularly in light of the growth of foreign investments and the activities of multinational holding companies in the past half-century.<sup>8</sup>

39. Several devices had come into being since *Barcelona Traction* to protect foreign investment and shareholders, for example, bilateral investment treaties, dispute settlement procedures, including arbitration, and ICSID, which provided individuals and corporations with a forum for bringing a suit against a wrongdoing State to enforce a contract. Under the lump-sum settlement procedure, which was another possibility, the individual could settle his claim within national bodies, for example, the Foreign Claims Settlement Commission of the United States. The United Kingdom had a similar arrangement. Other machinery that protected the property of foreigners was a mixed form of arbitration known as the Iran-United States Claims Tribunal, which had functioned much like the General Claims Commission constituted between the United States and a number of Latin American States in the 1930s.

40. The Commission should give serious consideration to choosing one of the Special Rapporteur's seven options set out in paragraph 28 of the report. With regard to the application of the genuine link doctrine to corporations (option 2), the Special Rapporteur had stressed in paragraph 18 of his report that in the particular field of diplomatic protection of corporate entities, no absolute test of genuine connection had found general acceptance. ICJ had ruled out the applicability of the genuine link doctrine to corporations. He drew attention in that connection to the observation of Judge Jennings that the analogy between the nationality of individuals and the nationality of corporations might often be misleading and that those rules of international law which were based upon the nationality of individuals could not always be applied without modification in relation to corporations.<sup>9</sup>

41. He said that he had no objection to draft article 17 and thought that the square brackets at the end of paragraph 2 should be removed. ICJ had added a registration requirement to the requirement of incorporation to prevent fraudulent commercial transactions.

42. As to article 18, he supported the "ceased to exist" test over the "practically bankrupt" test. However, under article 878 of the Spanish Commercial Code, cited by Mann in an article in the *American Journal of International Law*,<sup>10</sup> once bankruptcy had been declared, the bankrupt was to be incapacitated from administering his property, and all his acts of disposal and administration subsequent to the time to which the effects of the bankruptcy were retroactive were to be null and void. Thus, support for the "practically bankrupt" test over the "ceased to exist" test was also justified and should be given due consideration.

43. The *Barcelona Traction* judgment was based on procedural grounds, namely the issue of *locus standi*, and not on the merits. The facts had been sacrificed to the logic of law, and that had been a travesty of justice. The case had involved a large sum of money, and some 88 per cent of the shareholders had been Belgians and had been deprived of their proprietary and other rights on the procedural ground that Belgium lacked *locus standi*. It was

<sup>8</sup> H. W. Briggs, "Barcelona Traction: the *jus standi* of Belgium", *AJIL*, vol. 65 (1971), p. 341.

<sup>9</sup> See *Oppenheim's International Law*, 9th ed., vol. I, Peace, R. Jennings and A. D. Watts, eds. (Harlow, Longman, 1992), p. 860.

<sup>10</sup> F. A. Mann, "The protection of shareholders' interests in the light of the Barcelona Traction case", *AJIL*, vol. 67 (1973), p. 261.



difficult to imagine that Spain had been unaware of the nationality of the *Barcelona Traction* corporation. He was reminded in that context of a comment by Justice Holmes to the effect that the definition of law depended on the experience of life, not the logic of law. It was thus high time to reconsider *Barcelona Traction* in the light of recent developments. In an article published in *International Law: Theory and Practice* in 1998, in which Dinstein had stressed that in an era of international investments on a massive—and growing—scale, local subsidiaries acted as the long arms of foreign parent companies, that injury to the local subsidiary actually constituted injury to the foreign parent company, that international law must allow the “lifting of the veil” of the local subsidiary in order to give effective protection to the property of foreigners, and that only the “lifting of the veil” exposed the true circumstances in which a local company was owned by a foreign parent company or other shareholders.<sup>11</sup> As he saw it, that point was most appropriate for assessing *Barcelona Traction* in the context of current international economic relations.

44. Mr. ECONOMIDES said that, in an excellent report, although the Special Rapporteur had been quite critical of ICJ for its *Barcelona Traction* judgment, he had fully adopted the principles enunciated there in draft article 17 and sought to introduce exceptions to them, relying chiefly on what the Court seemed to have accepted implicitly in 1970. There was some inconsistency between such criticism and the integral adoption of the Court’s solution, especially since the Special Rapporteur noted in paragraph 27 of his report that *Barcelona Traction* was, 30 years later, widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but as a true reflection of customary international law. Furthermore, he personally disagreed with the Special Rapporteur’s statement in paragraph 22 of the report that the Court’s decisions were not binding on the Commission. On the contrary, the decisions of the Court, when it ruled on and applied international law, including customary law, bound the Commission as the body responsible for the codification of international law. The Commission could only depart from a particular customary solution in the interest of the progressive development of law; in so doing, it must explain why it was opting in favour of a new rule.

45. For a better assessment of recent trends in diplomatic protection concerning corporations and shareholders, it would have been preferable to have more extensive information than that provided in paragraph 17 of the report on the number of agreements concluded following *Barcelona Traction* and their specific solutions.

46. He endorsed draft article 17, paragraph 2, provided the State in which the corporation was incorporated was the same as the one in which it had its registered office. But in the exceptional case in which a corporation was established in one State and its registered office was in another, that would cause problems, because neither of the two States could meet the two conditions required by paragraph 2, and thus the provision could not be applied.

In such cases, the corporation would not have a State of nationality that could exercise diplomatic protection on its behalf, which would be an unacceptable situation. Replacing the word “and” by “or”, as had been proposed, would confer the right to exercise diplomatic protection on two States simultaneously: the State in which the corporation was incorporated and the State on whose territory its registered office was located. It would not be a wise course, given the reasoning of ICJ in *Barcelona Traction*. He failed to see why virtually all corporations should have only one State of nationality, whereas some, presumably the more clever ones, could have two. The most prudent and convenient solution would be to endorse the Special Rapporteur’s proposal, retaining only the first criterion, and to explain in the commentary that the other criterion was superfluous because a corporation’s registered office was almost always located in the same State. A reference should also be added to the effect that, if a corporation had its registered office in another State, it was the first criterion that took precedence over the second, and hence the State of nationality of the corporation was the one in which it was incorporated and not the State in whose territory it had its registered office.

47. Draft article 18, subparagraph (a), was too narrow. He proposed that the words “*de jure* or *de facto*” should be inserted between “exist” and “in the place of”. The words “*de facto*” would cover the case of a corporation in such dire straits that, although legally speaking it had not yet been dissolved, in reality it was no longer in a position to defend itself as a legal person. On the other hand, he had reservations about draft article 18, subparagraph (b), which did not constitute an exception, but a new rule that came under the heading of progressive development of the law. Such a new rule, which would certainly be applied more frequently than the basic rule in draft article 17, went beyond the proposed aims and could cause trouble; it was controversial and should be deleted, especially since, as Mr. Sepúlveda, Mr. Sreenivasa Rao, Mr. Addo and others had rightly pointed out, the guarantees provided under international arbitration in respect of investments and municipal law were more than sufficient.

48. In his view, the draft articles on diplomatic protection should contain a special clause stipulating that the articles were not applicable if binding international texts for the protection of human rights or of investments existed and provided special avenues of recourse.

49. Draft article 17 could be referred to the Drafting Committee, as could draft article 18 along with draft article 19, for it might be possible to combine the two, and so they should be considered together.

50. Mr. FOMBA said that the Special Rapporteur’s excellent report addressed four substantive issues: the definition and attribution of the nationality of corporations; diplomatic protection for corporations; diplomatic protection for the shareholders of corporations; and the relevance of the solutions proposed in draft articles 17 and 18.

51. With regard to the first point, the basic principle involved was the same as that governing the nationality of natural persons, namely that the territorially sovereign State alone had the power to determine a corporation’s nationality. There were two criteria for conferring nationality:

<sup>11</sup> See Y. Dinstein, “Diplomatic protection of companies under international law”, K. Wellens, ed., *International Law: Theory and Practice* (The Hague, Martinus Nijhoff, 1998), p. 505, especially p. 515.

the place of the registered office, used in civil-law countries, and the place of incorporation, favoured in common-law countries. In *Barcelona Traction*, ICJ had formally recognized the existence of those criteria, but without expressing a preference for one or the other.

52. International law did not consider the effectiveness of the corporation's link to the territorial State; ICJ had thus adopted a different approach from that followed in the *Nottebohm* case. The Court's formal approach in *Barcelona Traction* had been discarded to a certain extent by international law, as well as by the Convention Establishing the Multilateral Investment Guarantee Agency and bilateral treaties on the protection of private foreign investment.

53. On the question of the diplomatic protection of corporations as such, ICJ had introduced the rule that the State in which a corporation was constituted had the sole right to exercise diplomatic protection if that corporation had suffered injury. The rule reflected customary international law, without prejudice to the development of the dialectical link between it and the treaty process.

54. In the *Barcelona Traction* judgment ICJ had ruled out the possibility of diplomatic protection of shareholders, for reasons that were open to criticism in a number of respects. Such protection would appear to be legitimate, not as a principle in itself, but as an exception applicable in certain particular circumstances.

55. Overall, draft article 17 was acceptable. Since *Barcelona Traction* had recognized the two criteria set out in paragraph 2, the square brackets should be deleted and the word "and" replaced by "or", so as to reflect the two alternatives. Draft article 18, too, was acceptable in the main, reflecting the principle of the legitimacy of shareholder protection in exceptional circumstances. Subparagraph (a) should be amended by deleting the words "in the place of its incorporation"; and the exception provided for in subparagraph (b) should be maintained.

56. Mr. Kamto had raised the question of whether it was necessary to provide for time limits. As Mr. Pellet had said, this was a pervasive problem in international law. But in the current context there might be a case for specifying the scope *ratione temporis* of the right to exercise diplomatic protection.

57. In the matter of form, Mr. Melescanu had proposed merging draft articles 17 and 18, as a means of stressing the link between the rule and its exceptions. His own preference would be to retain the provisions as two separate articles. In his opinion, both articles should be referred to the Drafting Committee.

58. Mr. PELLET said he found the reactions to the Special Rapporteur's fourth report very disturbing. Like others, he endorsed all the draft articles submitted and wished to see them referred to the Drafting Committee. That being said, he found that the Special Rapporteur erred on the side of honesty. There could be no doubt that it was the duty of special rapporteurs to provide the Commission with all the necessary information to enable them to form an opinion. In that respect the present Special Rapporteur was beyond reproach, providing all those elements with honesty and rigour. Yet he provided them indiscriminate-

ly, without offering guidance or explaining why he had opted for one solution in preference to another. Thus, for instance, on draft article 17, paragraph 2, the Special Rapporteur proposed that the Commission should endorse the principle adopted by ICJ in the *Barcelona Traction* case. Yet in the process of reaching that conclusion the Special Rapporteur examined no fewer than seven options, considering their advantages and drawbacks, but without justifying his preference—well grounded as that preference was.

59. He would attempt to explain why he shared the Special Rapporteur's preferences. First, he agreed that *Barcelona Traction* was the inescapable starting point for any consideration of the subject under discussion. In its judgment of 1970 ICJ had discussed every aspect of the problem in detail and had even pronounced, by way of an *obiter dictum*, on questions not central to its findings—a commendable approach which, regrettably, it had latterly abandoned. The Court's position had been elucidated by lengthy pleadings dissecting every facet of the case. Like the Special Rapporteur, he considered that the *ELSI* case could throw light on certain particular aspects of *Barcelona Traction*, but that the solution nonetheless rested on a *lex specialis* which made it difficult to generalize.

60. As the Special Rapporteur had explained, in delivering its judgment ICJ had referred to the twofold criterion of the place of incorporation and/or the place of the registered office (the question of "and/or" was one to which he would revert). Quite apart from purely technical considerations, to which he would also revert, the sole genuine competitor to that criterion was the admittedly somewhat formalistic criterion of economic control.

61. And, at first sight, that criterion was defensible. After all, in the modern world, investment—particularly foreign investment—constituted a fundamental component of the wealth of nations. And what counted was economic reality: it mattered little whether a Belgian, French or Nigerian investor used a company registered in Canada or the Bahamas in order to invest in Spain, the United States or Chad. If that investment was the victim of an internationally wrongful act on the part of the host country, it was ultimately the real State of origin of the investment, in other words, the State of the shareholders whose economy would suffer injury, as had been pointed out by ICJ in paragraph 86 of its judgment. Several of the pleadings in the case demonstrated that point strikingly, even though that economically oriented, neoliberal and capitalist line of reasoning had been less prevalent 30 years ago than it had since become.

62. *Pace* the Special Rapporteur's assertion in paragraph 36 of his report, he did not think that the developing and industrialized nations had fundamentally divergent interests in that regard. The real reasons for discarding the criterion of economic control lay elsewhere, and, curiously, those two reasons were not clearly spelled out by the Special Rapporteur, although ICJ had set them forth in the clearest possible manner in its 1970 judgment.

63. The first of those reasons was purely practical and a matter of common sense. In the contemporary capitalist system, it was extraordinarily difficult, if not downright impossible, to "track" the true origins of a company's

capital. Most of the shareholders in Barcelona Traction had been Belgian, but they had not necessarily been natural persons, and the companies participating in the capital of those “Belgian” shareholder companies might well have been French, United States or Indian companies. In paragraph 87 of its judgment ICJ had found that: “it must be proved that the investment effectively belongs to a particular company. This is ... sometimes very difficult, in particular where complex undertakings are involved” [p. 46]. It continued, in paragraph 96: “The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands” [p. 49]. That was even truer now than it had been in 1970.

64. The second reason why economic control should, in principle, be rejected as a criterion was more a political or moral than a practical issue. The Special Rapporteur seemed to express concern, *inter alia* in paragraphs 10 and 21 of his report, that the criterion of incorporation and/or registered office could leave shareholders without protection. That seemed to show excessive scrupulousness. Shareholders, in their capitalist wisdom, could opt to incorporate a company in a State other than their own, with a view to maximizing profits; and, indeed, it was their prerogative to act in their own best interests in the best of all possible capitalist worlds. But they could not have their metaphorical cake (usually in the form of a more favourable tax regime) and at the same time eat it (by benefiting from a “proximity” to their State of nationality that would afford them more active and effective exercise of the right—the *right*, not the obligation—of the State to grant diplomatic protection (*cf.* para. 94 of the *Barcelona Traction* judgment)). As ICJ had also rightly noted in paragraph 99 of the judgment, a passage not cited by the Special Rapporteur:

It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders. [p. 50]

65. It was those considerations, rather than those put forward by the Special Rapporteur, that led him to fully support the Special Rapporteur’s conclusions that had taken concrete form as draft article 17.

66. As to the wording of that provision, he had no difficulty with paragraph 1, with the proviso that the injury must have been caused by an internationally wrongful act. That, however, was presumably implicit and would be spelled out in the commentaries.

67. As for the justification of the wording of draft article 17, paragraph 1, in paragraph 51 of the report the Special Rapporteur referred to “the pessimistic assessment of the situation by Kokott” that “the traditional law of diplomatic protection has been to a large extent replaced by a

number of treaty-based dispute settlement procedures”,<sup>12</sup> a state of affairs also mentioned by ICJ in paragraph 90 of the *Barcelona Traction* judgment. That trend was indisputable, but he could see no reason to characterize it as pessimistic. On the contrary, the conclusion of bilateral agreements clearly establishing the rights of the various participants in international investments and creating effective and efficient dispute settlement mechanisms was a good thing in itself, even if he had ideological reservations regarding some of the rules contained in contemporary investment protection conventions. That reservation, did not, however, affect his approval of draft article 17, paragraph 1, as proposed by the Special Rapporteur.

68. Draft article 17, paragraph 2, also posed no problems of principle. But, as he had already said on several occasions, he was extremely concerned about placing the expression “and in whose territory it has its registered office” in square brackets. Some members of the Commission appeared to see themselves as internal, as opposed to international, legislators—an approach that he found entirely unacceptable. Despite some members’ stated views, determination of the nationality of corporations was essentially a matter within States’ domestic jurisdiction. That was true of natural persons, as ICJ had found in the *Nottebohm* case; and also of corporations, as it had also found in the *Barcelona Traction* judgment, in paragraphs 39 to 43 of which it stated that the legal status of corporate entities was a matter for municipal law and even essentially within domestic jurisdiction. Just as the nationality of individuals was determined by two main alternative criteria, *jus soli* and *jus sanguinis*, referred to in draft article 3, so too the nationality of corporations depended on two alternative systems, namely, place of incorporation and place of registered office, though many States borrowed to varying extents from one or the other system. Despite the Special Rapporteur’s assertion in paragraph 53 of the report, the Court’s insistence on the requirement of a registered office in parallel to that of incorporation had not been “misplaced”. In so doing it had simply respected the legal systems of States, which used one or the other of those two criteria, or a combination of the two. Unlike the Special Rapporteur and other members of the Commission who wished to impose their own system—that of incorporation—on the rest of the world, the Court had also respected the principle set forth in paragraph 38 of its 1970 judgment—which, furthermore, the Special Rapporteur cited in paragraph 54 of his report—that recognition of the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction required that international law must refer to the relevant rules of municipal law.

69. Contrary to what some members wished to believe or to assert, municipal laws were not uniform in that regard. Broadly speaking, the Anglo-Saxon countries and their epigones relied on the system of incorporation, and the civil-law countries tended towards the registered office or the real headquarters system. In passing, it was worth noting that the description in the *Barcelona Traction* judgment was not satisfactory in English, as the term *siège social* would more properly be rendered as “headquarters”. It was true that Italy, under the enlightened in-

<sup>12</sup> Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 377.



fluence of Mr. Gaja, had gone over to the incorporation system; but that was no reason to indirectly oblige other States to align themselves with Anglo-American law. The Commission should leave that question to UNCITRAL, and should take due note that two systems existed, as ICJ had wisely done in 1970.

70. Admittedly, the formulation that ICJ had used in paragraph 70 of its judgment and that the Special Rapporteur cited, albeit only partly, in paragraph 52 of his report posed problems. The Court wrote: "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office" [p. 42]. The conjunction was indeed "and". However, a reading of the passage in which the sentence occurred raised doubts as to whether even the Court might not have had in mind two alternative criteria. That, at any rate, was his own view of the matter.

71. He therefore strongly urged the Special Rapporteur and the Drafting Committee to retain the phrase currently enclosed in square brackets and to eliminate the ambiguity created by the formulation used by ICJ in *Barcelona Traction*, by replacing the conjunction "and" with "or", as Mr. Galicki and others had proposed. That was the only way to respect the essentially national jurisdiction of States in one of the rare domains in which it still existed. And he most emphatically did not see on what grounds his Anglo-Saxonophile colleagues should impose the criterion of incorporation upon States that remained attached to the *siège social* ("headquarters") system, one which, contrary to what Mr. Gaja had just asserted, was much less formalistic than the incorporation system, even if those States were in a minority and were not among the economically strongest; even if technically one could maintain that the incorporation system was preferable—a matter on which he was not able to pronounce and which, as an international lawyer, he dismissed out of hand, as it was not within the Commission's mandate to accord one system preference over another. The Commission's task, like that of the Court in 1970, was to note that States had a measure of freedom in that regard, and he did not see why it should arrogate to itself the possibility of reining in that freedom. The only other possibility would be to say nothing at all, by simply deleting paragraph 2 and stressing in the commentaries that determination of the nationality of corporations was essentially a matter for States' jurisdiction.

72. Draft articles 18, 19 and 20 constituted totally acceptable and endorsable exceptions to the principle of article 17, bearing in mind that it was ICJ itself that had mentioned those exceptions in its 1970 *Barcelona Traction* judgment, relatively cautiously and again in the form of *obiter dicta*, as none of those exceptions was applicable to the circumstances of the case.

73. The exception covered by draft article 18, subparagraph (a), concerned the scenario in which the corporation had ceased to exist in the place of its incorporation. Again he had no problem of principle, but he was somewhat perplexed by the drafting of the provision. Obviously, if the corporation had ceased to exist, the State of which it had the nationality—by virtue either of incorporation or of registered office—could no longer protect it. One could not protect a dead body; at best one could protect

its beneficiaries, who, in the case in point, were, *mutatis mutandis*, the shareholders. That being so, he wondered whether the criterion adopted by ICJ in *Barcelona Traction*, which, as the Special Rapporteur explained in paragraphs 59 and 60 of his report, was stricter than the one applied previously, was not too rigid. Like Mr. Brownlie, cited by Judge Jessup, like Paul de Visscher, cited by Judge Fitzmaurice, like Mr. Riphagen, whose personal opinions on the matter he had reread, he thought it preferable to adhere essentially to the idea of effectiveness of the legal entity. Admittedly, diplomatic protection rested on a fiction: a corporate entity was itself in some respects a legal fiction. But when that fiction no longer corresponded to any reality whatsoever, when the legal entity no longer had any effectiveness, when it was "practically defunct", one had to abandon fiction and revert to reality. The whole question was whether the corporation was or was not still in a position to act in pursuit of its rights and to defend its interests. If it was, there was no reason to abandon the principle laid down in draft article 17. If it no longer was, then the exception under draft article 18, subparagraph (a), was necessary; but as presented by the Special Rapporteur, basing himself on the idea, if not the formulation, of *Barcelona Traction*, that exception seemed decidedly too narrow and formalistic. It would be better to say that diplomatic protection could be exercised on behalf of shareholders when "the possibility of a remedy available through the company" [p. 41, para. 66] was ruled out, or when the company was no longer in fact in a position to act to defend its rights and interests.

74. On the other hand, he had no objection to adding, as proposed by the Special Rapporteur, the words "in the place of its incorporation", thereby making it possible to avoid ambiguities. For instance, in the *Barcelona Traction* case, the fact that that company could not act in Spain should not be taken into consideration, at any rate under the criterion of nationality; that incapacity to act in Spain concerned only the other condition for exercise of diplomatic protection, namely, exhaustion of domestic remedies.

75. He did not share some other members' concerns regarding subparagraph (b) of draft article 18. Admittedly, the Special Rapporteur showed that ICJ had not firmly upheld the rule whereby diplomatic protection could be exercised on behalf of the shareholders of a company if that company had the nationality of the State responsible for injury caused to it. The Special Rapporteur had also shown that the precedents were ambiguous, even though he seemed to have exaggerated the extent of the scope for ambiguity. But the *ELSI* case confirmed that opinion, though the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy<sup>13</sup> had not played an exclusive role in the Chamber's reasoning. As the Special Rapporteur stressed in paragraph 84 of his report, and as several speakers had pointed out to further substantiate their criticisms of the Court's *obiter dictum* of 1970 in the *Barcelona Traction* case, the United Kingdom and the United States had pronounced in favour of that exception. But the fact that the United States was in favour of a rule of international law—or of what it allowed to remain of it—did not mean

<sup>13</sup> See 2757th meeting, footnote 6.

that the rule was necessarily a bad one. Furthermore, it was now reflected not, as some members claimed, in a few bilateral investment conventions, but in thousands of such conventions concluded by all States of the international community, regardless of their level of development or ideological orientation. That state of affairs consolidated the principle set forth by the Court in its *obiter dictum*.

*The meeting rose at 1 p.m.*

## 2760th MEETING

*Wednesday, 21 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI said that, in his thorough and objective study of the topic of diplomatic protection of legal persons, the Special Rapporteur had rightly raised the question of the nationality of those persons and had opted for a reaffirmation of the centrality of the decision of ICJ in the *Barcelona Traction* case. He proposed that, for the purposes of diplomatic protection, the State of nationality of a corporation was the State in which the corporation was incorporated and in whose territory it had its registered office—the latter condition, however, being enclosed in square brackets. Many bilateral or multilateral investment protection agreements established other arrangements for

the benefit of the corporations, shareholders and other parties concerned, but, in the absence of such an agreement, the *Barcelona Traction* judgment remained the correct expression of the law.

2. On draft articles 17 and 18 specifically, the first posed very few problems and should be referred to the Drafting Committee, although the phrase “and in whose territory it has its registered office” was not very helpful. Admittedly, that was a criterion adopted by ICJ in the *Barcelona Traction* case, but in practice the headquarters was in the place of incorporation and a corporation had the nationality of the State in which it was incorporated. If that phrase was retained with the conjunction “and”, the corporations—perhaps few in number—whose registered office was located in a State other than the State of incorporation were in danger of losing the right to diplomatic protection on the grounds that they failed to meet both of the conditions that would be laid down in draft article 17. If the conjunction “and” was replaced by “or”, that could lead to dual nationality and competition between several States wishing to exercise diplomatic protection. The phrase in question should thus be omitted from draft article 17, paragraph 2.

3. Draft article 18 laid down the principle that the State of nationality of the shareholders of a corporation was not entitled to exercise diplomatic protection on behalf of those shareholders when an injury was caused to the company, but then established two exceptions to that principle which some members of the Commission had considered superfluous—especially the exception provided for in subparagraph (b). Admittedly, as those members pointed out, diplomatic protection was seldom invoked in practice because local remedies were usually sufficient and multilateral or bilateral arrangements could be invoked, but those two arguments were perhaps not always valid for all countries. As the Special Rapporteur said, however rare those cases might be, they should be provided for in the draft articles. Article 18 should thus also be referred to the Drafting Committee.

4. Mr. PELLET reiterated his belief that incorporation and registered office represented two different systems whereby nationality could be conferred on corporations. It was thus incorrect to say that only the first was determining and that the second merely flowed from it. Replacing the conjunction “and” with “or” in draft article 17, paragraph 2, would raise the problem of dual nationality, but international law had ways of dealing with that problem. In the case of natural persons, the Commission had noted the different systems whereby nationality was conferred without seeking to impose one of them—*jus soli*, for example. It could thus proceed in the same way in the case of legal persons. As for the cases, referred to by the Chair, of States that applied neither of the two systems and did not recognize the notion of nationality of corporations, it seemed difficult to imagine a case in international law in which a State refused to let its corporations have a nationality, and, if such were the case, that would call article 17 as a whole into question.

5. Mr. GAJA said that, in the *Barcelona Traction* judgment, a distinction was drawn between the “registered office” (*siège* in French) and the “seat” (*siège social* in French). Paragraph 71 of the judgment also introduced

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

the expression *siège statutaire* as a rendering of “registered office”. It could be seen from the use of those terms in the judgment that what ICJ had initially referred to as the “seat” was a formal structure resembling the “registered office”, little more than an address. It thus made little difference whether the criterion of incorporation or the criterion of registered office was adopted, as the former was simply the one more frequently used in practice.

6. Mr. BROWNLIE said that the Commission had run up against two major difficulties. The first, fundamental source of difficulty was that the nationality of corporations was always established by municipal law, with international law coming afterwards, either to recognize the determinations made by municipal law or to apply its own standards. The Commission seemed not to have fully faced up to that problem. The second difficulty related to the application of the *Nottebohm* principle. In the *Barcelona Traction* case, ICJ had not taken a firm grip on the question. It had considered that it could leave the problem aside by adding to the criteria of the incorporation of the company and the place of its registered office a series of other links between the company in question and Canada, so that the Court had in fact decided, but without saying so, that the *Nottebohm* principle applied, *mutatis mutandis*, to companies. With respect to the *Nottebohm* case, the synthesis in paragraph 71 of the Court’s judgment in *Barcelona Traction* was that the element of free choice was very important and that the relevant persons chose with what jurisdiction they wished to establish a connection. It should also be noted that, even in the case of individuals, naturalization was a very strong voluntary link. There was thus no need to apply the *Nottebohm* principle in such a way as to artificially remove the nationality of corporations.

7. Mr. DUGARD (Special Rapporteur) said that the formulation he had proposed for draft article 17, paragraph 2, rested on the idea that the place of incorporation of the company was the most important factor and that the registered office, which was also important, was the natural consequence of incorporation. In Mr. Brownlie’s view the term “registered office” was important in that it indicated the existence of a connection between the company and the State of incorporation. In paragraph 71 of its judgment in the *Barcelona Traction* case, ICJ described the elements constituting that connection (registered office, accounts, register of shareholders). One could thus interpret the term “registered office” in draft article 17 as designating the connection thus described by the Court. More problematic would be, on the other hand, the similarity between the term “registered office” and the term *siège social*. In some legal systems, the *siège social* referred to the “headquarters”, in other words, the place where the company conducted its business. And, in paragraph 70 of the aforementioned judgment, the Court had found against the criterion of the *siège social*, or place where the company had its centre of control. With regard to the problem of dual nationality, the Court’s judgment seemed to be opposed to the notion of dual or secondary protection, considering that only one State could protect the corporation. To change the word “and” to “or” in draft article 17, paragraph 2, would be tantamount to introducing a principle that was not supported by the judgment. Most members of the Commission seemed to favour the

use of the sole criterion of incorporation, but it would be wise to retain the phrase “registered office” so as to give effect to the connection between the State and the corporation that was to be found in paragraph 71 of the Court’s judgment.

8. Mr. CHEE said that the two criteria in draft article 17, paragraph 2, were taken word for word from paragraph 70 of the judgment by ICJ. Was the Commission proposing to challenge the Court’s decision by invoking the municipal law of sovereign States? As for the doctrine of the genuine link referred to by Mr. Brownlie, in paragraph 70 of its judgment, the Court noted the absence of clear criteria. While the Commission should not blindly follow the Court’s decision, when the choice was between the jurisdiction of sovereign States and that of the Court, to whose Statute those States had acceded, since it was an integral part of the Charter of the United Nations, the Commission must clearly decide which choice it must make.

9. Mr. BROWNLIE said it was not fair to say that the Special Rapporteur had departed from *Barcelona Traction*. On the contrary, he had taken it as his general guide. However, ICJ had not really been required to rule on the issue of nationality, which had not been contested by the parties. In the relevant passages of its judgment, the Court had referred to the principles of incorporation and registered office, but also to the company’s other connections with the State of nationality. Also, it must not be forgotten that the concept of nationality of corporations did not exist in the municipal law of some States. That was why a sufficiently broad criterion of international law was needed to cover the various possibilities. Draft article 17 should refer to the State where the company was incorporated and/or in whose territory it had its registered office and/or with which it had other appropriate links.

10. Mr. YAMADA said that he could accept both of the criteria proposed in draft article 17, paragraph 2, on condition that they were cumulative. A company could be incorporated in Japan only if its headquarters were in that country. He asked the Special Rapporteur whether there was any legal system under which a company’s registered office could be located in a country other than that of incorporation. If the two criteria were taken as alternatives, there was a danger that a company might have dual nationality, yet the report seemed to rule out that possibility.

11. Mr. AL-BAHARNA asked Mr. Pellet how French law regarded the situation of a company incorporated in another country that had its headquarters in Paris and whether, in practice, France would accord it diplomatic protection.

12. Mr. DUGARD (Special Rapporteur) emphasized that the question of nationality of corporations was guided by rules of municipal law. The difficulty was that such rules differed, with some countries emphasizing incorporation, others economic control, yet others registered office and still others having no specific criteria. He agreed with Mr. Brownlie and Mr. Yamada that the criteria of incorporation and registration should be combined. A consensus seemed to be emerging on that subject, but he remained concerned about the possibility that diplomatic protection might be exercised by two different States, something which seemed incompatible with *Barcelona*



*Traction*. That would be the case if the company could be protected both by its State of incorporation and by the State where it had its headquarters. However, the concepts of incorporation and registration were indissociable in most systems.

13. The CHAIR, speaking as a member of the Commission, said that the Commission must find a satisfactory definition of nationality that recognized the company's link with the State. In that connection, the Commission could draw on the definition of nationality given in draft article 3, paragraph 2, with respect to individuals. The Special Rapporteur might consider that idea.

14. Mr. KAMTO said that he found Mr. Brownlie's interpretation convincing. In the *Barcelona Traction* case, the influence of *Nottebohm* was clear, in that ICJ listed the elements of fact demonstrating the company's connection with Canada, namely, incorporation and place of registered office. In that spirit, the second criterion should be retained in draft article 17, paragraph 2, preceded by the conjunction "and", and without the square brackets. If the first criterion alone were retained, the nationality requirements for a legal person would be less strict than those for an individual, and that would be a departure from the court's jurisprudence. In order to take account of certain elements of national legislation, however, a formulation such as "with which it has a genuine link" might be inserted. It would then be for the courts to weigh those elements of connection in the event of competing claims by two States.

15. Mr. BROWNLIE said that it would be too restrictive to combine the criterion of registered office with another criterion. Moreover, unlike the Special Rapporteur, he did not think that the question of the nationality of corporations was governed by municipal law. Such law could attribute nationality, but any conflict must be settled by international law. *Barcelona Traction* did not say that nationality should be governed by municipal law. The issue in *Barcelona Traction* was not nationality but the power to exercise diplomatic protection, which was a matter of international law. In *Nottebohm*, ICJ had drawn an enlightening parallel with the issue of territorial waters. The existence of such waters was determined by the legislation of the coastal State, but international law imposed limits on what the coastal State could do in that regard. Accordingly, he felt that a more general principle than the two criteria in the draft article should be used.

16. Mr. CHEE said that, while the municipal law of each State might stipulate conditions for the incorporation of companies, the question was: In the event of a conflict between municipal and international law, which had precedence? Since the Statute of the International Court of Justice was an integral part of the Charter of the United Nations, it was important to comply with the Court's decisions.

17. Mr. PELLET, responding to Mr. Al-Baharna, said that he did not know enough about the applicable law to give a detailed answer, but that, under French law, the criterion of "headquarters" referred to the actual situation and to the corporation's actual activities. France's practice in the area of diplomatic protection was difficult to

ascertain, since such action was necessarily shrouded in secrecy.

18. On the point under debate, he agreed with Mr. Brownlie that *Barcelona Traction* did not provide an answer, since ICJ had not had to rule on the problem of nationality. On the other hand, the Court had stated clearly that the very existence of corporations was not governed by international law and that legal persons were defined by municipal law. That was because, unlike individuals, legal persons were simply creations of internal law. The State attributed a nationality to such persons, but that nationality was not necessarily recognized by other States because, as *Nottebohm* pointed out, there must be a genuine link between the person and the State of nationality. Following that logic, he wondered whether the draft articles should reintroduce the idea of a genuine link that would make it possible to exercise diplomatic protection. Such a link could be determined according to various criteria, such as the place of incorporation, headquarters, registered office and probably others. Satisfactory wording would have to be found to convey that idea.

19. Mr. DUGARD (Special Rapporteur) asked whether that meant that Mr. Pellet had abandoned the idea of dual protection.

20. Mr. PELLET said he believed that there was nothing to prevent several States from being entitled to exercise diplomatic protection on behalf of a corporation if the latter had a genuinely strong link with more than one State. Nevertheless, for the purposes of the progressive development of international law, the Commission could say that only one State—the one with which the company had the strongest link—could exercise such protection.

21. Mr. GAJA observed that *Barcelona Traction* could not be said to have ignored international law. He quoted the first sentence of paragraph 70 of that judgment, in which ICJ noted: "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals" [p. 42]. The judgment referred to municipal law only with respect to incorporation of companies and not with respect to nationality, a concept which did not always exist in municipal law where legal persons were concerned. Since the legislation applied to corporations envisaged a wide variety of criteria, it was necessary to find a criterion under international law while not forgetting the genuine link issue. Place of registered office was not an element of that link.

22. Mr. ECONOMIDES welcomed the turn taken by the debate. He suggested that draft article 17, paragraph 2, should be formulated in more general terms—for instance, by saying that diplomatic protection was exercised by the national State, such State to be determined by internal law in each case, provided that there was a genuine link or connection between the national State and the company concerned. That would obviate the need for the Commission to discuss the various criteria, which could be mentioned in the commentary, yet would retain the "genuine link" condition.

23. Mr. PAMBOU-TCHIVOUNDA requested that Mr. Economides produce his proposal in writing, as it would be of interest as the discussion proceeded.

24. Mr. ECONOMIDES said he could certainly comply with that request, but that Mr. Brownlie might be in a better position to do so.

25. The CHAIR invited the Special Rapporteur to introduce articles 19 and 20 of the draft articles on diplomatic protection.

26. Mr. DUGARD (Special Rapporteur) said that draft article 19 was a saving clause designed to protect shareholders whose own rights, as opposed to those of the company, had been injured. As ICJ had recognized in the *Barcelona Traction* case, the shareholders had an independent right of action in such cases and qualified for diplomatic protection in their own right.

27. The Chamber of ICJ had also considered the issue in the *ELSI* case, but it had failed to expound on rules of customary international law on that subject. The proposed article left two questions unanswered: the content of the right, or when such a direct injury occurred, and the legal order required to make that determination.

28. The Court in *Barcelona Traction* had mentioned the most obvious rights of shareholders, but the list was not exhaustive. That meant that it was left to courts to determine, on the facts of individual cases, the limits of such rights. Care would have to be taken to draw clear lines between shareholders' rights and corporate rights, however. He did not think it was possible to draft a rule on the subject, as it was for the courts to decide in individual cases.

29. As to the second question, it was quite clear that the determination of the law applicable to the question whether the direct rights of a shareholder had been violated had to be made by the legal system of the State in which the company was incorporated, although that legal order could be supplemented with reference to the general principles of international law. He had not wished to draft a rule, but simply to state the one recognized by ICJ in the *Barcelona Traction* decision, namely, that in situations in which shareholders' rights had been directly injured, their State of nationality could exercise diplomatic protection on their behalf.

30. Turning to article 20 on continuous nationality of corporations, he pointed out that State practice on the subject was mainly concerned with natural persons. In that connection, he recalled that the Commission had adopted draft article 4<sup>3</sup> on that subject at its fifty-fourth session in 2002. The principle was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when the latter had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

<sup>3</sup> See footnote 1 above.

31. If the corporation ceased to exist in the place of its incorporation as a result of an injury caused by an internationally wrongful act of another State, however, the question that arose was whether a claim had to be brought by the State of nationality of the shareholders, in accordance with draft article 18, subparagraph (a), or by the State of nationality of the defunct corporation, or by both. The difficulties inherent in such a situation had been alluded to in *Barcelona Traction*, and some of the judges had considered that both States should be entitled to exercise diplomatic protection.

32. He agreed with that view, as it would be difficult to identify the precise moment of corporate death, and there would be a "grey area in time" during which a corporation was practically defunct but might not have ceased to exist formally. In such a situation, both the State of incorporation of the company and the State of nationality of the shareholders should be able to intervene. He was aware that, in the *Barcelona Traction* case, ICJ had not been in favour of such dual protection, but it seemed that that solution might be appropriate.

33. Finally, he did not think it was necessary to draft a separate rule on continuous nationality of shareholders; since they were natural persons, the provisions of draft article 4 would apply to them.

#### **Reservations to treaties<sup>4</sup> (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>5</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

#### **DRAFT GUIDELINES ADOPTED BY THE DRAFTING COMMITTEE**

34. The CHAIR invited the Chair of the Drafting Committee to introduce the draft guidelines relating to reservations to treaties adopted by the Committee (A/CN.4/L.630).

35. Mr. KATEKA (Chair of the Drafting Committee) said that the Committee had completed its consideration of the 15 guidelines the Commission had referred to at its preceding session.

#### **Explanatory note**

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

[...]

#### **2.5 Withdrawal and modification of reservations and interpretative declarations**

##### **2.5.1 Withdrawal of reservations**

<sup>4</sup> For the text of the draft guidelines provisionally adopted to date by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>5</sup> See footnote 2 above.

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

#### 2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

#### 2.5.3 *Periodic review of the usefulness of reservations*

1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

#### 2.5.4 [2.5.5] *Formulation of the withdrawal of a reservation at the international level*

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without the person's having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and ministers for foreign affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

#### 2.5.5 [2.5.5 bis, 2.5.5 ter] *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

#### 2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

#### 2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

1. The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

#### 2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

#### Model clauses\*

##### A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

##### B. Earlier effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

##### C. Freedom to set the effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

#### 2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(b) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations.

#### 2.5.10 [2.5.11] *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

#### 2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

\*For the commentary see...



36. He drew the Commission's attention to a new section, which would be entitled "Explanatory note" and would be placed at the beginning of the draft guidelines. In considering the model clauses relating to draft guideline 2.5.9, the Drafting Committee had concluded that it would be useful to retain them, but had been uncertain as to where they should be placed: in the text of the Guide to Practice itself, either just after the relevant draft guideline or in a footnote; in an annex to the Guide; or in the commentary to the relevant draft guideline to explain the circumstances in which the clauses could be used. After having eliminated a number of possibilities, and in view of the fact that the Special Rapporteur intended to submit more model clauses for future guidelines, the Drafting Committee had concluded that the best and most practical solution would be to keep the model clauses in the guidelines to which they related and place an explanatory note at the beginning of the Guide to Practice, explaining the function of the model clauses. In addition, a footnote would refer the reader to the relevant commentary. The explanatory note would also be used to explain other issues in relation to the Guide to Practice that might arise in the future. In fact, it would serve as a general introduction to the Guide.

37. Referring to draft guideline 2.5.1 (Withdrawal of reservations), he said the Drafting Committee had made no changes to the guideline originally proposed by the Special Rapporteur.<sup>6</sup> Its wording was identical to that of article 22, paragraph 1, of the 1986 Vienna Convention. The phrase "unless the treaty otherwise provides", which was also found in the Convention, had been maintained, although it was understood that *all* the draft guidelines had a purely residual character and could thus be followed in the absence of any other treaty provisions.

38. Draft guideline 2.5.2 (Form of withdrawal) had been provisionally adopted by the Drafting Committee, as proposed by the Special Rapporteur, without any modification. The wording was identical to that of article 23, paragraph 4, of the 1969 Vienna Convention. On the basis of the debate in plenary, the Drafting Committee had considered whether mention should be made of "implicit" withdrawals, which resulted from the obsolescence of internal legislation or developments in general international law. Reference had been made to the view that a State announcing its intention to withdraw a reservation should be bound to act accordingly even before the reservation had been formally withdrawn. The Committee had nevertheless decided that, for the sake of legal certainty and security of treaty relations as well as consistency with the 1969 and 1986 Vienna Conventions, such "implicit" withdrawals should not be admitted.

39. Draft guideline 2.5.3 (Periodic review of the usefulness of reservations) had received almost unanimous support in plenary. Several observations had been made about the use in English of the term "internal legislation" with reference to international organizations. The possibility of mentioning treaty-monitoring bodies explicitly had also been recalled. The view had been expressed that developments in internal legislation were not the only reason

why reservations should be reconsidered: developments in international law or other factors could also play a role. The Drafting Committee had carefully considered all those views and had decided that the words "in particular" should be inserted before the words "in relation" in paragraph 2 in order to indicate precisely that those developments were a factor among others.

40. The Drafting Committee had replaced the words "internal legislation" by the words "internal law" so that they would be equally applicable to international organizations. The words "rules of the international organization" as used in article 46 of the 1986 Vienna Convention were also recalled, but the Committee had considered that that reference would be better placed in the commentary. In the same paragraph, the word "special" had replaced the word "particular" and the word "retaining" had been added before the words "the reservations", while the word "careful" had been deleted, since it no longer had a *raison d'être* after the addition of the words "in particular" further on.

41. With regard to the treaty-monitoring bodies, it had been agreed that, despite their special role, they should not be singled out in that context, since other legislative bodies (for example, the United Nations General Assembly or the Parliamentary Assembly of the Council of Europe) often made similar recommendations for the withdrawal of reservations. It had been decided, however, that the issue should be addressed in more detail in the commentary. Finally, in the context of that guideline, the fact that all the draft guidelines were recommendations had again been stressed, in order to dispel any fear that, in the context of such a periodic review, States might think that reservations could be made easily.

42. Draft guideline 2.5.4, which dealt with the persons competent to formulate the withdrawal of a reservation at the international level, had originally been guideline 2.5.5, for which the Special Rapporteur had proposed two alternatives, one short and one long. The plenary had preferred the longer version, and, in view of the pedagogic function of the Guide to Practice, it was that version that had been retained by the Drafting Committee. The draft guideline had also needed to be brought into line with draft guideline 2.1.3 (Formulation of a reservation at the international level), to which it corresponded. That was why the title had been changed to "Formulation of the withdrawal of a reservation at the international level". In addition, the square brackets around paragraph 2 (c), which corresponded to paragraph 2 (d) of draft guideline 2.1.3, had been deleted.

43. Draft guideline 2.5.5 was a merger of guidelines 2.5.5 *bis* and 2.5.5 *ter*, as originally proposed by the Special Rapporteur. It corresponded to draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). The Drafting Committee had brought the wording of paragraph 1 (former guideline 2.5.5 *bis*) into line with that of draft guideline 2.1.4 and replaced the words "internal law of each State or international organization" by "or the relevant rules of each international organization". That change, which might seem to be inconsistent with guideline 2.5.3, was deliberate and justified. In the view of the Drafting Committee, the words

<sup>6</sup> For the text of the draft guidelines proposed by the Special Rapporteur in his seventh report, see *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1-3.

“internal law” in guideline 2.5.3 had a broader and more general meaning, whereas, in guideline 2.5.5, the “rules of the organization” referred to a more specific issue, that of competence to withdraw reservations. Another question had been raised with regard to the effect of the withdrawal of a reservation resulting in reduced obligations for all the parties to a treaty. It had, however, been pointed out that that problem related more to draft guideline 2.5.7 and it would be enough to mention it in the commentary. Finally, the title of guideline 2.5.5 was that of former guideline 2.1.4.

44. Draft guideline 2.5.6 (Communication of withdrawal of a reservation) had also been proposed by the Special Rapporteur in two versions, one shorter and one longer. The Drafting Committee had preferred to retain the shorter version, which referred to draft guidelines 2.1.5, 2.1.6 and 2.1.7 dealing with the communication of reservations and the functions of depositaries [already adopted by the Committee at the Commission’s fifty-fourth session<sup>7</sup>]. It would be recalled that the procedure determined for the communication of reservations (draft guideline 2.1.6), including the use of electronic mail or facsimile, was equally applicable to the withdrawal of reservations.

45. Draft guideline 2.5.7 (Effect of withdrawal of a reservation) was the result of the merger of guidelines 2.5.7 and 2.5.8, as originally proposed by the Special Rapporteur. The original text would not have been applicable when one objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization. As currently drafted, paragraph 1 of the new draft guideline 2.5.7 corresponded to the text of the former draft guideline 2.5.7, whereas paragraph 2 corresponded to the former draft guideline 2.5.8.

46. Taking into account observations made in plenary, the Drafting Committee had replaced the words “of the treaty” in the first sentence of paragraph 1 by the words “of the provisions on which the reservation had been made”. The commentary should explain that the plural “provisions” could also refer to a single provision, and it should also refer to draft guideline 1.1.1 (Object of reservations) pertaining to certain specific aspects of reservations to the treaty as a whole.

47. The Drafting Committee had retained the words “whether they had accepted or objected to the reservation” at the end of paragraph 1, which made it clear that the guideline covered two separate cases. For the sake of clarity, it had been thought better to add the words “by reason of that reservation” at the end of paragraph 2.

48. Draft guideline 2.5.8 was the former guideline 2.5.9, as originally proposed by the Special Rapporteur. It closely followed article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions. The Drafting Committee had adopted it with only a minor change in the French version, the word *autrement* having been added in the first line to bring it into line with the text of the provision in the Conventions.

49. That draft guideline was accompanied by model clauses. The Drafting Committee had had an extensive debate on the exact placement and function of such clauses.

It had eventually decided to retain the model clauses in the guideline and to refer to their function in the explanatory note at the beginning. As had been agreed, the model clauses would also be accompanied by a footnote referring the reader to the commentaries, where the appropriate use of model clauses would be explained. The Drafting Committee had placed the general heading “Model clauses” immediately after draft guideline 2.5.8. The text of the clauses followed, preceded by the letters A, B and C. The Drafting Committee had not made any changes to the model clauses themselves, except to move the square bracket before the word “depository” to include, more appropriately, the words “to” or “by”.

50. The text of draft guideline 2.5.9 (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation) was essentially as proposed by the Special Rapporteur. The Drafting Committee had considered the proposal that the words “the situation of the withdrawing State” should be replaced by the words “the content of the obligations of the other contracting States or international organizations”. It had been argued that that substitution was justified because it was not possible to determine unilaterally the effect of the withdrawal of a reservation. Consequently, if the reserving State or organization was allowed to do so, the other contracting parties should be protected from any change (for the worse) of their obligations as a result of that unilateral determination of the effect of the withdrawal. In that context, the view had also been expressed that the obligations mentioned should be those of the withdrawing State rather than those of the other contracting States or international organizations. Those two views were not necessarily the same, since it could be argued that the obligations of the other contracting parties were almost always affected by the withdrawal of a reservation. In order to clarify the guideline further, it had been suggested that the words “in relation to the withdrawing State” should be added at the end of subparagraph (b).

51. According to the first view, however, there could be situations when the withdrawal of a reservation (relating, for example, to legal cooperation in the field of political and civil rights) did not really affect the obligations of the other contracting parties even if it had a retroactive effect. In the course of the debate, it had been felt that, if the content of obligations was mentioned, the content of rights could be included as well. It had then been pointed out that the initial word “situation” covered both rights and obligations. It had been agreed that the best formulation to signal that the withdrawing State did not disadvantage the other contracting parties was the wording adopted, namely, “add to the rights of the withdrawing State or international organizations in relation to the other contracting States or international organizations”. In the final analysis, the withdrawing State or international organization should not be able to put itself in an advantageous position *vis-à-vis* the other contracting parties.

52. There had been no other changes (from the original wording) in that draft guideline. The Drafting Committee had decided to retain the words “withdrawing State” on the understanding that it could be explained in the commentary that that meant the State (or organization) withdrawing a reservation and not the State (or organization) withdrawing from a treaty.

<sup>7</sup> See *Yearbook ... 2002*, vol. I, 2733rd meeting, para. 2.

53. Draft guideline 2.5.10 (Partial withdrawal of a reservation) corresponded to draft guideline 2.5.11 as proposed by the Special Rapporteur. Taking into accounts comments made in plenary, the Drafting Committee had decided to reverse the two paragraphs for logical reasons and to deal with definition before procedure.

54. The Drafting Committee had replaced the words “modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty” by the words “limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty”. The Drafting Committee had found the word “modification” misleading, since it might also indicate an extension of the reservation. It was therefore preferable to set out clearly what the partial withdrawal of a reservation did—namely, limit the legal effect of the reservation.

55. There had also been a discussion regarding the words “achieves a more complete application of the provisions of the treaty”, which had eventually been adopted because they better reflected the idea that the partial withdrawal of a reservation achieved a more complete application of the treaty by its very existence. As a consequence of that change, the word “withdrawing” had had to be added before “State or international organization”. The title of the draft guideline remained unchanged.

56. Draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation) corresponded to guideline 2.5.12 as originally proposed by the Special Rapporteur. The guideline had been modified to take account of two observations made during the debate in plenary. The first observation had referred to the possibility that an objection to a reservation which was partially withdrawn continued to have its effects to the extent that the objection did not apply exclusively to that part of the reservation which had been withdrawn. The second sentence of the draft guideline had been modified accordingly. The second observation had referred to the possibility that the partial withdrawal of a reservation might have a discriminating effect. In such a case, an objection could be made to the reservation resulting from the partial withdrawal. A last sentence had therefore been added stating exactly that possibility.

57. The first sentence of the draft guideline remained unchanged—only the word “effects” had been changed to the singular “effect”, since the plural had been unnecessary.

58. In closing, he said that the Drafting Committee recommended that the Commission should adopt the draft guidelines before it.

59. The CHAIR thanked the Chair of the Drafting Committee. Noting that the originals of the report of the Drafting Committee were in English and French, he recommended that those members of the Commission who used the other official United Nations languages should examine the translations carefully and communicate any remarks to the Chair of the Drafting Committee.

60. Mr. ECONOMIDES said that he had a number of suggestions to make concerning the French version. In draft guideline 2.5.2, the words *doit être formulé* were

wrong. Either the *request* was *formulated* in writing or the *withdrawal* was *made* in writing. At the end of draft guideline 2.5.3, it would be preferable to replace the words *qu’il a subies* by the word *intervenues*, which was more neutral. In paragraph 1 (b) of draft guideline 2.5.4, the word *pertinentes* should be inserted after the word *circonstances*. In draft guideline 2.5.9, he failed to see how the withdrawal of a reservation could add to the rights of the withdrawing State or international organization.

61. The CHAIR, speaking as a member of the Commission, said that the title of draft guideline 2.5.4 should be changed to read “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), which seemed to him to be more in line with the content. He also had a number of comments on the Spanish version which he would communicate to the secretariat in due course in the appropriate manner.

62. Mr. GAJA, referring to a point of grammar, said that, at the end of the first paragraph of the English version of draft guideline 2.5.7, it would be preferable to say “whether they had accepted the reservation or objected to it”.

63. Mr. MOMTAZ said that, in paragraph 1 of the French version of draft guideline 2.5.10, the words *assurer plus complètement l’application* should be replaced by the words *assurer une plus large application*.

64. Mr. ROSENSTOCK suggested that a comma should be added after the words “international organization” in the introduction to draft guideline 2.5.9 of the English version.

65. Mr. PELLET (Special Rapporteur) reminded members that the consideration of the report of the Drafting Committee was not meant as an opportunity to catch up on substantive matters. With regard to draft guideline 2.5.2, its wording was perfectly in line with that of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, as the Chair of the Drafting Committee had pointed out. As to draft guideline 2.5.4, he reminded the Chair that he himself had proposed using the word *compétence* in connection with draft guideline 2.1.3, but his suggestion had not been followed up. It therefore seemed inevitable that draft guideline 2.5.4 must be brought into line with draft guideline 2.1.3. He did not object to adding the word *pertinentes* after the word *circonstances*, although he regarded it as superfluous.

66. In respect of draft guideline 2.5.8, he said that, in the French version of model clause A, the square brackets should be placed between *notification* and *au* and not before *dépôt*.

67. In formulating his comment on draft guideline 2.5.9, subparagraph (b), Mr. Economides had reopened a very long discussion which had taken place in plenary and in the Drafting Committee during the previous session. At that time, Mr. Gaja had put forward the idea of the possibility of a discriminatory withdrawal. If he thought about that, Mr. Economides should easily be able to see the real scope of subparagraph (b).



68. With regard to paragraph 1 of draft guideline 2.5.10, he said that he was not enthusiastic about the words *une plus large application* because they might suggest problems of either interpretation or territorial application. In his view, the word *complètement* was more appropriate.

69. The CHAIR, speaking as a member of the Commission, pointed out that the French and English versions of paragraph 1 of draft guideline 2.5.10 were not identical. There was a difference between “limits” and *vise à atténuer*; it would be preferable to say “aims at limiting”.

70. Mr. PELLET (Special Rapporteur) proposed “purports to limit”.

71. Mr. KATEKA (Chair of the Drafting Committee) said that he had no objection to the title “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), but he agreed with the Special Rapporteur that the wording of draft guidelines 2.5.4 and 2.1.3 should be consistent.

72. The CHAIR, speaking as a member of the Commission, said that he understood the need for consistency, but, on second reading, the title of a draft guideline could at least be brought into line with its content.

73. Mr. DAOUDI, referring to the differences between the French and English versions, asked which of the two the other language versions should follow.

74. The CHAIR and Mr. PELLET (Special Rapporteur) said that the French version was to be followed.

75. Mr. PELLET, speaking as a member of the Commission, said he hoped that the Chair would not press for the amendment of the title of draft guideline 2.5.4 because draft guideline 2.1.3 would then have to be amended as well.

76. The CHAIR, speaking as a member of the Commission, said that he would not insist any further. Speaking as Chair of the Commission, he said that, if he heard no objection, he would take it that the Commission adopted the draft guidelines submitted by the Chair of the Drafting Committee, subject to the comments and changes made during the debate.

*It was so decided.*

*The meeting rose at 1.10 p.m.*

## 2761st MEETING

*Thursday, 22 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr.

Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MELESCANU said that diplomatic protection of corporations and their shareholders was the most interesting aspect of the topic from the intellectual and practical standpoints. Diplomatic protection dated back to the last decades of the nineteenth century, but most investments were now made through corporations, rather than by natural persons—the situation covered by the *Nottebohm* case.

2. No more important problem confronted the developing countries and countries in transition than the problem of attracting investment, and one of the key aspects was providing the requisite guarantees for foreign investors. The debate on regulating the issue was more political than legal, tending to favour corporations, even multinational corporations, rather than the interests of the developing countries and countries in transition. It needed to be acknowledged, however, that those countries were currently engaged in a harsh struggle to attract foreign investment. Accordingly, they could benefit from the development of an internationally applicable regime governing investment. Without such a regime, there would be no alternative but to fall back on bilateral agreements negotiated with economically powerful countries, agreements that would inevitably grant less favourable terms to the countries seeking to attract investment.

3. Furthermore, paradoxically, despite the fact that most investment was now made through corporations, corporations were less well protected than were natural persons, who were able not only to seek diplomatic protection but also to invoke their human rights. Corporations, on the other hand, had no such protection, as *lex mercatoria* was a field of law still in its infancy.

4. The debate on the subject under consideration thus crystallized around one issue: Should the Commission confine itself to codifying existing international law on the basis of *Barcelona Traction*, or should it decide in favour of a new approach encompassing not only corporations but also their shareholders? In his view, there were

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

no grounds for concluding that any dramatic change in the latter direction had taken place. Accordingly, he favoured an approach based on the philosophy of law, rather than on judicial practice.

5. An analogy could be drawn between the present topic and the topic of the responsibility of international organizations, and between international organizations as subjects of public international law and corporations as subjects of municipal law. In both cases, it was agreed that there was a distinction between collective subjects (international organizations and corporations) and individual subjects (States and natural persons), provided those collective subjects had legal personality and a personality distinct from that of their creators. In his view, the logical conclusion was that the decision in the *Barcelona Traction* case was correct and must be used as the basis for the Commission's work. As ICJ had stressed, companies were characterized by a clear distinction between the company and its shareholders. Consequently, the draft articles should clearly indicate that diplomatic protection in the case of corporations fell to the State of nationality of the corporation and not to the State of nationality of the shareholders. That was the general conclusion emerging from the debate, and he thus supported draft article 17, paragraph 1, as the Commission was faced with a task of codification based on clear judicial practice, namely, the *Barcelona Traction* case.

6. The crux of the debate, however, was how to determine the nationality of corporations. Mr. Pellet had identified the matter, pointing out that the Commission was faced not merely with the task of codifying international law on the basis of the *Barcelona Traction* judgment, but also the task of progressively developing public international law by trying to establish under what conditions a corporation could truly claim the diplomatic protection of a State of which it was a "national". The judgment of ICJ had recognized Canada's right to exercise diplomatic protection, considering that there had been a genuine link between the company and the State inasmuch as the company had been incorporated in the State in question and had had its registered office in that country—cumulative conditions in the *Barcelona Traction* judgment. In that case as in others, reference had also been made to other elements, such as the company's principal place of economic activity, economic control, and the nationality of the majority shareholders. The Commission's task was now to decide how the question of nationality was to be regulated in future.

7. The question of the nationality of corporations, like that of the nationality of natural persons, the regime of foreigners or the territorial sea, was a domain essentially within national jurisdiction. The simplistic solution would be to refer directly to the provisions of municipal law. However, in all such domains international law must lay down guidelines. Accordingly, he did not support the proposal to delete the words "and in whose territory it has its registered office" from draft article 17, paragraph 2. It would be better to list illustrative conditions, rather than a single criterion or cumulative conditions, as State practice was very diverse. For instance, in the United States, for the purposes of diplomatic protection, a corporation was regarded as "national" if it was incorporated in the United States and at least 50 per cent of the shareholders

were United States citizens. In Switzerland, on the other hand, protection was granted to any corporation a majority of whose shareholders were Swiss citizens. On the basis of those considerations, of the debate at the previous meeting, and of the example of the rules adopted on the nationality of natural persons, he would propose that draft article 17, paragraph 2, should read:

"For the purposes of diplomatic protection, the national State of a corporation is the State in which the corporation is incorporated or in which it has its registered office or its domicile, or in which it has its basic economic activity or any other element recognized by international law as reflecting the existence of a genuine link between the corporation and the State in question."

A formulation of that type would allow the courts the flexibility to accept several criteria as a means to establish the existence of a genuine link, the only fundamental criterion of relevance to the nationality of corporations, as indeed to that of natural persons.

8. He had not included among those illustrative elements the criterion of "economic control", one of the Special Rapporteur's possible options. He shared the view expressed in paragraph 33 of the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) that that criterion accorded more with the economic realities of foreign investment. However, its use might destroy the entire logical edifice of the Commission's approach by introducing, as it were through the back door, diplomatic protection based on the State of nationality of the shareholders rather than of the corporation. For, in referring to economic control, one was referring to the State in which the majority of the shareholders resided, because it was they who exercised economic control.

9. The second task was to decide whether shareholders could be afforded diplomatic protection and, if so, when. ICJ had recognized that right in principle, but had considered that in *Barcelona Traction* those conditions had not been met. Despite certain arbitral decisions, such as the *Delagoa Bay Railway* and *Orinoco Steamship Company* cases and certain lump sum agreements, positive international law was silent on that matter. A first possible scenario involving protection of shareholders was the one in which shareholders had suffered direct injury as a result of an internationally wrongful act. In his view, draft article 19 covered that matter in a satisfactory manner.

10. A second possible scenario was one in which the shareholders had suffered injury caused by the corporation itself, as in the case of expropriation or where the corporation had ceased to exist in the place of its incorporation. He was in favour of the exception provided for in draft article 18, subparagraph (a), provided the provision was drafted so as to eliminate the possibility of the shareholders deciding to wind up the corporation as a means of enjoying the diplomatic protection of their State.

11. He also supported the Special Rapporteur's proposal to protect corporations against malpractice and abuses of law on the part of States. Draft article 18, subparagraph (b), was an interesting point of departure in that regard, for without provision for such an exception, the corpo-

ration in question might be entirely without diplomatic protection.

12. Finally, he supported the proposal that draft articles 17 to 20 should be referred to the Drafting Committee, with a view to finalizing acceptable texts as soon as possible.

13. Mr. DUGARD (Special Rapporteur) thanked Mr. Melescanu, Mr. Brownlie and Mr. Economides for their drafting suggestions. He was attracted to Mr. Brownlie's proposal, as he did not think it departed from the spirit of the *Barcelona Traction* decision. However, he was troubled by Mr. Economides' and Mr. Melescanu's proposals, which seemed to revert to the test of the genuine link. In *Barcelona Traction*, Belgium had argued that it had *locus standi* because the majority of the company's shareholders were Belgian, so that there was a more genuine link between Belgium and the company than between Canada and the company. ICJ had not accepted the Belgian argument. Though Mr. Melescanu claimed that he did not wish to introduce the test of economic control through the back door, that was precisely what he was doing because it would then be necessary for a court to examine which State controlled the company, something which would in turn entail its determining who had the majority shareholding. Thus, the Commission must guard against adopting a formulation in draft article 17, paragraph 2, which achieved that purpose. A much more cautious approach was needed, and Mr. Brownlie's proposal, subject to modification, provided an answer to many of the questions raised, including Mr. Pellet's call for a broader test than that of the registered office. In any case, it would be very unwise to introduce the notion of genuine link in that provision.

14. Mr. MELESCANU said he had referred to the notion of genuine link for two reasons, the first of which was logical and the second practical. Regarding the first, if one was to list a series of illustrative criteria in draft article 17, paragraph 2, it would also be necessary to include an indication for the courts as to what relative weight was to be assigned to each criterion. Without an indication of how to choose among the criteria listed, a court might be tempted to place the whole burden of a decision on the shoulders of the judges of ICJ.

15. The second, practical argument was that investors in countries in transition were often foreign companies whose shareholders were nationals of the country in which the investment was made. For example, a company incorporated in Switzerland and with its registered office in Switzerland, but whose sole shareholder was Romanian, might set up a bank in Romania whose activities were conducted solely in Romania. In such a situation, without at least a reference to a genuine link in draft article 17, paragraph 2, the result might be that what was to all intents and purposes a Romanian corporation was protected by another State. That case was applicable not just to Romania but to all the countries in transition, since they had created more favourable regimes for foreign than for national investors. In those circumstances, the temptation for any capitalist worthy of the name would be to cash in on those advantages by incorporating the company in a foreign country. The Commission should not encourage such behaviour. While Mr. Brownlie's proposed formulation was ingen-

ious, it must also be acknowledged that the difference between the "genuine" link he himself proposed and the "appropriate" link proposed by Mr. Brownlie was not very significant.

16. Ms. ESCARAMEIA asked whether Mr. Brownlie's intention in using the word "appropriate" in his proposal was to expand the possibilities of diplomatic protection. In adopting the criteria of incorporation and registered office to determine nationality, ICJ in the *Barcelona Traction* case had recognized the customary international law and treaty law prevailing at the time. Since then, however, national laws had changed dramatically. Mr. Melescanu had even described a situation where the nationality of the majority shareholders was the most important criterion. Had national laws changed so much that the Commission, by using general principles of international law, might arrive at a rule very different from that enunciated in *Barcelona Traction*?

17. Mr. BROWNLIE emphasized that he had deliberately avoided using any wording from the *Nottebohm* principle: that was the whole point. It would be highly problematic to apply *Nottebohm* to the present case and even more problematic to try to codify every possible kind of substantial or effective link. The use of "appropriate" was intended to be constructively vague.

18. *Barcelona Traction* was of no direct assistance, either. The issues raised by the present draft articles had not been central to *Barcelona Traction*, where the statement of ICJ on the nationality of the corporation had been limited to what was sufficient for that case. The Court's reference to the corporation's links with Canada had been descriptive, not normative, and the Commission could not deduce from *Barcelona Traction* what to do in the present instance. Using the word "appropriate" would enable members who disagreed with *Nottebohm* to opt for the necessary flexibility. Municipal legislation was very varied. Even the registered office and other criteria mentioned were not universal. Moreover, to apply *Nottebohm* rigorously, as Mr. Economides had suggested, would in fact limit the possibilities of diplomatic protection. The wording needed to be vague enough to broaden those possibilities and ensure that none of the very diverse cases that might arise was excluded.

19. Mr. ECONOMIDES said that one purpose of draft article 17, paragraph 2, was to define the State of nationality. Under internal law, various criteria were available: the State of nationality could be the State of incorporation, the State of registered office or the State whose nationals controlled the corporation. That meant that a corporation could have three nationalities, and that three States might claim the right to exercise diplomatic protection. The other purpose of paragraph 2, therefore, was to prevent competing claims. There were two possible solutions: either to consider the various criteria under internal law and decide which one was predominant, as the Special Rapporteur had done, in which case the remaining criteria became secondary, or to give all those criteria equal weight while imposing an international criterion of "genuine link", leaving it to the courts to decide, on the basis of that criterion, which State was the State of nationality.



20. Mr. CHEE noted that, in paragraph 70 of the *Barcelona Traction* judgment, ICJ defined how nationality was to be acquired, namely, by incorporation and registration. It also stated that in the particular field of diplomatic protection of corporate entities, no absolute test of the “genuine connection” had found general acceptance. That seemed to rule out the application of the “genuine link” test. In that connection, he agreed with Jennings that the analogy between the nationality of an individual and that of a corporation was often misleading and that rules of international law based on the nationality of individuals could not always be applied to corporations without some modification.<sup>3</sup> Jennings had also argued that the “genuine link” test could not be applied to ships, since ships were chattels, not individuals.<sup>4</sup> In all three cases there were very diverse situations, and he endorsed Mr. Brownlie’s proposal to use the term “appropriate links” in order to take account of that diversity.

21. Mr. MOMTAZ, responding to Mr. Melescanu’s statement, said he disagreed that the territorial sea was a matter essentially for the jurisdiction of States. Coastal States could enact laws relating to the territorial sea, but such laws must conform to international law.

22. In the discussion of draft article 17, paragraph 2, it had been said that States could enact their own laws governing the registration of corporations. States could also enact their own laws for the registration of ships. Under international law, most notably the United Nations Convention on the Law of the Sea, however, in order for a State to be able to authorize a ship to fly its flag, a “substantial link” must exist between the ship and the State (art. 91). Although attempts to clarify the criteria for the existence of such a link under the law of the sea had failed, he felt that the term “substantial link” might be appropriate in the present case.

23. Mr. PELLET said that he supported in spirit the three proposals put forward with regard to the definition of nationality of corporations in draft article 17, paragraph 2. In his fourth report on nationality in relation to the succession of States,<sup>5</sup> the Special Rapporteur, Mr. Mikulka, had defined clearly the criteria applied with regard to the nationality of corporations and had demonstrated convincingly that States applied a multiplicity of criteria. He understood the Special Rapporteur’s concern about including an express reference to “genuine link”, but felt that the proposals by Mr. Economides and Mr. Melescanu must not be interpreted as reintroducing the criterion of control, which presented more disadvantages than advantages. Instead, their proposals must be interpreted as referring to a genuine “legal” link, which could be established only by internal laws. Internal laws differed considerably and might include the criterion of “preponderant legal interest”. If there was an internal legal provision that referred to such a preponderant legal interest, it could be taken into account internationally. Given the very nature of legal persons, international law could not ignore provisions of internal law.

24. It could be seen from the range of criteria which States apparently applied in granting nationality to legal persons, especially corporations, that the links were, as Mr. Mikulka had said, very diverse. The Commission’s discussion seemed to imply that there were two criteria for according nationality: incorporation and registered office, on the one hand, and effective seat of business, on the other. In the light of Mr. Mikulka’s report, he wondered whether the Commission should in the present case even speak of “nationality”, especially in view of the attitude some countries displayed towards the very notion of nationality. What was important was that a “genuine” or “appropriate” legal link existed between the corporation and the State such that diplomatic protection could be exercised, and it might be going too far to speak of nationality in paragraph 2 when some internal legal systems might object to such a reference.

25. In paragraph 85 of the report, in the commentary to draft article 18, subparagraph (b), Mr. Brownlie was quoted<sup>6</sup> as criticizing the exception proposed by the Special Rapporteur. Earlier in the present session, however, Mr. Brownlie had considerably reduced the scope of his criticism by explaining that in the passage in question he had been referring to shareholders who were nationals of the State in question, namely, the State of nationality of the corporation. In that case and that case alone, he agreed with Mr. Brownlie that there was no logic in allowing another State to exercise the diplomatic protection of national shareholders. However, in other cases, namely, those involving shareholders who were nationals of the State that committed the internationally wrongful act, it was logical and equitable that diplomatic protection should be exercised on their behalf. For instance, if a company which was a national of State A and whose foreign shareholders were nationals of State B was the victim of an internationally wrongful act on the part of State A, those of its shareholders who were nationals of State A obviously could not be protected by a third State. However, there was no reason why the shareholders who were nationals of State B could not be protected by their own State since an internationally wrongful act had been committed against them. That was not the situation in *Barcelona Traction* where, as ICJ had stated repeatedly in its judgment, the State of nationality of the corporation could exercise diplomatic protection. Unless one accepted the hypothesis in draft article 18, subparagraph (b), one would be deliberately creating a situation where, unlike *Barcelona Traction*, no State could exercise diplomatic protection. Subparagraph (b) was entirely acceptable. Not only did it not contradict the general principles of the *Barcelona Traction* case, but it was in fact in line with the Court’s reasoning in that case, namely, that only one category of international protection was needed, but there must be one. If one generalized Mr. Brownlie’s objection, there would be no protection at all in the event of an internationally wrongful act. When the State of nationality of the corporation committed the internationally wrongful act, the only possible protection was that afforded by the State(s) of nationality of the shareholders. Since that was precisely the situation envisaged in draft article 18, subparagraph (b), he fully supported the drafting proposed by the Special Rapporteur.

<sup>3</sup> See 2759th meeting, footnote 9.

<sup>4</sup> *Ibid.*, p. 732.

<sup>5</sup> *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489.

<sup>6</sup> See 2757th meeting, footnote 3.

26. Draft article 19 dealt with another exception envisaged in the *Barcelona Traction* judgment, as cited in paragraph 88 of the report. He had no problem with the analysis in paragraphs 88 to 92 of the report, except that, in his view, the judgement of ICJ in that regard was less relevant than the separate opinions of certain judges, especially Judges Oda and Schwebel in the *ELSI* case. The question was, what were the shareholders' own rights as distinct from the rights of the corporation? According to the Court, such rights could include the right to control and manage the company, an important issue which in his view went beyond the rights of shareholders *per se* to those of managers and directors. That did not have to be specified in the text of draft article 19, but it should perhaps be specified in the commentary. Some shareholders had special responsibilities towards the corporation, and the State of nationality of the manager also had the right to exercise diplomatic protection.

27. The *Barcelona Traction* jurisdiction reflected in draft article 19 was not the only jurisprudence in that regard. Earlier arbitral awards, such as that in *El Triunfo Company*, had taken the same position.

28. Draft article 20 posed more problems than did draft article 19. He agreed with members who were opposed to the rule of continuous nationality of individuals. Since the injury was deemed to be caused to the State rather than to the protected person—by virtue of the very principle of the legal fiction on which diplomatic protection was based—only the nationality of the protected person at the time of the internationally wrongful act was relevant. By the same token, he was opposed to continuous nationality of legal persons. However, the Commission had taken a different position in draft article 4,<sup>7</sup> cited in paragraph 93 of the report, going so far as to accord an apparent preference to acquired nationality over nationality of origin. Although he disagreed with that position, it would be absurd to adopt a different line of reasoning with respect to legal persons, and he was prepared, regretfully, to defer to that position in the interests of consistency. He was not at all convinced by the Special Rapporteur's arguments in paragraph 95 of his report against extending to legal persons the exception provided in draft article 4, paragraph 2, for individuals. He did not see why the reasons given in paragraphs 6 to 8 of the commentary to article 4 should not apply also to legal persons, including corporations. Extending the exception in article 4, paragraph 2, to legal persons seemed all the more necessary when one considered that the Special Rapporteur's reasoning in paragraph 95 was based essentially on the erroneous belief that the only criterion for determining the nationality of a corporation was its place of incorporation. That belief was based on the abusive generalization of a given legal system, when internal laws differed on that score as they did on the legal personality of individuals.

29. He was, if not in agreement with, at least resigned to referral of the first part of draft article 20 to the Drafting Committee, on the understanding that wording equivalent to that in draft article 4, paragraph 2, would be incorporated. That provision referred to a "person", not a "natural" person or individual, and, as he had suggested in 2001 and 2002, the text should perhaps be revised, especially in

view of the Commission's present efforts regarding corporate persons.

30. He was in favour of retaining the bracketed portion of draft article 20, first because he had been won over by the arguments in paragraphs 98 *et seq.* of the report, and second, because it was the only solution compatible with draft article 18, subparagraph (a), for which he had already expressed support. That support was nonetheless tempered by his conviction that neither in draft article 18, subparagraph (a), nor in draft article 20 was the corporation's having ceased to exist in law the important element. What mattered more was that it should be actually and practically incapable of defending its rights and interests. If the Commission and/or the Drafting Committee agreed with the views he had outlined at the 2759th meeting, draft article 20 could be aligned on the wording, thus corrected, of draft article 18.

31. He agreed with the Special Rapporteur's statement in paragraph 105 of his report that it was unnecessary to draft a separate continuity rule for shareholders, but not with the assertion that the continuity rule in respect of natural persons covered shareholders. That was true only in some cases. In other, much more numerous cases, the shareholders of a corporation were corporate persons and were covered by draft article 17. Just as a door could only be open or closed, a person could only be natural or corporate.

32. Subject to the reservations he had expressed and the small additions he had suggested, he was in favour of referring draft articles 17 to 20 to the Drafting Committee. The French text of the fourth report was inaccurate in many instances, and, although he knew that the translation services worked under intense pressure, he would like to see the errors corrected. To give but one example: the phrase *succession d'État* was used in paragraph 97, but it should always be written *succession d'États*.

33. Mr. BROWNIE said that, because he shared Mr. Pellet's views on many of the major issues of principle and policy, he was surprised to hear his position on draft article 18, subparagraph (b). The *Barcelona Traction* decision was extremely dismissive of the principle enunciated in subparagraph (b), which was described as a "theory" that was not applicable to the case. At the Commission's 2759th meeting, Mr. Pellet had made some very significant remarks about how a corporation attached itself to a State's domestic system, and about the nature of incorporation. That process brought into play the will of the persons who took certain economic decisions. In *Barcelona Traction*, ICJ had emphasized that the incorporation of the company was an act of free choice, which was precisely the subject of article 18, subparagraph (b): when a group of persons decided to invest in State A which required them to form a local company, they took a decision based on free choice. Yet Mr. Pellet did not favour or lend credence to the operation of free choice on the part of a foreign company in the particular context of subparagraph (b).

34. Mr. GAJA said that a central element of Mr. Pellet's argument was the assumption that an internationally wrongful act had taken place and that, unless a State other than the corporation's State of nationality was allowed to

<sup>7</sup> See footnote 1 above.

intervene, no State would be entitled to give protection. Yet States did not have obligations with regard to their own national corporations under general international law, apart from obligations relating to human rights, which concerned all the other States.

35. As to whether a broad interpretation could be given to the rights of shareholders, such as to include the right to manage, in his opinion paragraph 70 of the *ELSI* judgment yielded little more than an indication that under the relevant treaty provision the shareholders' right to manage might include something more than just a formal right and involved the right to manage the assets of the company, which would be affected by the requisition of the company assets.

36. Mr. KAMTO said the Commission seemed to be straying farther and farther from the substance of the rule in draft article 17, paragraph 2. In paragraph 70 of the *Barcelona Traction* decision, the company's place of incorporation was given as the main criterion, and domestic laws had no bearing whatsoever on the problem. In respect of the nationality of ships, international law left it to the State to choose the criteria under which the ship was registered. For the purposes of draft article 17, paragraph 2, the Commission simply had to decide whether wording that would permit various factors of attachment to be taken into account should be inserted after the word "and". He had been somewhat surprised by the example cited by Mr. Melescanu. The main criterion must be that of the State of registration or incorporation: that was the case for the nationality of ships, and he saw no reason to do anything different with regard to corporations. The phrase "nationality of corporations", which had been used throughout the *M/V "Saiga" (No. 2)* case, was perfectly acceptable and should be retained. Draft article 20 could be improved by replacing the phrase "which was incorporated under its laws" by "which had its nationality", something that would remove all ambiguity and should resolve Mr. Pellet's concern about whether a single criterion or several should be applied.

37. Mr. PELLET, replying to Mr. Kamto's comments, said the fact that something existed under a domestic legal regime was not a good reason for it to be used elsewhere. As to Mr. Gaja's first remark, the existence of an internationally wrongful act was posited by definition in the draft—in draft article 1, paragraph 1.<sup>8</sup> Perhaps diplomatic protection could be exercised in other contexts, but they fell outside the purview of the draft. Concerning Mr. Brownlie's comments, in *Barcelona Traction* ICJ had declined to pronounce itself on the matter now covered in draft article 18, subparagraph (b). Mr. Brownlie laid great emphasis on free choice, yet the fact that a person chose to travel in a State did not absolve that State from responsibility for an internationally wrongful act that it might commit against that person. If domestic remedies had been exhausted, there was no reason why the State should not be called to account internationally through the mechanism of diplomatic protection. That was why he upheld draft article 18, subparagraph (b), with all his might.

<sup>8</sup> *Ibid.*

38. Mr. MANSFIELD said he had been prompted to speak because the focus of the discussion seemed to be shifting. The basic issue was who could exercise diplomatic protection for a corporation. The Special Rapporteur's report, and the *Barcelona Traction* case, showed that the only State that could do so was the State in which the corporation was incorporated or perhaps, following Mr. Pellet's comments, with which it had a formal link, a link equivalent in the State's domestic law to the link of incorporation. As Mr. Brownlie had pointed out, in *Barcelona Traction* ICJ had not had to decide which particular element of the formal link had to be present. On the other hand, the Court had made it clear that it was not in the business of lifting the corporate veil and trying to find where the company's essential economic interest lay: it had been looking at the formal links.

39. Where did that leave tax haven companies? That was not much of a problem, in his opinion. If a company decided to incorporate in a tax haven, it was a legitimate choice, but the corollary was that if the company needed diplomatic protection, it was unlikely to receive it from such a State. It could, and many companies did, conclude a bilateral investment treaty to cover it if things went wrong. The Commission could certainly codify on that basis, in which case it would be codifying an essentially residual rule, and it would probably not be particularly relevant to the way companies actually did business.

40. Two other angles seemed to have emerged from the discussion. The first was that the State that could exercise diplomatic protection must be one which had some form of genuine link with the company. Yet if the Commission went in that direction, it would have to attempt to lift the corporate veil in one way or another. That would create difficulties not merely for courts but also for States of investment, which would have to decide whether to receive diplomatic representations or claims from States which believed that a company with which they had a genuine link had been injured. It placed the onus on those States to try to find out whether there was in fact a genuine link. In reality, the genuine link test with respect to ships had done nothing to solve the problem of flags of convenience flown by ships which roamed the world's oceans doing untold damage to endangered fish stocks and changing their registration whenever it looked like somebody might catch up with them.

41. The third position that seemed to be emerging from the discussion was that there was no need to be unduly precise about which State could exercise diplomatic protection in respect of a particular company and that it was acceptable for more than one State to be able to do so. That was fine from the company's standpoint, but for the State of investment it could present the difficulties he had just mentioned: deciding whether to receive diplomatic representations, claims, and the like. Such a State needed to be able to assess its obligations and determine whether there were one or several States that could make representations. Tact was required on the part both of the State making the claim and of the one receiving it, since their relations could be affected. For example, if a country rejected diplomatic representations of a given State, the rejection could have adverse repercussions on relations with the State endeavouring to make the representations.



42. Those three lines in the Commission's thinking had led him to seek guidance from the Special Rapporteur. He had originally thought the Commission was focused very firmly on draft article 17, paragraph 2, and that a formal link, not a lifting of the corporate veil, was being viewed as the basis for deciding who could exercise diplomatic protection. The only issue had been whether actual, formal incorporation was adequate for all circumstances as a test for a formal link. If that was still the trend, then it might be possible to emphasize the formal link of incorporation in a fairly restrictive way, so as to avert the possibility that numerous States might exercise diplomatic protection. If anything other than the formal link of incorporation was taken as the basis, however, then the Commission must take care to preclude a multiplicity of claims. By lifting the corporate veil, it would be opening a rather large Pandora's box, and he was not sure what might pop out of it.

43. Mr. MONTAZ said that, in his view, draft article 19 did not pose problems. As the Special Rapporteur indicated, it was designed to protect shareholders against injury of their direct rights through wrongful acts of States. It was based on the decision by ICJ in the *Barcelona Traction* case, which recognized that shareholders were entitled to diplomatic protection in their own right, independently of the right to recourse of an injured company. The decisions of the European Court of Human Rights went in the same direction.

44. He agreed with the Special Rapporteur that it was not necessary to look into the content of the shareholder's rights, but he would nevertheless be interested in an answer to an interesting question. When a company ceased to exist because it had been nationalized and consequently could not undertake any action on behalf of its shareholders before the local courts, could the rights of the shareholders be considered direct rights? Would article 18, subparagraph (b), of the draft articles apply to that situation, or was it rather article 19 that came into play—in other words, did the shareholders have an independent right of recourse? Unquestionably, international law recognized the right of States to nationalize companies, so the act of nationalization in itself was not wrongful, but the owners of property that had been nationalized were owed compensation in accordance with terms now established under international law.

45. He experienced no difficulties regarding draft article 20, but the arguments made by the Special Rapporteur in paragraph 95 of his report were not very persuasive. There was no reason to adopt an approach other than the one used in article 4 of the draft articles for continuity of nationality of natural persons. The phrase in square brackets at the end of the article should be retained.

46. Mr. GALICKI said that the Commission now had four proposals for draft article 17, paragraph 2: from the Special Rapporteur, Mr. Brownlie, Mr. Economides and Mr. Melescanu. That should be enough to produce a definition. The Commission must define diplomatic protection for legal persons in the same way as it had done for natural persons, namely on the basis of nationality. The problem was how to do so. The definition in *Barcelona Traction* was inadequate, because it did not reflect later developments.

47. He sympathized with Mr. Brownlie's proposal, although it created an additional problem, because the Special Rapporteur cited two criteria, both based on *Barcelona Traction*, whereas Mr. Brownlie's proposal contained three. Were they to be understood separately or jointly? The linkage proposed by Mr. Brownlie was "and/or". He did not see how that would operate in practice. The reference to "other appropriate links" raised the danger of multiple nationality. He took it the Commission agreed that multiple nationality should not be possible in the case of corporations. The adverse impact of such multiple entitlement would outweigh the benefits. If a State exercised diplomatic protection on the basis of place of incorporation, place of registered office or other appropriate links, might that not prevent other States from exercising their diplomatic protection on another basis? The three new proposals all went beyond the Special Rapporteur's, which was based solely on the criterion of place of incorporation and, perhaps, the territory of the registered office. That was very clear, but not realistic. The three new proposals widened the variety of conditions for entitlement to diplomatic protection. Perhaps a sentence should be inserted in paragraph 2 to exclude the possibility of multiple nationality and multiple entitlement to exercise diplomatic protection.

48. Mr. BROWNLIE said that multiple nationality was something of a bugbear. Certainly, a corporation might qualify for diplomatic protection from more than one State. That was real life, and he did not see any rule-making way of avoiding it. It would be far worse if the Commission produced highly restrictive formulations and, in so doing, severely limited the possibilities of diplomatic protection. If by rule-making the Commission sought to ensure that there were no cases of multiple nationality, it would fail and would move in the wrong direction.

49. As to the wording of his proposal, to make it easier to understand he suggested simply removing all the "ands". Putting the "ands" back in did no harm, of course, if the corporation had all those links. But in order to make the proposition clear, both "or" and "and" should be left in. The proposal was meant to be inclusive, not exclusive.

50. Mr. ADDO said that Mr. Brownlie seemed to be advocating multiple nationality for corporations. Did that mean that the Commission was veering away from *Barcelona Traction*?

51. Mr. BROWNLIE said that the judgment in *Barcelona Traction* did not deal with that particular question. ICJ had clearly stated that the question of the company's Canadian nationality had not been disputed by either Belgium or Spain. It had then listed, purely as a matter of fact, all the connections which existed, which went well beyond a corporation's place of registration and head office. In describing all those connections, it happened to use the word "and", but that was not prescriptive; the Court was merely describing the facts which confirmed the Canadian nationality. In analytical terms, it was saying that those were sufficient connections; it left open the question of what were legally necessary connections. That was an area in which the Commission could not simply say that it was following *Barcelona Traction*, because on that point the judgment did not take a legal position.

52. Ms. ESCARAMEIA said she agreed with Mr. Brownlie that *Barcelona Traction* cited other criteria and that the corporation's links with Canada were irrelevant. But apart from rather formal links, such as meetings in a certain place, paying taxes and so on, the more substantive links seemed to have been excluded by ICJ, and that was why the Belgians had lost the case. She referred in that context to a sentence in paragraph 70 of the judgment: "However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance" [p. 42]. Thus, the Court had decided that, in the case in point, the genuine connection was not valid. After all, it had turned down the argument that the capital had been held in Belgium, although that had certainly been a real link. Under Mr. Brownlie's proposal, the Commission would accept the genuine connection, because a genuine link was an appropriate, and even the *most* appropriate, link, because it was the Belgians who had suffered the most. So the decision was a political one: Did the Commission want, or did it not want, to protect the shareholders?

53. If a court could choose from any of a whole range of appropriate links, it would mean that corporations had more protection than individuals. The ownership of property by an individual in the territory of another State was not regarded as an adequate link for the individual to be granted the nationality of that State. Corporations had activities everywhere, any of which might then be considered to be an appropriate link. That would increase the protection of corporations enormously.

54. Mr. BROWNLIE, responding to Ms. Escarameia's comments, said he was not proposing that the Commission should depart from the *Barcelona Traction* judgment. ICJ had not decided on that point, because it had not been required to, and because the two parties had not been disputing the Canadian nationality of the corporation. That was why, in the key paragraph, the Court had noted that in any case there had been numerous links, a matter that had not been in dispute. Since the point had been left open by the Court, there was no question of departing from anything.

55. Mr. ADDO said that, as he understood it, *Barcelona Traction* had rejected dual nationality. If the Commission wanted to allow multiple nationalities, it was departing from the judgment by ICJ. It was important to have a basis as a point of departure. As matters stood, he failed to see what direction the Commission was taking.

56. Mr. ECONOMIDES said he agreed with Ms. Escarameia and Mr. Addo. The crucial issue was whether the Commission believed that a corporation should have one sole nationality or that it could have several nationalities on the basis of various criteria of municipal law. In the latter case, several States would be able to exercise diplomatic protection. Did the Commission intend to regulate the situation, or would it allow a chaotic situation to remain? In *Barcelona Traction*, ICJ had decided that the existence of competing claims was inadmissible. Hence the need to find criteria to ensure that such a situation did not occur. For that reason, the Court had agreed with the Canadian position and rejected the Belgian argument. Notwithstanding Mr. Pellet's opinion, corporations should have no more than one nationality. That question could

be resolved either by reference to certain criteria of municipal law—the *Barcelona Traction* approach—or by making a general reference to municipal law and stressing that, although there could be several criteria, a genuine link was the only valid one. Anything else would be skirting the issue.

57. Mr. KAMTO said the Special Rapporteur had proceeded in draft article 17, paragraph 2, on the assumption that the starting point was the criterion of the company's place of incorporation; only after that assumption had been accepted could the question of the genuine link be posed. The Commission must find a general, flexible formulation which allowed an assessment of factors for establishing the genuine link, such as the *siège social* or the payment of taxes. That was what the *Barcelona Traction* decision said. He disagreed with those who thought that *Barcelona Traction* had mixed everything up while deciding nothing and that the Commission must produce a wording which left everything open.

58. Mr. BROWNLIE, replying to those who were worried about multiple nationality, said that, to a considerable extent, the question was academic, since in most cases of action by means of diplomatic claims, arbitration or litigation on such matters, there was no finding, because no one had any interest in raising the issue that the nationality of the corporation in question was nationality X *erga omnes*. Of course, there were cases in which it was in the interest of the respondent State or respondent party in arbitration to raise the issue of a third or fourth nationality. He was not in favour of multiple nationality, but the Commission should be careful not to make a mess of things. Multiple nationality was very difficult to avoid, especially in regard to corporations. The alternative was to have very restrictive rules in which the *Nottebohm*-type principle acted as a sort of censorship of nationality, cutting it down too much.

59. Mr. MELESCANU said that considerable disagreement clearly remained on the interpretation of *Barcelona Traction*. Even if, intellectually speaking, Mr. Kamto was right, what did he propose to do if real life turned out to be different? In Switzerland, it was not the place of incorporation that counted, but the nationality of shareholders. Some might say that was unfortunate, but Mr. Kamto's position was contradicted by practice. In real life, some States recognized other criteria. ICJ had not ruled that such criteria were invalid; it had simply recognized that they existed.

60. There was no such thing as multiple nationality. There were claims of multiple nationality, but ultimately a court would decide on the basis of one single nationality. He agreed with Mr. Brownlie that it was not possible to prevent a corporation from trying to cite a number of criteria to prove its link to several States. But ultimately, the basis of the *Barcelona Traction* was the recognition that the diplomatic protection of corporations could be exercised only by one State, the State of nationality. The whole debate focused on how to decide what that State was. The Commission should leave aside arguments drawn from *Barcelona Traction* and try to imagine a situation which was consistent with practice in international law; that could probably be done in the Drafting Committee.

61. The CHAIR, speaking as a member of the Commission, said the State that exercised diplomatic protection

on behalf of an entity which, or an individual who, had suffered injury as the result of an internationally wrongful act must have a genuine link with the victim of that act. In the case of a natural person, the most obvious link was that of nationality. For corporate entities, it was also important for there to be a genuine link between the State seeking to exercise diplomatic protection and the victim. The Commission referred to that as nationality, but could also call it something else. The problem was the link between the State trying to exercise diplomatic protection and the victim of the internationally wrongful act. For that reason, he endorsed a flexible formulation such as the one proposed by Mr. Brownlie. The usual wording used to designate that link was “State of nationality”, the State with which, in accordance with its municipal law, the corporation had established a genuine link, whether by virtue of incorporation of the corporation, the establishment of its *siège social* or any other way consistent with international law. In a case in which several States claimed that they had that genuine link, it would be necessary to consider which genuine link took precedence. The Commission could not allow for all the scenarios that might arise. It must remain flexible and produce a wide range of criteria which could then be identified case by case.

*The meeting rose at 1 p.m.*

## 2762nd MEETING

*Friday, 23 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. YAMADA, following up on the discussion on draft article 17, paragraph 2, on the definition of the State

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of nationality of a corporation, thanked Mr. Economides, Mr. Brownlie and Mr. Melescanu for introducing the element of a genuine, effective or appropriate link. He recognized that the current trend in international private law was to focus more on the domicile of a corporation than on its nationality as an element indicating its link with a State. However, as Mr. Brownlie had pointed out, the main question in the field of international private law was the applicable law, not the nationality of the corporation.

2. For the purpose of diplomatic protection, however, the Commission must spell out a clear rule of international law which set out criteria for the nationality of corporations. Article 1, paragraph 1, as provisionally adopted by the Commission at its fifty-fourth session, in 2002,<sup>3</sup> stipulated the basic principle that it was the State of nationality which was entitled to exercise diplomatic protection both for natural persons and for legal persons. Accordingly, regardless of whether municipal law recognized the nationality of a corporation or not, a rule of international law must be written that defined such nationality.

3. The question was therefore whether draft article 17, paragraph 2, which the Special Rapporteur in his fourth report (A/CN.4/530 and Add.1) had based on *Barcelona Traction* and which set out both “incorporation” and “registered office” as criteria, adequately reflected customary law, or whether there was a legal vacuum which must be filled with a view to the progressive development of international law.

4. While he recognized the rationale for relying on the element of a link between the corporation and the State, whether it was “genuine”, “effective” or “appropriate”, he hesitated to consider it an independent, alternative element. When the Commission had defined the State of nationality of natural persons in article 3, adopted in 2002, it had not introduced the link concept. The Commission should follow the same approach for the nationality of corporations, since introducing the link element would cause complications. For instance, Microsoft, an American corporation incorporated in the State of Washington and with its registered office in Redmond, Washington, earned 27 per cent of its revenue from activities outside the United States and had very close links with 58 other States and territories. Again, the Hong Kong and Shanghai Banking Corporation (HSBC), a British corporation with its headquarters in London, still had its *de facto* headquarters in Hong Kong and, together with Chartered Bank, had even functioned as a central bank of Hong Kong until Hong Kong reverted back to China. It maintained 9,500 offices in 80 States and territories on every continent. All those States could be said to have an appropriate link with Microsoft and HSBC. Furthermore, it was most likely that a corporation would suffer injury as a result of an internationally wrongful act of the State with which it had the closest link and in the territory of that State. If that State was deemed to be the State of nationality of the corporation because of that link, the regime of diplomatic protection ceased to function. He had a problem with Mr. Brownlie’s formulation referring to “an appropriate link”, while the formulation proposed by Mr. Economides relied on municipal law, which did not always recognize the nationality of corporations. Mr.

<sup>3</sup> See footnote 1 above.



Melescanu's formulation also brought in the link element as an alternative criterion and he had cited the case of a Swiss corporation with majority Romanian shareholders. He understood why Mr. Melescanu would not want the Swiss Government to exercise diplomatic protection in that case, but assumed that what Mr. Melescanu had had in mind was a case where injury had occurred in Romania. He wondered what his position would be if the injury had been caused in Japan. In any case, if the Commission decided to introduce a link element as an alternative criterion, it would have to address the question of multiple nationality and formulate a new article dealing with that situation.

5. He had no problem with draft article 19. He took it that the Special Rapporteur had formulated that article separately from draft article 18 because, unlike article 18, it dealt with a situation that was not an exception to draft article 17, paragraph 1. He had difficulty visualizing a case where the corporation was not injured and the shareholders were injured directly, but article 19 appeared to assume that case. Since the question of diplomatic protection of the corporation did not arise in that case, article 19 was not an exception to article 17. Article 18, subparagraph (b), also envisaged a situation where the question of the diplomatic protection of the corporation did not arise. For example, if Sony Corporation of Japan suffered an injury in Japan as a result of a wrongful act of the Japanese Government, that fell outside the scope of the diplomatic protection of legal persons as defined in article 1. It could therefore not be an exception to article 17. That left the question of the diplomatic protection of Sony's foreign shareholders. If that were to be dealt with, it would be more appropriate to move article 18, subparagraph (b), to article 19.

6. Turning to draft article 20, he had no problem with the substance of the first sentence, although its formulation would have to be brought into line with the final formulation of article 17, paragraph 2. However, the proviso in square brackets seemed to contradict article 18, subparagraph (a). According to subparagraph (a), the State of nationality of the corporation was no longer entitled to exercise diplomatic protection when the corporation had ceased to exist, whereas according to the proviso in article 20, the State of nationality was still eligible to exercise diplomatic protection on behalf of the defunct corporation. That proviso should therefore be deleted.

7. Mr. CHEE said that he could support draft article 17, paragraph 1. He also endorsed article 17, paragraph 2, which was consistent with *Barcelona Traction*. He recalled that ICJ had not viewed the "genuine link" as an alternative criterion for determining the State of nationality of a corporation, but as an element additional to the two criteria of incorporation and registered office.

8. With regard to draft article 18, he could accept the wording chosen by the Special Rapporteur for subparagraph (a), which was consistent with the customary formulation used by the Court, although he would have preferred it to speak of the corporation going bankrupt rather than of it ceasing to exist. As to subparagraph (b), he believed that shareholders in both the subsidiaries and the parent company should be protected from injury caused by the internationally wrongful act of a State.

9. He endorsed article 19 as drafted by the Special Rapporteur because, as the latter had pointed out, it was a savings clause that provided an additional source of law to ensure that shareholders' rights and interests were protected by their State of nationality. He also endorsed article 20 as it stood, although, like Mr. Brownlie, he would prefer to replace the criterion of the date of official presentation of the claim by the date on which a judgement was awarded, which seemed more appropriate in the case of legal persons.

10. Finally, he recommended that draft articles 17 to 20 should be referred to the Drafting Committee.

11. Mr. BROWNLIE, commenting on Mr. Yamada's argument as illustrated by the example of Sony Corporation, said that, if the Commission focused exclusively on one or the other of the two criteria given in article 17, paragraph 2, namely, incorporation or registered office, rather than attaching the same importance to the link element, it might overly restrict the incidence of nationality. Moreover, if it insisted that both those criteria should be met, that would exclude many cases and restrict the possibilities for a State to exercise diplomatic protection on behalf of a corporation. There was no easy answer, for it was impossible to list criteria in advance. That was why he had suggested the idea of "appropriate link", which made it possible to envisage other situations where the exercise of diplomatic protection would be permissible.

12. He did not agree with Mr. Chee's comment that the choice of the two criteria mentioned in article 17, paragraph 2, was justified by *Barcelona Traction*. In that case, ICJ had not decided on the nationality of the Canadian corporation because it had had to do so.

13. Mr. YAMADA, replying to Mr. Brownlie, recognized that he had been referring to an extreme case and acknowledged the need to strike a balance between the two extremes.

14. Mr. CHEE said that he was not at all eager to merge the two criteria of State of incorporation and State of registered office and had no objection to their being treated separately. He recalled that draft article 17 established a general rule concerning the link between a State and a corporation.

15. Mr. MELESCANU explained that, in his proposal, "link" was not an additional criterion, but simply an element to be taken into account when examining other criteria. He did not understand the concern aroused by the example he had cited of a Swiss company whose majority shareholders were Romanian, and he feared that, by dwelling on the idea of the nationality of a corporation, the Commission might find itself adopting a decision that brutally contradicted the provisions adopted on the diplomatic protection of natural persons.

16. Mr. ECONOMIDES said that the savings clause in draft article 19 did not resolve the question of the right of the State of nationality of the shareholders to protect the latter's own rights in that it excluded the question to which it referred from the scope of codification. It would be better to deal with that question either in a separate provision or as an exception to article 19.

17. Mr. DAOUDI joined in congratulating the Special Rapporteur on his fourth report. He agreed with the view expressed by Mr. Kamto in 2002 that it was international law that stipulated the rule of nationality and municipal law that governed the attribution of nationality. The “genuine link” criterion could indeed restrict the scope of diplomatic protection and leave many corporations unprotected, unless the national State of the shareholders was allowed to protect them or the corporation when the link of nationality was not established. Draft article 18 guaranteed that right in the event of two exceptions taken from *Barcelona Traction*, whereas draft article 19 indicated that that was a proper right of the shareholders, not the corporation. That left a number of corporations without diplomatic protection. Some members wanted to give the State of nationality of the shareholders the right to exercise diplomatic protection on behalf of the corporation, but the amendments proposed to draft article 17, paragraph 2, did not do that. It was therefore preferable to clarify that point before referring the paragraph to the Drafting Committee.

18. With regard to draft article 18, he had no objection to providing for an exception in the two situations specifically cited by the Special Rapporteur in two separate articles, but he agreed with the Special Rapporteur about competing claims by States for the exercise of protection. Draft article 19 posed no problem since it codified the most common situation, that of an individual shareholder whose subjective right had been harmed, which corresponded to the general rules set forth in the part of the draft articles devoted to the diplomatic protection of natural persons. With regard to draft article 20, he felt that the draft articles should not accord more favourable treatment in the matter of continuous nationality to legal persons than to natural persons. He therefore supported its referral to the Drafting Committee.

19. Mr. RODRÍGUEZ CEDEÑO, referring to draft article 17, paragraph 2, said that the concept of the State of nationality of a corporation should be construed fairly broadly, even if that meant departing from the *Barcelona Traction* judgment. The criteria for determining nationality should be sought in municipal law, but in some cases that could give rise to the problem of multiple nationality. It must therefore be made clear that there could be only one State that had the right to exercise diplomatic protection as the State of nationality of the corporation, even though there might be many claims relating in one way or another to a single case. That solution might be difficult to translate into a rule, but it could be explained in the commentary. The pre-eminence of the State that was deemed to be the State of nationality should be based on a genuine link with the corporation, but with a fairly broad interpretation of that link and bearing in mind, as Mr. Brownlie had recalled, that ICJ had not gone to the heart of the matter because the issue of the nationality of a corporation had not come up in the *Barcelona Traction* case. Perhaps a working group should look into all those questions before draft article 17 was referred to the Drafting Committee.

20. Draft article 19 could be viewed as yet another exception to the rule in article 17—one which related to direct injury suffered by shareholders and which could

be included in article 18. That provision was acceptable, but its scope should be defined, and a clear-cut distinction must therefore be drawn between the infringement of the rights of shareholders owing to injury suffered by the corporation and the direct infringement of the rights conferred on shareholders by statutory rules and company law, of which examples were given in the *Barcelona Traction* judgment (para. 47). The commentary might be the place to explain that problem as well. As to the matter of which legal order would be called on to decide on those rights of shareholders, it must be the municipal law of the State in which the corporation was incorporated, including when the corporation was incorporated in the wrongdoing State, in which case the Special Rapporteur believed that the general principles of the law could be invoked.

21. Mr. ADDO said that draft articles 19 and 20 were acceptable as long as the words in square brackets at the end of article 20 were deleted.

22. Ms. ESCARAMEIA said that the informal proposal by Mr. Gaja on draft article 17 had the merit of solving at least two problems for those who did not want to expand the diplomatic protection of corporations: the connection with municipal law and the States whose municipal law did not assign nationality to corporations. Since the positions of members of the Commission were deeply split over draft article 17, paragraph 2, however, a working group should perhaps be asked to deal with that provision. Draft article 18, on the other hand, could now be referred to the Drafting Committee.

23. Draft article 19 raised one problem of form and several of substance. The problem of form concerned its relationship to other provisions. Draft article 19 was explicitly presented as an exception to articles 17 and 18, although in reality it was an exception on the same level as those in article 18. The Special Rapporteur dealt with that exception separately because he was extremely faithful to the *Barcelona Traction* decision and because the exception related to a slightly different situation, one that could even be dealt with in the part of the draft on natural persons. It would be preferable to transpose it to article 18, however, or at least to reconsider the relationship between the three provisions.

24. On the substance of draft article 19, the Special Rapporteur was right not to enunciate the content of the direct rights of shareholders, but it should nevertheless be explained in the commentary that it was for the laws of the State in which the corporation was incorporated to determine the content of those rights. As to which legal system was to determine that there had been a violation of the rights of shareholders, the Special Rapporteur was again right in saying that it should be the State of incorporation there as well, although, referring to the *ELSI* case, he also considered the possibility of invoking the general principles of law in certain cases. The Commission should give some thought to that possibility because some national systems might not define very clearly what constituted a violation of those direct rights, and it might therefore be useful to refer to general principles of law taken from several common systems of law. Sometimes companies incorporated under the law of a given State but, for certain aspects such as dispute settlement, decided to adopt the law of another State or international law. It should perhaps

be stated in the commentary that, if the injury to the direct rights of the shareholders related to those aspects, it was system of law chosen by the founding shareholders that should apply. With the inclusion of those clarifications in the commentary, article 19 could be referred to the Drafting Committee.

25. For draft article 20 on the continuous nationality of corporations, the Special Rapporteur applied the same criteria as for continuous nationality of natural persons, while adapting them to take account of the fact that corporate persons changed nationality much less easily than natural persons. That approach might cause problems, however, if, in relation to draft article 17, paragraph 2, the strict rule of incorporation was abandoned in favour of an appropriate link, which might result in the designation of the State of nationality of the shareholders or of a majority of them as the State of nationality of the corporation. Shares were traded frequently and majorities changed, however, hence the need for caution in respect of the criteria for determining the nationality of corporations. The proviso set out in square brackets in article 20 was justified by the “grey area in time” which the Special Rapporteur mentioned in paragraph 104 of his report, and during which both the State of nationality of the corporation and the State of nationality of the shareholders could bring claims. Article 20 should thus be referred to the Drafting Committee with the square brackets around the final part deleted and with the necessary clarifications given in the commentary.

26. Mr. GALICKI, referring to draft article 17, paragraph 2, said there was agreement on the rule that the State of nationality of a corporation was the State in which the corporation was incorporated. He therefore proposed that the disputed part of the provision, which introduced the criterion of registered office, should be replaced by the phrase “or which, in another way, recognizes the acquisition of its nationality by that corporation”, which was similar to the wording proposed by Mr. Brownlie. The text proposed by the Special Rapporteur for draft article 19 was entirely acceptable. Draft article 20, on the other hand, raised first of all a problem of language. If nationality was considered to be the decisive factor, then the phrases “a corporation which was incorporated under its laws” and “the State of incorporation of the defunct company” should be replaced by the words “a corporation which has its nationality” and “the State of nationality of the defunct company”, respectively. But article 20 also posed a problem of substance owing to the fact that, as had been pointed out, the proviso in square brackets might be at variance with draft article 18, subparagraph (a). In respect of a single situation, namely, when a corporation “ceases to exist as a result of the injury”, subparagraph (a) stipulated that the State of nationality of the shareholders could exercise diplomatic protection, thereby automatically excluding the State of incorporation, since there could not be multiple nationality, yet the second part of article 20 stated that the State of incorporation could continue to present a claim in respect of the corporation. One way of removing that contradiction might be to divide article 20 into two paragraphs, the second to consist of the bracketed part of the text, from which the words “provided that” would be deleted, and to add the words “with the exception provided in article 20, paragraph 2”

at the end of draft article 18, subparagraph (a), after the word “incorporation”. Of course, the right accorded to the State of incorporation in paragraph 2 would prevail over the right granted to the State of the nationality of the shareholders in draft article 18, subparagraph (a).

27. Mr. FOMBA said that draft article 19 raised, *inter alia*, the question of the distinction between rights and interests and the procedural consequences of that distinction, as well as the more fundamental question whether there was always a very clear-cut distinction between the rights of a corporation and the rights of the shareholders. There was room for doubt in that regard if reference was made to paragraphs 88 and 91 of the report of the Special Rapporteur, as well as to paragraph 89, which indicated that, even in the *ELSI* case, ICJ had failed to expound on the rules of customary international law on the rights of the shareholders to organize, control and manage a company. Did such rules really exist, and were they not primarily rules of municipal law? In paragraph 90 of his report, the Special Rapporteur indicated that the proposed text left unanswered the questions of the content of the shareholders’ rights and of the applicable legal order. On the first question, starting from the observation that the *Barcelona Traction* decision mentioned only the most obvious rights of shareholders by way of illustration, the Special Rapporteur took the view that it was for the courts to determine, in each individual case, the limits of such rights. On the second question, paragraph 92 of the report contained intellectually stimulating arguments, but raised questions that were difficult to resolve in practice.

28. The main question raised in draft article 20 was that of the situation of practice with regard to the admissibility, establishment and application of the principle of the continuous nationality of corporations. It was the answer to that question that should be given consideration and that must determine the course to be followed. There were two possibilities. The first was that, by its nature, content and functioning, nationality was the same for both natural and legal persons and was equally important in both cases, so that parallels could be drawn and identical solutions found; the second was that no such parallels existed and a cautious and clear-sighted approach had to be taken in establishing the same rule for the two categories. Contrary to what the Special Rapporteur stated in paragraph 103 of his report, the issue was thus much more one of logic than one of equity. Article 20 appeared to be based on an analogy in relation to the sociological and legal issues underlying the nationality of natural and legal persons, but only a more in-depth analysis of practice would show whether that was really true.

29. In conclusion, he believed that the proposals made by the Special Rapporteur in draft articles 19 and 20 were not without theoretical and practical importance, but that they should be examined more closely and carefully, taking into account the conclusions to be reached by the Commission on the questions raised during the discussion and, if necessary, within the framework of a working group.

30. Mr. AL-BAHARNA noted that, in his fourth report, the Special Rapporteur dealt extensively with the *Barcelona Traction* decision and the underlying principles. In that decision, ICJ had distinguished between two entities, the company and the shareholders. Establishing a close



and permanent connection between the company and, in the case in question, Canada, the Court had expounded the principle that the right of diplomatic protection in respect of a corporation might be exercised by the State under the laws of which the corporation was incorporated and in the territory of which it had its registered office. While rejecting the applicability of the *Nottebohm* principle, the Court had nevertheless accepted that in two exceptional situations, diplomatic protection could be exercised by the State of nationality of shareholders, although it had declined to recognize the existence of a secondary right of diplomatic protection, even when the State of incorporation declined to exercise that right. The Special Rapporteur recognized that the Court's decision had been subjected to criticism and that it might be necessary to depart from it and to formulate a rule that accorded more fully with the realities of foreign investment and encouraged foreign investors to turn to the procedures of diplomatic protection rather than to the protection of bilateral arrangements. He also recalled that, in the decision, the Court had not been codifying international law, but settling a dispute. Nevertheless, in paragraph 27 of his report, the Special Rapporteur characterized the *Barcelona Traction* decision as an accurate statement of the law on the diplomatic protection of corporations, a contradiction which led him to provide seven options for the Commission in relation to the nationality of corporations and the formulation of rules on the diplomatic protection of companies and/or shareholders.

31. In his view, option 1 (the State of incorporation) was the best one because it was the safest one in that it adopted the rule expounded in *Barcelona Traction*, whereas option 4 (the State of economic control), which some members seemed to support, had disadvantages, as explained in paragraphs 32 to 36 of the report. He therefore endorsed the text proposed by the Special Rapporteur for draft article 17, paragraph 2, the phrase in square brackets being retained—and the square brackets thus being deleted—with the word “and”. The criterion of registered office was perhaps superfluous, since registration was the natural consequence of incorporation, but, for the sake of consistency with the wording used by ICJ, it should be maintained.

32. With regard to draft article 18, he proposed that the word “place” in subparagraph (a) should be replaced by the word “State”. Draft article 19 was acceptable, as was draft article 20, subject to removal of the square brackets at the end. He was open to a more flexible definition of the link between corporations and their State of nationality that went beyond *Barcelona Traction*, but the proposals by Mr. Brownlie and Mr. Gaja were not helpful. Mr. Brownlie's proposal was very wide, whereas a definition must be precise and succinct.

33. Mr. GAJA read out his proposal for a new text for draft article 17:

“A State according to whose law a corporation was formed and in which it has its registered office is entitled to exercise diplomatic protection as the State of nationality in respect of an injury to the corporation.”

34. The proposal aimed to take into account the concerns expressed about the fact that some States might not

have any rules on the nationality of corporations. Another purpose was to establish a rule for the sole purpose of diplomatic protection and not to superimpose new criteria of nationality on those used by member States.

35. Mr. PELLET said that Mr. Gaja's proposal did not meet his concerns at all. Mr. Brownlie's proposal was more conducive to a compromise, as were those of Mr. Economides and Mr. Melescanu.

36. The CHAIR invited the Special Rapporteur to sum up the debate on draft article 17.

37. Mr. DUGARD (Special Rapporteur) pointed out that draft article 17, paragraph 1, reaffirmed the basic principle of *Barcelona Traction*. Most of the members had endorsed it; the discussion on the subject had dealt with drafting questions. He therefore recommended that it should be referred to the Drafting Committee.

38. As far as draft article 17, paragraph 2, was concerned, however, the debate had taken a new turn, and it had now been suggested that criteria other than State of incorporation, registered office and *siège social* should be adopted. Some of the proposals, such as Mr. Gaja's, were cautious. That was also the case with Mr. Brownlie's, which he interpreted as making criteria more flexible so as to cover the *siège social*, but not including a reference to the State of nationality of the shareholders. The proposals by Mr. Economides and Mr. Melescanu were more radical and implied lifting the corporate veil in order to identify the State with which the corporation was most closely connected and which thus established the locus of the economic control of the corporation. That approach would be difficult to reconcile with *Barcelona Traction*; it would be in line with the *Nottebohm* case, which emphasized the principle of the link with the State. As the Commission had not followed the *Nottebohm* test in draft article 3 with regard to natural persons, however, it might be illogical to do so for legal persons.

39. The other problem which had been raised related to dual protection, or situations where both the State of incorporation and the State of the *siège social* exercised diplomatic protection for the same corporation, a notion which had been supported by several judges in the *Barcelona Traction* case. In any event, there would not be a multiplicity of States able to act, contrary to what might be the case if the Commission were to recognize the State of nationality of the shareholders, and, as had been noted by Judge Jessup, whom he had cited in paragraph 104 of the report, “the Respondent can eliminate one claimant by showing that a full settlement has been reached with the other” [p. 200]. In its judgment in *Barcelona Traction*, however, ICJ had clearly been hostile to the notion of dual protection or of a secondary right to protection in respect of the corporation and shareholders, a point which had been made in paragraph 88 of the judgment, which stated that “where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim”. That might be interpreted to mean that there were several national States which alone might make a claim, or that only one State might make such a claim.

40. To pursue its work on paragraph 2, the Commission could either continue the debate in plenary, which he did not recommend, or refer the paragraph to the Drafting Committee or a working group on the subject. Many members had supported the underlying idea in paragraph 2, if not necessarily as formulated, namely a provision which emphasized formal links between the corporation and the State exercising diplomatic protection. However, if many members supported the proposal to include the notion of genuine link, notably by establishing the place of the economic control of the corporation, then the issue should be examined in a working group. He thought that it would be useful to take a vote on whether the matter should be referred to the Drafting Committee or to a working group.

41. Following a vote on whether draft article 17, paragraph 2, should be referred to the Drafting Committee or whether a working group should be set up to consider the matter in depth, the CHAIR said that, since a slight majority was in favour of the second option, the matter would be considered by an open-ended working group, which the Special Rapporteur would chair.

*It was so decided.*

42. Mr. DUGARD (Special Rapporteur) said that, in the light of Mr. Gaja's proposal that the two paragraphs should be merged, it might be wise to withhold a final decision on draft article 17, paragraph 1, until the working group had reached a decision. He urged the members of the Commission to attend the working group to avoid reopening the debate on the entire issue later in plenary.

43. Mr. KAMTO said that it would be preferable for the working group to focus exclusively on paragraph 2, even if it meant that the Drafting Committee would consider later whether or not the two paragraphs should be merged. The concept of nationality was at the heart of diplomatic protection, as was clearly shown in paragraph 1, which adopted the wording used in *Barcelona Traction*. He therefore hoped that the Commission would not lose sight of that fundamental idea, which absolutely must be included in the draft article.

44. The CHAIR confirmed that the working group would focus on draft article 17, paragraph 2.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/529, sect. D, A/CN.4/531<sup>4</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

45. Mr. Sreenivasa RAO (Special Rapporteur), introducing his first report on the legal regime for allocation of loss in case of transboundary harm arising out of haz-

ardous activities (A/CN.4/531), said that the report was divided into three parts, which he would consider one by one.

46. Part I of the report summarized the work of the Commission on the question of international liability and, in particular, the work of the two previous special rapporteurs on the topic, Mr. Quentin-Baxter and Mr. Barboza. The draft articles prepared in by the Working Group of the Commission at its forty-eighth session, in 1996, had dealt, *inter alia*, with a regime of negotiated liability aimed at reaching an equitable settlement on the basis of "the principle that the victim of harm should not be left to bear the entire loss".<sup>5</sup>

47. In the course of the Commission's work, differences of opinion had arisen on four important aspects of the issue that remained unresolved, the first of which was the linkage between prevention and liability in the approach adopted by Mr. Quentin-Baxter and Mr. Barboza. However, that question had been resolved by a decision of the Commission at its forty-ninth session to deal with the two topics separately.<sup>6</sup> As a consequence, the Commission had been able to adopt, at its fifty-third session, in 2001, the draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities.<sup>7</sup> The other three issues had been (a) State liability and the role of strict liability as the basis for creating an international regime; (b) the scope of activities and the criteria for delimiting "transboundary damage"; and (c) the threshold of damage.

48. First, it had been felt that the emphasis placed on State liability was misplaced. It had been feared that, in the absence of established scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the suggested approach could amount to absolute liability for non-prohibited activities, which would be unacceptable to States (para. 18 of the report). It had also been felt appropriate not to place undue emphasis on strict or absolute liability at the international level, where States adopted a more pragmatic approach to compensation, without relying upon any one consistent concept of liability.

49. The two previous special rapporteurs had been careful to limit the scope of activities, placing the emphasis on the physical consequences of transboundary activities. To that end, while it had decided not to draw up a list of activities to which the draft articles would apply, the Commission had set clear delimiting criteria, excluding from the scope of the articles, *inter alia*, harm caused to the global commons and leaving that issue for possible subsequent examination on the basis of a separate mandate from the General Assembly. He referred to that matter in paragraph 28 of his report.

50. With regard to the threshold of damage triggering the obligations imposed by the regime of prevention, the Commission had considered that the threshold should be "significant" harm. Given that there was a wide consensus in favour of fixing such a threshold under any model

<sup>5</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 102 (art. 21).

<sup>6</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

<sup>7</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97, pp. 146–148.

<sup>4</sup> See footnote 2 above.

of allocation of loss in case of injury arising from hazardous activities, the report recommended accepting the same threshold of “significant harm” for triggering the obligation to compensate. As the Special Rapporteur stated in paragraph 37 of his report, the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law set up at the Commission’s fifty-fourth session, in 2002, to settle the direction of the work remaining on the subject of international liability had recommended that the Commission should limit the scope of the topic to the same activities as were covered by the regime of prevention, but that it should also concentrate on harm caused for a variety of reasons, but not involving State responsibility; that it should deal with the topic of allocation of loss among different actors involved in the hazardous activities; and that it should include within the scope of the topic loss to persons, property (including the elements of State patrimony and national heritage), and the environment within national jurisdiction.<sup>8</sup>

51. Finally, part I of the report noted three broad policy considerations which had been the basis for consideration of the topic of international liability, namely: (a) that each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) that the protection of such rights and interests required the adoption of measures of prevention and, if injury occurred, measures of reparation; and (c) that, insofar as was consistent with the two preceding principles, the innocent victim should not be left to bear his or her loss or injury unaided (paras. 43–46). The draft articles adopted in 2001<sup>9</sup> already addressed the first objective and, partially, the second. The challenge now facing the Commission was to address the remaining elements of the policy, namely, encouraging States to conclude international agreements and adopt legislation and implementing mechanisms for prompt and effective remedial measures, including compensation in case of significant transboundary harm.

52. While there was general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim was not left to bear the loss resulting from transboundary harm arising from hazardous activity, it was nevertheless acknowledged that full and complete compensation might not be possible in every case, for a variety of reasons. At the same time, any regime for allocation of loss should be intended to provide incentives for all those concerned with the hazardous operations to take preventive or protective measures in order to avoid damage; to compensate damage caused to any victim; and to serve an economic function, by internalizing costs.

53. In accordance with the recommendations of members of the Commission and States in the General Assembly, section A of part I of the report began with a review of sectoral and regional treaties and other instruments providing for sharing of risk and costs of economic loss resulting from any transboundary harm (paras. 47–113). Those included the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,

of 1993, which had not yet been ratified, but which, as a model, offered important pointers for the Commission’s work, particularly on the definition of damage; the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal; and instruments establishing the liability regimes governing damage from oil pollution and nuclear activities and the liability regime governing outer space activities.

54. New instruments were being negotiated, particularly in the European context. Other international and regional instruments in force providing for the creation of liability and compensation regimes included the Convention on Biological Diversity and its Cartagena Protocol on Biosafety and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, to cite only a few.

55. Those instruments, some of which were not yet in force or had not been widely ratified, nevertheless had a number of common features, addressed in section B of part II of the report (paras. 114–121), namely:

(a) That State liability was an exception, accepted only in the case of outer space activities;

(b) That liability in the case of damage which was not nominal or negligible but more than appreciable or demonstrable was channelled through a single entity and, in the case of stationary operations, to the operator of the installation. However, other possibilities existed. For instance, in the case of ships, the owner, not the operator, bore liability. The real underlying principle did not seem to be that the “operator” was always liable, but that it was the party with the most effective control of the risk at the time of the accident who was made primarily liable;

(c) The liability of the person in control of the activity was strict, but limited, in the case of hazardous or dangerous activities. That was justified as a necessary reflection of the “polluter pays” principle, which, however, could in certain cases be replaced by the principle of equitable sharing of risk, with a large element of State subsidy;

(d) Where the obligation to compensate was based on strict liability, it was also usual to limit the liability to amounts that would be generally insurable. Under most of the schemes, the operator was obliged to obtain insurance and other suitable financial securities in order to take advantage of the scheme. The scheme of limited liability was, of course, open to criticism as not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits were set too low, it could even become a licence to pollute. Furthermore, the system might not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury;

(e) Most liability regimes concerning dangerous activities provided for additional funding sources to meet claims of damages. States took a share in the allocation of loss. The other shares, however, were allocated to a common pool of funds created by contributions either from operators of the same type of dangerous activities or from

<sup>8</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 448.

<sup>9</sup> See footnote 7 above.



entities for whose direct benefit the dangerous or hazardous activity was carried out;

(f) Strict liability had been recognized in a number of countries around the world belonging to all the legal systems. It was arguably a general principle of international law or, in any case, could be considered as a measure of progressive development of international law. In the case of activities which were not dangerous but still carried the risk of causing significant harm, there was perhaps a better case for liability to be linked to fault or negligence;

(g) On its own merits, fault-based liability might perhaps better serve the interests of the innocent victims and should be retained as an option for liability. It was not unusual in such cases to give the victim an opportunity to have recourse to liberal rules of evidence and inference. By reversing the burden of proof, the operator might be required to prove that he had taken all the care expected of a reasonable and prudent person, proportional to the risk of the operation.

56. Section C of part II of the report (paras. 122–149) addressed a few important questions concerning the regimes of civil liability, which were rooted in the development of the law in each State and its application by their domestic jurisdictions, which varied considerably from State to State, depending upon the system of law prevailing.

57. Thus, the question of the causal link between the damage caused and the activity alleged to have given rise to it and the related issues concerning foreseeability, proximity or direct loss were not treated uniformly. It was to be noted that there was no support for providing for liability for damage to the environment *per se*. Furthermore, in the case of damage to the environment or natural resources, there was agreement to recognize a right of compensation or reimbursement for costs incurred by way of reasonable or, in some cases, “approved” or “authorized” preventive or responsive measures of reinstatement (para. 131). The “reasonableness” criterion was defined to include those measures found in the law of the competent court to be appropriate, proportionate and cost-effective.

58. An analysis of the civil liability regime showed that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. The outcome would also depend on the jurisdiction in which the case was instituted and the applicable law. While it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, it was, in his view, not possible to draw any general conclusions on the system of civil liability. Such an exercise, if it was considered desirable, would properly belong to forums concerned with the harmonization and progressive development of private international law.

59. It was against that background that, in part III of the report (paras. 150–153), he put forward a few submissions for consideration. While the schemes examined had common elements, each was tailor-made for its own context. It did not follow that in every case the best solution was to negotiate a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if considered appropriate, by allowing the plaintiff to sue in the most favourable jurisdiction or

by negotiating an *ad hoc* settlement. It was best to give States sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss that the Commission might wish to endorse should be both general and residual.

60. Having regard to the earlier work of the Commission on the topic, in paragraph 153 of his report, he put forward various submissions with a view to developing that model. If those recommendations were generally acceptable, they could provide a basis for formulating more precise draft articles on the topic of international liability, with a view to the Commission’s fully discharging its mandate. Members might also like to comment on the type of instrument that would be suitable and the manner in which the Commission could best discharge its mandate. One possibility would be to draft a few articles and to recommend that they should be adopted as a protocol to the draft framework convention on the regime of prevention. However, he would go along with any suggestions that met with the approval of most members.

*The meeting rose at 1 p.m.*

## 2763rd MEETING

*Tuesday, 27 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

### **International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities) (*continued*) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Ms. ESCARAMEIA said she hoped that the viability of the entire project would not again be at issue, in view of

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

the results of the work of the Working Group established at the previous session<sup>2</sup> and the endorsement of the Sixth Committee.<sup>3</sup>

2. The first report of the Special Rapporteur (A/CN.4/531) was well-structured, but the tone of the introduction was too pessimistic. After all, the Special Rapporteur had had the support of the Commission in 2002 and of the Sixth Committee, as was reflected in the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session (A/CN.4/529). The General Assembly had reacted positively to Mr. Quentin-Baxter's suggestion many years earlier regarding a number of preventive measures and the right of the affected State to receive reparation from the State that was the source of the injury. Mr. Barboza's suggestion of additional guarantees had also been well received. A reference had been made to the 1996 Working Group, and apparently most members had endorsed its conclusions. It was puzzling to see that those conclusions had not immediately been taken further, and it would have been useful if the Special Rapporteur had informed the Commission in greater depth about difficulties encountered so that the Commission could try to overcome them.

3. As to the recommendations of the 2002 Working Group, the term "innocent victim"<sup>4</sup> was inappropriate, especially with regard to the environment or the global commons, to which such moral qualities as innocence hardly applied. Moreover, the Working Group had discussed the threshold of "significant"<sup>5</sup> harm, but for the purpose of compensation it was sufficient to speak of "appreciable" harm.

4. In the discussion of policy considerations, according to paragraph 43 of the report, the Commission should direct its effort towards encouraging States to include international agreements and adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures. However, the Commission's task was much broader, namely, to draft rules. Although it could not impose such rules on States, the Commission should not merely produce "soft" recommendations or very general guidelines.

5. Paragraph 44 gave the impression that the innocent victim would always have to bear part of the loss, something that might be unavoidable in practice in view of the difficulty in quantifying such loss. The Commission should not, for all that, depart from the assumption that the victim should not have to pay anything.

6. The Special Rapporteur's analysis of model schemes of allocation of loss was very useful, the conclusion being that, apart from space activities, State liability was highly exceptional. In her opinion, the State almost always had a residual role, either directly (for example, in conventions which stipulated that the State would bear the loss that could not be covered by the operator) or indirectly (in the form of funds set up by parties that were States). True, the

primary liable entity should be the operator. However, she endorsed the Special Rapporteur's comment to the effect that it was not the operator that should be liable, but the entity that controlled the activity. It was worth pointing out that several conventions spoke of "the operator", yet the person in question might well be the entity in control. Article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, for instance, extended the notion of "operator" to anyone who was in control of a particular stage of a procedure.

7. The Special Rapporteur had said he would be presenting models of liability and compensatory schemes, but she hoped he would do rather more. States had a duty to provide arrangements for equitable allocation of loss. Hence the need to draft general rules, albeit of a residual nature.

8. With regard to the Special Rapporteur's submissions in paragraph 153 of his report, any regime recommended should indeed be without prejudice to claims under civil liability as defined by national law (subpara. (a)), but she would add the proviso that it should not always be necessary to exhaust national remedies before resorting to international mechanisms. Under some systems, it was possible to refer directly to international mechanisms. The Commission should perhaps say that civil liability was available, but not that it must be exhausted before turning to international mechanisms for dispute settlement and allocation of cost. Moreover, several national jurisdictions should be available, at least in the State of origin of the injury and in the State of the injury.

9. Subparagraph (b) was wholly acceptable, and she agreed with the submission in subparagraph (c) that the scope should be the same as in the draft articles on prevention. Nevertheless, the threshold should be lower, namely "appreciable" rather than "significant" harm.

10. As for subparagraph (d), the assertion that State liability was an exception needed to be qualified—it was an exception when the State had a primary role, but not when it had a residual role. Even the Convention on Third-Party Liability in the Field of Nuclear Energy and the draft directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage,<sup>6</sup> although not yet in force, pointed in that direction, and funds and other mechanisms also did so indirectly. As could be seen from paragraph 171 of the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session, most delegations in the Sixth Committee were in favour of residual liability for the State. The fact that the State had duties to fulfil encouraged it to take preventive measures, which in turn promoted compliance with the draft articles on prevention of transboundary harm arising out of hazardous activities.<sup>7</sup>

11. Clearly, the causal link should be based solely on reasonableness (subpara. (e)) but on the issue of harm caused by several sources (subpara. (f)), a regime of joint

<sup>2</sup> *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.

<sup>3</sup> General Assembly resolution 57/21 of 19 November 2002, para. 2.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 450.

<sup>5</sup> *Ibid.*, para. 452.

<sup>6</sup> *Official Journal of the European Communities*, C 151 E, of 25 June 2002, p. 1322.

<sup>7</sup> See 2762nd meeting, footnote 7.

and several liability was preferable to one of the equitable apportionment, for it gave more guarantees to the victims.

12. Whether it was limited or not, the liability of the operator (subpara. (g)) should always be supplemented by additional funding mechanisms, but the word “limited” posed some difficulty. Even if there was complete liability, the operator might be financially unable to pay compensation, and hence the need for other sources of compensation. The Commission must also consider cases in which insurers were not willing to insure the activity. While the operator might have complete liability, no one would compensate the victim for his loss. Obviously, such a situation required the guarantee of additional funds.

13. With regard to subparagraph (h), States must certainly put in place domestic schemes relating to prevention, protection and national funds, but the Commission should not at the present stage discard the obligation to arrange for some sort of dispute settlement mechanism, such as arbitration, and it should discuss whether or not the mechanism should be mandatory.

14. She agreed fully with the consideration discussed in subparagraph (i). As to subparagraphs (j) and (k), damage to the environment *per se* should be compensated, and not simply as damage to persons or property. Such was the position taken in both the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European Union draft directive.<sup>8</sup>

15. She was opposed to the Special Rapporteur’s suggestion that general rules should be drawn up as a protocol to the articles on prevention, a course that would emphasize prevention as a main obligation and compensation as a mere accessory. They should be on an equal footing. The best thing was to have a convention in two parts, one on prevention and the other on compensation for harm, with rules enunciating general principles on liability. That idea was supported by the Sixth Committee, as could be seen from paragraph 179 of the topical summary.

16. Mr. PELLET commended the Special Rapporteur for his report, the erudite and excellent quality of which merely confirmed that the topic was not one conducive to codification and progressive development of the law. He wondered just what its aim was. As the title showed, the subject focused on defining the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, although it might have been simpler to speak of compensation rather than loss, since that was what was at issue, or, as the Special Rapporteur stated more clearly in paragraph 38 of his report, “facilitating a more equitable and expeditious scheme of compensation to the victims of transboundary harm”. He would emphasize the word “transboundary”, because the Special Rapporteur did not stick fully to the topic, especially when he evoked the *Ok Tedi* case (paras. 143–149 of the report) or the Bhopal disaster (a footnote to para. 149 of the report). It was not suitable to include in an already difficult topic the question of harm caused by the activities of a transnational corporation in the territory of a host State, despite the fact that, like the Special Rapporteur (a footnote to

para. 19 of the report), he was in favour of developing a liability regime for multinational corporations.

17. For similar reasons, he was reluctant, to say the least, to see the Commission set out upon a study aimed at producing a more rapid and equitable regime for victims of transboundary harm. The report provided all the arguments needed to show it was a task that strayed from the Commission’s field of competence. The Commission’s task was to work towards the progressive development and codification of international law, and, even though it was not specifically stated in its statute, the Commission pursued that task primarily, if not exclusively, with regard to public international law. Yet the Special Rapporteur had himself acknowledged that international liability did not lend itself easily to codification and progressive development (para. 2 of his report) and any doubts that might have been voiced in the 1980s about the value or viability of the topic itself (para. 9) persisted more than ever today. The Commission had been dragging the topic around with it since the 1970s without ever having been able to complete it. Perhaps that was because, as Tomuschat had stressed (a footnote to para. 18 of the report), a global approach was not suited to yield constructive results.<sup>9</sup> The Special Rapporteur himself admitted as much in saying (para. 150) that “the legal issues involved are complex and can be resolved only in the context of the merits of a specific case”, in other words, as a function of circumstances, the nature of the harm or the risk.

18. The Special Rapporteur’s other objection (in para. 24 of his report) was that, as the Commission itself had concluded at its forty-eighth session, in 1996, “the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability”.<sup>10</sup> In 1997, the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law had considered that “the scope and content of the topic remained unclear”<sup>11</sup> (para. 33 of the report). In the final analysis, neither in the literature, nor in case law, nor in practice was there any agreement on anything, and it emerged from the many conventions cited by the Special Rapporteur that “there could be no single pattern of allocation of loss” (para. 46 of the report). That was true at the international level and at the level of the domestic law of States, as was repeatedly pointed out in the report—for example, in one of the footnotes corresponding to paragraph 117 or in paragraph 125. It would be noted in passing, with regard to domestic law, that under French law, and probably under other systems that distinguished between administrative law and civil law, no-fault liability had grown considerably in the context not only of civil liability but also of administrative liability, and on a basis not referred to by the Special Rapporteur but one to which the Commission might give some consideration, namely

<sup>9</sup> C. Tomuschat, “International liability for injurious consequences arising out of acts not prohibited by international law: the work of the International Law Commission”, F. Francioni and T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London, Graham and Trotman, 1991), pp. 37–72, at p. 55.

<sup>10</sup> Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 127 (para. 32 of the commentary to art. 5).

<sup>11</sup> *Yearbook ... 1997*, vol. II (Part Two), para. 165.

<sup>8</sup> See footnote 6 above.



the principle that a public burden should be shared equally by all citizens.

19. Whether in connection with causation, the duty of care, the definition of damage or proper jurisdiction, the Special Rapporteur acknowledged that no particular solution was widely favoured (para. 128) and that no general conclusions could be drawn (para. 150). Of course, there were a number of good ideas, such as the creation of national or international compensation funds, but that did not come under codification or progressive development; rather, it was a matter of negotiation between States. It might be worth investigating possibilities in the area of the development of uniform laws or in that of private international law, but that was a matter for the bodies involved in the codification of private law, above all UNCITRAL, and not the Commission.

20. Others would probably say that the Sixth Committee wanted the topic, but he was not so sure, and he wondered whether the Commission had not forced its hand. In any case, nothing prevented the Commission from explaining to the Sixth Committee that it was on the wrong track. If the Commission really decided that it should set out upon that “mission impossible”—and one that was probably pointless—the report was the best basis for doing so. But to go where? It was still a mystery.

21. To conclude on a more positive note, subject to some adjustments when it came to examining the Special Rapporteur’s conclusions at future sessions—if that was indeed necessary, which he doubted—he wished to single out a few details of substance for comment. First, the Commission must avoid references to “civil liability”, as inclusion of the adjective “civil” would trouble jurists from countries that drew a distinction between administrative law and civil law. It would be a good idea to include harm caused to the State itself, as was proposed in paragraph 40 of the report. *Pace* Ms. Escameia, with a view to avoiding duplication of work, it would be wise to adopt the same threshold for liability in the present draft as had been adopted in the draft articles on prevention of transboundary harm arising out of hazardous activities.

22. He fully endorsed the submission in paragraph 153, subparagraph (d), of the Special Rapporteur’s report, to the effect that no general conclusions could be drawn as to the regime of liability. If that was the case, the only reasonable possibility open to the Commission—should it wish to launch itself into that task, of which he personally disapproved—would be to attempt to formulate model clauses that could serve only as alternatives. It was absolutely clear that no general rule regarding liability, including liability of the operator, was appropriate, and that no uniform rules could be adopted in that area.

23. He failed to understand why a distinction was drawn between “reasonableness” and “causality” in subparagraph (e); causality was the reasonable criterion. Submissions (f) to (k) clearly showed that the topic was not ripe for codification. Nor was it clear what form the finished product might take: certainly not a convention, though model rules might perhaps be appropriate. Finally, the present topic should not be grafted on to the topic of prevention, for, unlike the latter, it did not lend itself readily to codification.

24. Mr. GAJA said that the Special Rapporteur’s report represented a remarkable attempt to give an overview of all the issues involved in a very difficult topic. It contained an impressive amount of material which would no doubt be helpful for the continuation of the Commission’s work. In the final part of the report, the Special Rapporteur briefly outlined some tentative submissions and awaited the Commission’s reaction. Given the divisions within the Commission regarding the feasibility of the work proposed, it might have been wiser if the Special Rapporteur had left it to the Commission to react before taking any further steps. Instead, he had created difficulties for the reader.

25. The main difficulty in responding to the Special Rapporteur’s suggestions was that it was not yet clear what kind of end product was envisaged. It was not clear whether, on the one hand, the “model of allocation of loss” was a model for a treaty regime or for parallel national legislation, or whether, on the other, it was a set of recommendations or guidelines enabling States and other persons concerned to comprehensively assess the issues when setting up a regime. For the time being, it seemed that the latter model was the one proposed; indeed, that might be the easier way out.

26. Part II of the report showed the existence of a series of treaty regimes, mostly intended to cover specific risks. Their great variety reflected the needs of the specific sector involved and cast doubt on the usefulness of an attempt to outline a general and residual regime. As Mr. Pellet had recalled, the Special Rapporteur himself had noted in paragraph 46 of the report that those treaties “indicate that there could be no single pattern of allocation of loss”. Before they were taken as a source of inspiration, those treaty regimes should first be assessed in terms of their adequacy for the specific sector. The number of ratifications of the relevant treaty was not necessarily decisive for that purpose: a treaty might be widely ratified simply because it said little. Furthermore, not all the treaties concerned the intended subject matter of the Commission’s work, namely, transboundary harm, and thus their contents might prove not to be transposable.

27. As to some of the submissions in the final part of the report, he would hesitate to recommend a regime that was “without prejudice to claims under civil liability”, as was suggested in paragraph 153, subparagraph (a). It seemed more reasonable to envisage a comprehensive regime that covered all the aspects of the allocation of losses. If the operator was held liable under a treaty or other regime, it was unreasonable to expect that another source of liability should be added. Allocation of losses should be studied in a comprehensive manner that also took account of municipal law systems.

28. The suggestion in paragraph 153, subparagraph (d), that “the person most in control of the activity” should bear the brunt might have to be reviewed in the light of the need to secure assets in the event of loss. That seemed to be the main reason why the shipowners rather than the charterers were held liable for harm caused by ships. Shipowners thus had an incentive to insure against the risk, and they might transfer the costs to the charterers.

29. In the case of activities within a State causing transboundary harm, some harm was also likely also to take place within the territory where the cause was located. In a comprehensive regime, that harm should not be ignored. Article XI of the Convention on Supplementary Compensation for Nuclear Damage sought also to protect those who suffered damage in the installation State.

30. Finally, since the amount for which the operators were liable under a strict liability regime might be inadequate to cover all the damages, a viable scheme should envisage the participation of a large number of States that could provide part of the compensation in case of harm, irrespective of their involvement in the actual hazardous activity. Such an arrangement was provided for in article IV of the Convention on Supplementary Compensation for Nuclear Damage. It would be difficult to generalize the solution adopted by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage complementing the International Convention on Civil Liability for Oil Pollution Damage, to which reference was made in paragraphs 47 and 48 of the report, since a comparable situation did not exist in other cases. If it was wished to establish a viable regime for compensation, the role of States could not be ignored.

31. Mr. MANSFIELD said that the Special Rapporteur's report not only made it clear why the Commission could not fail to deal with the topic of allocation of loss in case of transboundary harm, but also provided an excellent basis on which the Working Group established at the previous session<sup>12</sup> could take the issues forward.

32. Some members still wished to avoid the topic, but his own view was that the Commission must address it, for a number of reasons. First, it was the Commission itself that had conceived the topic of State responsibility as being limited to internationally wrongful acts. That had not been the only possible approach, as some writers of considerable standing had been at pains to point out. Nonetheless, it had been the approach chosen by the Commission. Second, the prevention and response obligations developed by the Commission were important—a matter to which he would revert; but they could never entirely eliminate the risk of an accident. Third, if loss occurred despite fulfilment of the prevention obligations, there was no wrongful act on which a claim could be founded. Fourth, unless that loss was to lie where it fell, in other words, potentially on the innocent victim, there was a gap in the Commission's work to date—a gap that was sufficiently obvious to require the Commission to address it if it was not to lose credibility.

33. The survey of existing regimes was very useful indeed. He would not comment on the different approaches adopted for loss allocation, or on the reasons behind those approaches, except to note that something common to all of them was the idea that prevention was better than cure. Admittedly, there had been various degrees of success on the prevention front in the various sectoral areas: it was a regrettable fact that in some sectors preventable accidents continued to occur all too frequently. Yet in general there was an increasing recognition by all operators engaged in

hazardous activities, whether State or private and whether in developed or developing countries, that the costs associated with accidents, irrespective of any liability to pay compensation, were very high and represented perhaps the single biggest preventable cost to their business, in terms of down time of machinery and staff, loss of production, failure to meet orders and loss of reputation. It was the recognition of those factors, rather than a legal obligation to take prevention measures or to pay compensation, that was increasingly the reason that drove operators to adopt state-of-the-art prevention techniques and seek to follow continuous improvement procedures and work against complacency. In fact, no operation involving hazardous activities anywhere in the world could any longer ignore those managerial insights and hope to stay in business.

34. There were two implications for the Commission's work, both of which were acknowledged in the Special Rapporteur's report. First, it needed to ensure that the result of its work supported the incentives for those with the effective ability to control the risk to follow best-practice risk management techniques. Second, the allocation of loss that the Commission was attempting to deal with was residual in character. It could not be part of the intention to replace existing regimes, still less to discourage the development of new tailor-made sectoral regimes or to attempt to provide some new detailed comprehensive regime that would cover all conceivable circumstances.

35. Obviously, there was much to be said for tailoring specific regimes to the specific circumstances of the activities in question. But it must be acknowledged that they had had limited success to date. More generally, it might be the case that a specific regime was intended to ensure that there was an appropriate allocation of loss in the event of accidents, and, in particular, that it did not fall on an innocent victim who had had no participation in or no benefit from the activity in question. However, there were various reasons why that result might not be achieved: the regime might not be enforced; the relevant State or States might not be party to it or covered by it; the particular risk of harm or the nature of the harm itself might not have been foreseen and not be covered by the regime; or the best-practice prevention might have proved not to be effective in the circumstances of the particular accident.

36. The Commission needed to consider carefully how there could be some residual obligations to avoid a situation in which an innocent victim was in fact left to bear the full loss without any support in circumstances where it had not been a participant in the hazardous activity and had gained no benefit from it. Nevertheless, it needed to do so without distorting the incentives to those in the best position to manage risk. It might not be satisfactory or sufficient, but at the very least there needed to be some residual obligation on the relevant States to address the issue of allocation of loss in unforeseen circumstances after the event. That, however, was a matter for further reflection.

37. He agreed with the proposition set forth in paragraph 152 of the report that the model should be general and residual in character, and he also endorsed the submissions in paragraph 153, subparagraphs (a) and (b), to the effect that the model should be without prejudice to remedies under domestic law, private international law

<sup>12</sup> See footnote 2 above.

or public international law relating to State responsibility. Although he had some reservations, he could for the moment accept the recommendation in subparagraph (c) about limiting the scope to that of the draft articles on prevention. However, at some point in its work, the Commission would need to consider further the question of harm to the global commons.

38. He agreed with the recommendation on the threshold of significant harm, even though, as a practical matter, the threshold was unlikely to be an issue at any time. In a residual regime, the character of the harm to be dealt with would never be anything less than significant. As to subparagraph (d), he had already indicated that it was the person most able to control the risk who needed to have the fullest incentive to manage the risk, including the responsibility for compensation.

39. In general, there was much to be said in support of the comments in subparagraphs (e) to (i), though some aspects of the very condensed material contained there needed further discussion in the Working Group. Subparagraphs (j) and (k) raised difficult questions that called for further thought. The world had moved a long way in its attitude to damage to the environment. The notion that such damage was a matter of concern only to the State in which it occurred was not in accordance with the growing understanding of the global interconnectedness of environmental considerations. With regard to subparagraph (k), on tourism and loss of profits, liability as such might be a difficult concept. Nevertheless, if there was a clear causal link, grounds might exist for a claim if there had been a breach of State responsibility. Furthermore, it should be acknowledged that loss of tourism might be well-nigh catastrophic for some smaller economies: the notion that they might have to bear those losses totally unsupported was difficult to square with any sense of equity. The report provided an excellent framework for further refinement of those difficult issues in the Working Group.

40. Finally, a decision on the final form of the work could, in his pragmatic view, be left to emerge from the continuing work of the Working Group.

41. Mr. BROWNLIE said that the report raised issues with which he had considerable difficulties. It was not the fault of the Special Rapporteur, who had provided a helpful overview, but the Commission needed guidance on addressing serious structural problems. The proposed regime would be both general and residual. It would not be a regime of general international law because the Commission was not codifying such law: it was inventing an entirely new regime.

42. The only treaty models available were highly political. For instance, the European nuclear regime had been designed to limit responsibility in order to protect the nascent development of civilian uses of nuclear energy. It thus represented an attempt to balance risk against the possibility of conducting a given activity. Regimes of that kind clearly had no bearing on the Commission's present task. He remained to be persuaded, therefore, as to the character of the residual regime that would emerge from the Commission's deliberations.

43. The approach taken by Mr. Quentin-Baxter in his various reports on international liability continued to exert an influence in that regard. Mr. Quentin-Baxter had made no distinction between State responsibility and other considerations, and all the examples he had cited in his reports had been straightforward examples of State responsibility.

44. The Commission would indeed have to provide for the possibility of arbitration, but he wondered what would be the applicable law in that case. Treaty regimes were self-contained and dealt with arbitration in their own way, but it remained to be seen how the Commission would tackle the issue.

45. It was clear that the Commission must address those serious structural problems and avoid causing a reaction in the Sixth Committee that might damage its existing work on State responsibility.

### **The responsibility of international organizations (continued)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>13</sup> A/CN.4/L.632)**

[Agenda item 7]

#### **REPORT OF THE WORKING GROUP**

46. Mr. GAJA (Special Rapporteur), introducing the report of the Working Group, said that, in view of several criticisms made in the plenary, he had submitted to a meeting of the open-ended Working Group a revised text of draft article 2 which omitted any reference to "governmental functions". Following a discussion, the Working Group had reached a consensus on a new text that he was now submitting to the plenary for referral to the Drafting Committee.

47. The new text proposed a definition of "international organization" that was designed to cover all international organizations established by a treaty or other instrument of international law and possessing international legal personality. It made no reference to "capacity", because when an international organization breached an obligation under international law, that would in any case entail its international responsibility. The definition stressed the central role of States, although it acknowledged that members of the organization might include non-State entities, such as other international organizations, territories or private entities. The text adopted by the Working Group read:

#### ***"Article 2. Use of terms***

For the purposes of the present draft articles, the term 'international organization' refers to an organization established by a treaty or other instrument of international law and possessing its own international legal personality [distinct from that of its members]. In addition to States, international organizations may include as members, entities other than States."

\* Resumed from the 2756th meeting.

<sup>13</sup> See footnote 1 above.



48. He thanked the many members who had attended the meeting of the Working Group for their constructive contributions.

49. Mr. PAMBOU-TCHIVOUNDA said that, since he was not a member of the Drafting Committee, he wished to express his full support for revised article 2, on condition that the phrase in square brackets was deleted.

50. Ms. XUE said she had been unable to attend the meeting of the Working Group, but it seemed the plenary was still expected to comment on the policy considerations underlying the new text. She agreed that article 2 was one of the most difficult of the draft articles. Previous conventions had used the term “intergovernmental organization” without defining it, but since the Commission had agreed that “intergovernmental organizations” were the target of the draft articles, it might be worthwhile trying to arrive at a definition.

51. She had some reservations regarding article 2 as originally proposed by the Special Rapporteur in his report (A/CN.4/532, para. 34), but the new version still contained some problematic terms. For instance, the wording “established by a treaty or other instrument of international law” did not necessarily reflect the real practice of States and international organizations. With regard to the phrase “possessing its own international legal personality”, although in the 1949 Advisory Opinion in the *Reparation for Injuries* case, ICJ had said that an international or intergovernmental organization possessed “international personality” [p. 15], it was still not clear that this phrase was meant to include “intergovernmental organizations” only. It was meant to include other types of organizations as well. However, not all international organizations necessarily possessed such personality, and including that essentially theoretical concept in the revised text made it more confusing than the original draft article. Finally, with regard to the wording “in addition to States ... may include as members entities other than States”, she felt that the organization’s composition was a matter to be decided by its constituent instrument. If the Commission retained that wording as it stood, it would have to make clear the relationship between the character of such an organization and the status of such non-State entities. Otherwise the scope might become too broad.

52. The revised version was confusing. If there was already a consensus on policy considerations, meaning that the text could be referred to the Drafting Committee, the Committee would have to work very hard to make plain what international organizations the Commission intended to include.

53. Mr. Sreenivasa RAO thanked the Working Group and the Special Rapporteur for accommodating the diversity of views on the definition of “international organization”. There was a kernel of truth, however, to what Ms. Xue had said about the drafting of the revised text. The first sentence referred to the organization’s establishment by a treaty or other instrument under international law, which did not make it clear whether such an instrument could be negotiated by non-State actors as well as States. As long as an organization was established by an instrument negotiated only among States, no problem arose if the instrument created a membership that could include

non-State entities. Otherwise, there would be a gap which the Drafting Committee would have to fill.

54. Mr. ECONOMIDES noted that the definition chose three criteria. The first, namely establishment by a treaty or other instrument of international law, posed no problems because it was true of all international organizations. The second, that of international personality, was true of all international organizations that had international powers, such powers being implicit. If an organization did not have international personality, but simply internal legal personality in the territory where it operated, the draft articles would not apply to it. The third criterion, relating to membership, was a useful addition, in that it reflected the fact that an increasing number of international organizations had non-State members. The revised text was perfectly acceptable, although the Drafting Committee might refine it further.

55. Mr. CHEE said that in the Working Group he had raised the issue to which Ms. Xue had referred, namely, what was meant by “instrument of international law”. Ms. Escameia had said that it could include a resolution of the General Assembly. The term was very broad and imprecise. He had also raised in the plenary the issue of the distinction between “international personality” and “international legal personality”, which had a bearing on the term “instrument of international law” and needed to be clarified.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to refer article 2 to the Drafting Committee.

*It was so decided.*

57. Mr. PELLET said that the definition in article 2 was excellent. He emphasized that, if the plenary referred to the Drafting Committee an article already discussed at length in the Working Group, the Committee was bound to respect the position of the full Commission and not reopen the debate on the many problems that had led to the adoption of the article in question.

*The meeting rose at 11.30 a.m.*

## 2764th MEETING

*Wednesday, 28 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

**Diplomatic protection<sup>1</sup> (continued)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)**

[Agenda item 3]

REPORT OF THE WORKING GROUP

1. The CHAIR invited the Special Rapporteur on diplomatic protection to introduce the report of the Working Group on draft article 17.

2. Mr. DUGARD (Special Rapporteur) recalled that Mr. Gaja had proposed merging draft article 17, paragraph 1, with paragraph 2 of the same article. The Working Group established to consider the matter had drafted a provision that took account of that proposal, which read:

“For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection.”

3. The Working Group had had before it proposals by Mr. Economides, Mr. Brownlie, Mr. Gaja and Mr. Pellet and had reached a consensus on the need, first of all, to cater for situations when a municipal system did not know the practice of incorporation, but applied some other system of creating a corporation, and, second, to establish some connection between the company and the State along the lines of the links enunciated by ICJ in the *Barcelona Traction* decision. At the same time, however, the Working Group had been careful not to open Pandora’s box by adopting a formula which might suggest that the tribunal considering the matter should take into account the nationality of the shareholders that controlled the corporation, something which the Court had rejected in the *Barcelona Traction* case. Several different wordings were put forward in the text submitted by the Working Group for article 17, and the Special Rapporteur proposed that that provision should be referred to the Drafting Committee.

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)\*

4. The CHAIR invited the Special Rapporteur to sum up the debate on articles 18 to 20 of the draft articles on diplomatic protection.

\* Resumed from the 2762nd meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

5. Mr. DUGARD (Special Rapporteur) said that the debate had centred, quite rightly, on criteria to be used for identifying the nationality of a corporation. Before turning to the three draft articles in question, and in response to an issue raised by Mr. Brownlie, who had said the Commission should look more closely at the status of legal persons other than corporations, he would submit an addendum on the subject to the Commission. Because legal persons came in extremely varied types, however, it was impossible to provide a generalized regime for all legal persons in international law. Some members of the Commission had in fact suggested that it was inadvisable to go further into the matter. He would therefore not go into the minutiae of the topic from the standpoint of diplomatic protection.

6. Draft article 18 set out two exceptions to the rule that diplomatic protection was to be exercised by the State in which the corporation was registered, extending that possibility to the State of nationality of the shareholders. The first exception, contained in draft article 18, subparagraph (a), posed no particular problem, the majority of the Commission’s members being in favour of the test that the corporation should have ceased to exist for the State of nationality of the shareholders to be able to exercise diplomatic protection. Other useful suggestions had been made: Mr. Kamto had proposed that a time limit should be imposed for bringing a claim, and Mr. Addo had raised the possibility that the shareholders might bring their claims against the liquidator of the corporation. He himself thought that that could be done during the period of liquidation, but that after the company had completely ceased to exist, the shareholders must have the right to persuade their State of nationality to intervene. Since there had been no serious objection to article 18, subparagraph (a), he recommended that it should be referred to the Drafting Committee.

7. Draft article 18, subparagraph (b), had given rise to a much more vigorous debate and created something of a division among members of the Commission. Fifteen members had been in favour of including subparagraph (b), namely, Mr. Al-Baharna, Mr. Chee, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Yamada and himself, and nine against, namely Mr. Addo, Mr. Brownlie, Mr. Economides, Mr. Kateka, Mr. Koskeniemi, Mr. Mansfield, Mr. Rodríguez Cedeño, Mr. Sreenivasa Rao and Mr. Sepúlveda. He himself believed that the exception set out in subparagraph (b) was part of a cluster of rules and principles which together made up the decision of ICJ in the *Barcelona Traction* case, as was attested to by the fact that the Court had raised the possibility of such an exception, although it had not been relevant to the case itself. For that reason, he thought it should be included. As to whether the exception was part of customary international law or not, the views of members of the Commission had likewise been divided. His own view was that a customary rule was developing and if the Commission wished to engage in progressive development of the law in that area, it should do so with great caution.

8. Many members of the Commission had argued that article 18, subparagraph (b), was unnecessary because the shareholders had other remedies such as domestic

courts, ICSID or the international tribunals provided for in some bilateral or multilateral agreements. That was not always true, either because there was no domestic remedy or because the State of nationality or the host State had not become a party to ICSID or to a bilateral investment treaty. He had been surprised that Mr. Sreenivasa Rao and Mr. Sepúlveda had been in favour of the availability of ICSID-type protection when neither India nor Mexico was a party to that arrangement and, indeed, many other important States, including Brazil, Canada, Poland, the Russian Federation and South Africa, were also not parties.

9. Some members were probably hostile to article 18, subparagraph (b), because of a historical opposition to foreign investment on the grounds that it was contrary to the interests of developing countries. As Mr. Kamto and Mr. Momtaz had pointed out, however, the situation had changed considerably since ICJ had handed down its decision in the *Barcelona Traction* case. The type of situation he had in mind was that of an entrepreneur who, having set up a company in a developing country at the request of its Government, had the assets of the company confiscated following a change in government and found that there was neither a domestic nor an international remedy. It was in a sense a matter of protecting the human rights of the investor.

10. Many members had stressed that the exception contained in article 18, subparagraph (b), should be used only as a final resort. He thought that that went without saying: the exception was not a remedy that should be used lightly, and it should be resorted to only when there was no other solution. He accordingly recommended that subparagraph (b) should be referred to the Drafting Committee.

11. Draft article 19 presented very few problems. Some members had taken the view that it was an exception that would be better placed in article 18. He, however, was persuaded that, with a view to conformity with the *Barcelona Traction* decision, the two articles should be separated. There had been no objections to draft article 20. There had, however, been a division of opinion over the proviso, with some members suggesting that it should be dealt with in the commentary, and he had no objections to that. It had also been rightly proposed that the text of the article should be harmonized with that of article 4. He consequently recommended that the two draft articles should be referred to the Drafting Committee.

12. Mr. Sreenivasa RAO said that India had carefully considered becoming a party to the ICSID arrangement, but that, for various domestic reasons, that action had been delayed. In any case, the opposition to or defence of draft article 18, subparagraph (b), could not rest entirely on whether a State recognized the competence of ICSID, or not as long as effective remedies were available.

13. He was in favour of the inclusion of draft article 18, subparagraph (b), in the draft on the understanding that the exception it provided for should come into play only as a last resort.

14. Mr. BROWNLIE said that a number of very important public law institutions, such as cities or universities, were treated analogously to corporations by major judicial bodies. Admittedly, not all municipal systems dealt with

those matters in the same way. He also hoped that the Special Rapporteur would reconsider his statement that the *Barcelona Traction* case supported the exception in draft article 18, subparagraph (b).

15. Mr. ECONOMIDES suggested that it should be stated, either in the body of the articles or in the commentary, that the draft articles were without prejudice to rules applicable to legal persons, other than corporations, that came under municipal law.

16. Mr. GALICKI said that he endorsed the referral of draft articles 17 to 20 to the Drafting Committee, but thought that draft article 20 should be brought into line not only with article 4, as proposed by the Special Rapporteur, but also, in respect of the second part, with draft article 18, subparagraph (a). The relationship between those two provisions might be explained either by the Drafting Committee or in the commentary.

17. Mr. PELLET said that he appreciated the resoluteness shown by the Special Rapporteur, who had not only defended his positions ably but also been receptive to other opinions. Concerning the question whether to focus on other legal persons, he said that he had always been in favour of doing so. It would be better to cover the entire subject, since the principles applicable to non-profit organizations should not be very different from those applicable to corporations. However, a savings clause like the one proposed by Mr. Economides would not suffice to settle the question, and the addendum promised by the Special Rapporteur would therefore be welcome. With regard to draft article 18, subparagraph (b), he reiterated his disagreement with Mr. Brownlie: *Barcelona Traction* was not an argument for either side. Like Mr. Sreenivasa Rao, he believed that the problem was not one of human rights, but one of law. After all, when a State committed an internationally wrongful act, someone had to be able to hold it responsible; diplomatic protection was one way of doing so when all other remedies had been exhausted.

18. He did not think that a draft article should be referred to the Drafting Committee until the questions of principle had been settled in plenary because, otherwise, that would burden the Drafting Committee with too heavy responsibilities. That was the case with draft article 18, subparagraph (b), and above all with draft article 17 as proposed by the Working Group. He was nevertheless in favour of referring those draft articles to the Drafting Committee.

19. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to endorse draft article 17 in the new form proposed by the Working Group and to refer draft articles 18 to 20 to the Drafting Committee, subject to the comments made during the debate.

*It was so decided.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-**



**boundary harm arising out of hazardous activities)  
(continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>3</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

20. Mr. KATEKA, recognizing that the Commission had embarked on a difficult subject, said he hoped that the doubts of some members about the project's viability would not prevent it from moving ahead, if only for posterity's sake. He regretted that in 1998 the Commission had decided to exclude from the scope of the draft harm caused to the environment in areas beyond national jurisdictions, as the Special Rapporteur had stated in paragraph 35 of his report (A/CN.4/531). The recent case of the *Prestige*, the Greek-operated oil tanker registered in the Bahamas which had been repaired in China and had been heading for Asia with its cargo of Russian oil, showed that the price of negligence could be high. Spain had decided to tow the damaged tanker out to sea, 270 km off the coast, and it had sunk in waters 3,500 m deep with its dangerous cargo, polluting beaches in Spain and France for several months. It was regrettable that the Special Rapporteur had excluded damage to the environment *per se* not resulting in any direct loss to individuals or the State (para. 153 (k)).

21. He commended the Special Rapporteur for reviewing various regional and international environmental instruments in his sectoral and regional analysis (paras. 47–113), but it would have been better if he had considered more national legislation from other regions of the world. It would also be useful for the Special Rapporteur to provide more details on such incidents as the *Bhopal* case, referred to in a footnote to paragraph 149 of the report, so as to elaborate on the subject.

22. In paragraphs 122 to 149, the Special Rapporteur analysed some elements of civil liability, there again preferring damage to persons and property at the expense of the environment *per se* and going so far as to say that, in certain cases, such damage could indirectly benefit the environment. He hoped that the Commission would do better than that.

23. Although he had some misgivings about subparagraphs (f), (g) and (k), he agreed with most of the recommendations made in paragraph 153, particularly on the threshold of significant harm in paragraph 153 (c). As to the form of the future draft articles, he was of the view that it was too early to decide, but he did not agree with the Special Rapporteur's idea to adopt them as a protocol to the draft framework convention on the regime of prevention because a soft-law approach, for example, might be more appropriate. The Special Rapporteur should ask himself why several of the conventions to which he referred in paragraphs 47 to 113 were still not in force. Perhaps it was due to the lack of specificity and the scope of the subject matter. The Fifth Ministerial Conference "Environment for Europe", which had been held in Kiev in May 2003, had emphasized the importance of insurance and other financial instruments for making civil liability regimes work effectively. Of course, the Commission did

not have expertise on such questions, but, as in the past, the special rapporteurs might make use of specialists.

24. Mr. PAMBOU-TCHIVOUNDA said that, although the Special Rapporteur had done an excellent job, he should perhaps have delimited the topic more precisely, because it was not certain that the report had helped "throw some useful light on the model of allocation of loss the Commission may wish to recommend", as was noted in paragraph 4. From a terminological point of view, it would be better to use only the word "damage", which was used in almost all the conventions cited in paragraphs 47 to 113 of the report, rather than the word "loss".

25. The question of prevention having been settled, the Commission should now shift the focus of its work to compensation for transboundary harm arising out of hazardous activities. One of the problems to which the topic gave rise was the result of the fact that the role of the State was built on a fiction, particularly with regard to harm arising out of hazardous activities which were not prohibited by international law and which were industrial or commercial—in other words, purely private—activities usually carried out by private individuals. They were carried out by States, without the latter losing their character as private activities, only because the States decided, on an exceptional basis, to place themselves in the same conditions as private individuals. That gave rise to consequences at the level of liability when those activities caused transboundary harm and States were affected. He had two comments to make in that regard, one conceptual and the other methodological. At the conceptual level, if those activities were not prohibited by international law, it was not because they were private activities, but because States benefited from them. The involvement of the State in a compensation process was a logical consequence of that relationship of dependence on the activity in question. At the methodological level, if the aim was a global regime of State liability, it was necessary to know which activities or sectors of activities were likely to entail the liability of the State on account of their harmful effects. He therefore wondered whether it was possible to draw up a complete or partial list of those activities or sectors of activities and whether that list could be corrected and amended and, if so, under whose authority. He also wondered to what extent such a list might influence the scope and impact of the regime of compensation and to what extent its inclusion in an annex to the draft might strengthen the regime's credibility.

26. Defining the role of the State in the compensation of transboundary harm gave rise to problems of substance before problems of form and modalities. The first case considered the risk to which the State exposed itself by assuming the obligation to compensate when it acted as the operator or carried out a hazardous activity, particularly for reasons of national security. In that case, the State would be fully liable for compensation subject to the modalities for the settlement of compensation, which, following the negotiation with the other State, might take different forms in keeping with the whole range of possibilities for dispute settlement. The second case was that of an internationally wrongful act when it was established that the State, which was not the operator of the activity in question, did not fulfil the obligations provided for in the draft articles on the prevention of transboundary harm.

<sup>3</sup> See footnote 2 above.

In that case, State responsibility was international responsibility, and mere recognition of responsibility might already constitute a form of compensation, as ICJ had stated in the *Corfu Channel* case. That was token compensation, and it supplemented that of the operator or of “the party with the most effective control of the risk at the time of the accident” (para. 114 of the report). The third case was that of the liability of the operator himself, when it was established that the State had conformed in full to the obligations of prevention. The coverage of damage would then bring other mechanisms into play, private-law mechanisms in particular. His brief three-case summary might find a place in a provisional outline of principles, and the Commission might reserve for later consideration the question of the definitive form that the principles might take. He encouraged the Special Rapporteur to work in that direction.

27. Mr. BROWNLIE said that he remained concerned about the structural relations between the Commission’s work on the topic and other areas of existing international law. He asked Mr. Pambou-Tchivounda whether he would accept that most of the cases he had described were adequately covered by State responsibility and, if so, why the concept of State liability was needed. He would also like to have the views of other members on that question.

28. Mr. PAMBOU-TCHIVOUNDA explained that he had referred to possible situations while bearing in mind those envisaged in the report. The questions were (a) whether the Commission should work towards proposing a range of generally applicable rules, and (b) whether it should first draw up an inventory or whether the examples provided by the Special Rapporteur were sufficient. As for the rationale behind the draft articles on liability arising out of acts not prohibited by international law, it might be the case that the State on whose territory the activity took place had behaved punctiliously; nevertheless, in the event of an accident, a frame of reference must be available with which to deal with compensation. Hence the value of a regime other than one of responsibility based on a wrongful act of the State.

### Cooperation with other bodies

[Agenda item 11]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

29. The CHAIR welcomed Mr. João Grandino Rodas, Observer for the Inter-American Juridical Committee, and invited him to report to the Commission on the work of the Committee.

30. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) said that he was very honoured to address the Commission, whose members were among the world’s most eminent contemporary international lawyers. The Inter-American Juridical Committee was the oldest legal body in the Americas and would be celebrating its centenary in 2006. The agenda for the Committee’s August 2003 session was divided into two sections. Section A comprised items under consideration, while section B contained follow-up items. The first item in section A concerned the Seventh Inter-American

Specialized Conference on Private International Law. The General Assembly of OAS had requested the Committee to support the consultation of governmental and non-governmental experts and to prepare such reports, recommendations and other materials as would be necessary for the consultation on that occasion.

31. The second item related to applicable law and competency of international jurisdiction with respect to extra-contractual civil liability. The documents presented by the co-rapporteurs had defined the complexity of that topic, which was compounded by the great differences in the treatment of the subject by common-law and civil-law countries. Proposed approaches to dealing with those issues had included the adoption of a convention on extra-contractual liability, specific conventions on the various categories of liability and the adoption of a model law. Discussions had centred around the kind of rules which should determine applicable law and jurisdiction, the choice being between a method that afforded a measure of predictability and one that was more flexible. A uniform approach in that area throughout the hemisphere would seem advisable. However, given the cost of preparing such a convention, account should be taken of the severity of the problem posed by the diversity of approaches to resolving the issue and the funds available, and of the likelihood of the problem being resolved in other forums and of finding a satisfactory solution in the inter-American sphere. Concerns had been expressed about the need to indicate, in addition to the internal legislation of the States, the general principles of law governing the subject and the exceptions to those principles. The generality of the criterion of *lex loci delicti* and of the exceptions presented in the context of the principles on the most significant relationship had been cited as examples. It was important to note that most of the countries in Latin America, Canada and the Caribbean, as well as 10 of the United States of America, applied some version of *lex loci delicti*, which had the virtue of predictability, although it had been pointed out that that could lead to unjust or arbitrary results. Discussion of which standards to apply involved the consideration of changing conflict-of-law rules in most countries of the hemisphere and would be difficult to accept, unless the instrument containing it was limited to a particular sub-category of extracontractual liability. The Committee had asked for a final report on the subject, taking into account the preliminary reports already submitted and the points of view expressed during the session, to the effect that, given the complexity of the subject and the broad variety of types of liability included under the category of “extra-contractual civil liability”, it would be better initially to recommend the adoption of inter-American instruments governing jurisdiction and applicable law with respect to specific subcategories of extracontractual civil liability and only later, if circumstances were appropriate, to seek the adoption of an inter-American instrument governing jurisdiction and applicable law with respect to the entire area of extracontractual civil liability.

32. The third item under consideration was cartels in the framework of competition law in the Americas. The Committee had already considered the topic of competition law in the Americas as part of the issue of the juridical dimension of integration and international trade, initially conducting a preliminary comparative analysis of exist-

ing laws and legislation on competition or protectionism in member States. Subsequently, the topic had been expanded to include a survey of international rules on competition law in the hemisphere, focusing more specifically on cartels, with particular regard to their international aspects. Specific concerns had been raised about export cartels formed to produce effects in the countries to which they exported their products, thereby creating a problem for those countries. A questionnaire had been designed requesting domestic authorities responsible for supervising competition in the OAS member States to provide information on laws, recent cases and practices concerning competition and cartels.

33. Following various initial studies, a consolidated report for the March 2003 session of the Committee had presented an overview of the evolution of competition law, focusing on the role of cartels and incorporating results of the questionnaire completed by 20 member States of the region. The report also included sections on regional and multilateral arrangements and cooperation in international forums, as well as a final section on future directions for competition and cartel policies. It was planned to publish a final, expanded version of the study in the four official languages of OAS. Concerns had been expressed regarding the fact that currently every matter relating to law on competition and cartels was governed by the internal law of States, as inter-American international law contained no provision making free competition obligatory or giving OAS the power to impose sanctions for breaches of that law. A convention on the subject would be more likely to be successful if it was consistent with what was actually provided in the national legislation of the respective States, as long as general principles of law were respected. Those concerns, as well as the special problems facing small economies in the area of competition law and the need for assistance and cooperation for countries faced with potential international regulation, would be reflected in a more fully refined report on the topic, to be submitted to the Committee for approval at its August 2003 session.

34. The fourth item under consideration was the enhancement of the administration of justice in the Americas, with particular reference to access to justice, a question that the OAS General Assembly had requested the Committee to continue studying in all its different aspects, while maintaining the necessary coordination and the highest possible degree of cooperation with other organs of the Organization working in that area, and especially with the Justice Studies Centre of the Americas, based in Santiago. That issue had received increasing attention at the Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, and various delegations had drawn attention to it during the presentation of the Annual Report of the Committee at the most recent General Assembly. Discussions in the Committee had included seeking analysis of specialized means of justice designed to facilitate access to justice and studying the underlying causes of the problem of access to justice in general, and for disadvantaged people in particular, and also the problems of funding.

35. The fifth item under consideration concerned the Fifth Joint Meeting with Legal Advisers of the Foreign Ministries of OAS Member States and the International Criminal Court. The OAS General Assembly had request-

ed the Committee to ensure that the agenda for the next meeting included a discussion of mechanisms to address and prevent serious violations of international humanitarian law and international human rights law, as well as the role of the International Criminal Court in that process. Accordingly, the Committee had prepared a basic document to be submitted at the next Joint Meeting, contributing to the analysis of a number of issues connected with the entry into force of the Rome Statute of the International Criminal Court and setting out the problems that might arise from the way in which the Statute had been adopted, as well as possible solutions. The Committee had requested the OAS General Assembly to submit to it a report on the status of signatures, ratifications and accessions to the Rome Statute, pertinent references to the instruments adopted by the Preparatory Commission for the International Criminal Court and any other information that might be relevant to that meeting. Necessary measures, including financing measures, were being taken to secure the participation of legal advisers of the foreign ministries at that important meeting.

36. Among the items in section B of the agenda concerning follow-up, the Committee would first deal with hemispheric security, an item that had already been studied in several reports. The second item was the implementation of the Inter-American Democratic Charter. A document on that subject had been submitted and would be analysed by the Committee at its next regular session. The third item related to preparations for the commemoration of the centennial of the Inter-American Juridical Committee, which would fall in 2006. As part of the programme of activities for that occasion, a draft declaration on the role of the Committee in the development of inter-American law might be prepared, for consideration in due course by the General Assembly. Furthermore, the 2006 session of the international law course held in August each year in Rio de Janeiro, Brazil, would focus on the topic of the contribution of the Committee to the development of inter-American law. The Committee had created a working group to coordinate and implement activities related to the celebration. A book celebrating the centennial was to be published shortly.

37. The last item in section B of the agenda was the preparation of a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, which the Committee had decided to include once again in its agenda in view of the importance assigned to it during the meeting of the Committee on Juridical and Political Affairs of the Permanent Council of OAS in March 2003. In conclusion, he thanked the members of the Commission who had honoured the Committee with their presence and expressed the hope that the relationship between the two bodies would continue to grow.

38. Mr. OPERTTI BADAN said that, on the current agenda of the Inter-American Juridical Committee, two items were particularly topical. The first was the competent jurisdiction in respect of extracontractual civil liability (*lex loci delicti*). The legal regime of contracts in the region was governed by norms, and the Inter-American Convention on the Law Applicable to International Contracts determined the applicable law, but that normative framework needed to be supplemented, in respect of extracontractual liability, by a regional codification exer-



cise that would define a number of general principles in that regard. The formulation of such principles did not involve the prior presentation of specific solutions for each category, but rather a pre-codification exercise that would allow progress to be made in developing the law of extracontractual liability, taking into account the work done by the Hague Conference on Private International Law, which, like the European Union, had not moved ahead as effectively in that area as in that of contractual liability. The second item concerned the absence of any regional law on competition. That item was important for MERCOSUR because of the problem of dumping. There had been attempts at codification in that area, but so far it had not been possible to arrive at a genuinely binding agreement. Dumping and trade were issues on which future work could be done within MERCOSUR, where the trend was towards adopting regional solutions.

39. Among the new items, the meeting with legal advisers of foreign ministries on the role of the International Criminal Court and on cooperation in that area was not just a question of organization. For the countries which had ratified the Rome Statute of the International Criminal Court, there were still some outstanding problems—for instance, article 98 of the Statute, on waiver of immunity, which might be an obstacle to the proper functioning of the Court. That problem should continue to receive attention, and that was why the Meeting with Legal Advisers and the inclusion of an item on the Court on the Committee's agenda were so important. Another major new development was the Inter-American Democratic Charter adopted in 2001. That document, which was very important from the standpoint of general principles of international law, regulated to some extent the principle of non-intervention and provided, *inter alia*, that a State could be prevented from participating in the meetings of inter-American bodies if it did not respect democratic principles. The Charter reflected a very strong commitment to the rule of law and representative democracy. Giving that basic political concept legal form took the sociological concept of representative democracy a step further. In adopting the Charter, which should be disseminated outside the region, the countries of the Americas had been the first to accept a code for the defence of democracy, the European Union clause being simply a general clause and not an operational norm. Finally, in an era of globalization and at a time when multilateralism and the international system adopted at the end of the Second World War were in crisis, not only politically but also in terms of financing and assistance, juridical development at the regional and sub-regional levels could revitalize the political will of States to abide by predictable rules of law. The Committee's work on racism and racial discrimination was very topical from that standpoint, in that it covered both traditional forms of discrimination and more heterodox and complex forms. The Committee's agenda demonstrated clearly the responsibility assumed by it at the regional level for the past almost 100 years, as well as its contribution to the progressive development of contemporary international law, both public and private.

40. Mr. MOMTAZ observed that many amnesty laws had been adopted in the Americas in recent decades and had been the subject of jurisprudence on the part of the Inter-American Court of Human Rights, which had judged them to be contrary to States' obligations under

the American Convention on Human Rights: "Pact of San José, Costa Rica". The United Nations Human Rights Committee had followed that jurisprudence. He wished to know whether, in its work, the Inter-American Juridical Committee had addressed the issue of amnesty laws as an obstacle to the implementation of the fundamental rights of the human person.

41. Mr. MELESCANU welcomed the continuing interest of the Inter-American Juridical Committee in the Commission's work. One of the new items taken up by the Commission was the fragmentation of international law. The view prevailing in the working group on that question was that one of the main reasons for such fragmentation was the development of regional legal systems which were autonomous on some issues and, in some cases, different from general rules. Meetings with regional legal bodies were therefore very important for ensuring that international law was diversified without being fragmented. The Committee should continue to keep the Commission abreast of its work, particularly on the two key issues of the regional application of the Rome Statute of the International Criminal Court and general principles in respect of extracontractual liability. The latter could be very important for the Commission's work on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities.

42. Mr. RODRÍGUEZ CEDEÑO said he agreed that the Inter-American Democratic Charter was a fundamental political and legal instrument for strengthening democracy in the region. The Meeting with Legal Advisers on the International Criminal Court was also important both for the universality of the Rome Statute of the International Criminal Court and for the internal legislation of countries of the region. Venezuela, for instance, had amended its Criminal Code, its Code of Criminal Procedure and its Code of Military Justice to facilitate cooperation with the Court. An effort must therefore be made to increase awareness of the Court's role as an international tribunal, which meant studying it in all its aspects, both procedural and legal, including its relationship with the legislative reforms under way in the region.

43. Mr. CHEE asked how many States of the region had acceded to or ratified the Rome Statute of the International Criminal Court and to what extent the work of the Inter-American Juridical Committee had influenced the policy of the States of the region. He wondered, in fact, whether the regional solidarity which was the basis for inter-American law and whose outcomes ranged from the Calvo clause<sup>4</sup> to the Inter-American Democratic Charter still prevailed. Finally, he would like to know whether the Committee's activities were disseminated globally, through journals, yearbooks and other publications.

44. Mr. BAENA SOARES said that the importance of the work of the Inter-American Juridical Committee could be explained by its tradition and authority and by the objectivity of its decisions, resolutions and reports. The items it took up were always topical and highly relevant. The Inter-American Democratic Charter reiterated and consolidated the resolutions and decisions of OAS and showed how much importance the region attached to

<sup>4</sup> See 2757th meeting, footnote 5.

the strengthening of democracy. The Meeting with Legal Advisers and hemispheric security were also important items. At a more practical level, since the Committee and the Commission both held annual seminars, the programmes of those seminars should perhaps be harmonized and a dialogue encouraged between them, through their secretariats as well as reciprocal visits, possibly involving members of the two bodies.

45. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) expressed satisfaction at the Commission's interest in the Committee's work and in strengthening the ties between the two bodies. With regard to the relationship between amnesty laws and access to justice, thus far, the Committee had focused on access to justice for the thousands of people who were too poor to afford a lawyer. It had considered the question of amnesty laws, but not in any depth. The issue might regain prominence. Of the 35 countries in the region, 34 belonged to the inter-American legal system, but only 16 were parties to the Rome Statute of the International Criminal Court, a number which did not include some of the region's major countries. The International Criminal Court already had two judges from the region. Inter-American law was perhaps one of the oldest examples of a regional legal system. The Inter-American Juridical Committee predated the United Nations system, as well as OAS. Currently, inter-American regional law was a reality which expressed itself in various forms, including the Inter-American Democratic Charter, attesting to the development of an objective regional legal system, not just the production of soft law. How to disseminate the experience gained in that context was one of the problems with which the Committee was dealing. A wealth of information on the subject was available on the OAS website. There was also the question of feedback on the experience that was disseminated. All the Commission's comments would be relayed to the plenary Committee at its August 2003 session in Rio de Janeiro. In any event, he hoped that cooperation between the Committee and the Commission would continue to grow.

46. The CHAIR asked the Observer for the Inter-American Juridical Committee to convey to the plenary Committee the importance that the Commission attached to the relationship between the two bodies.

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

[Agenda item 2]

47. Mr. KATEKA (Chair of the Drafting Committee) announced that the Drafting Committee on the topic of the responsibility of international organizations would comprise the following members: Mr. Gaja (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Kolodkin, Mr. Koskeniemi, Mr. Sreenivasa Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada and Mr. Mansfield (*ex officio*).

*The meeting rose at 1.05 p.m.*

\* Resumed from the 2758th meeting.

## 2765th MEETING

*Friday, 30 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

### International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. KOSKENIEMI thanked the Special Rapporteur for a useful overview of existing regimes of liability and thought-provoking suggestions. Perhaps it was impossible to trace a direct route from existing regimes to new ones, but there was an unaddressed gap between the Special Rapporteur's overview and the suggestions at the end of his report (A/CN.4/531). That gap continued to raise criticisms about the codifiability of the whole topic. In particular, five criticisms continued to be voiced. It was thus necessary to deal with them so as to demonstrate that useful work could be done.

2. One criticism, voiced by Mr. Brownlie and a number of academic commentators, was that a conceptual error had been made and the topic of liability should have been treated as part of the State responsibility project. There was some truth to that. On the other hand, responsibility and liability were both doctrinal constructions—languages, he would even call them—whose coverage could extend to the problem of uncompensated victims. Whether it should do so or not was a question of policy, not of doctrinal pigeon-holing. The criticism failed to take account of the real concern that, even after private liability regimes had been put into motion, cases might arise in which innocent victims were left without compensation. Surely the Commission should do something about that, whatever doctrinal difficulties that might create.

3. A second criticism was that the activities involved were too varied to regulate: oil pollution, nuclear pollution and hazardous waste were all very different, and

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

that was precisely the reason for the existence of a variety of regimes geared to their particularities. Issues such as the operator's liability in relation to that of the insurer or whether compensation funds should be established were matters that could not be dealt with in general terms. The criticism was partly correct: one could not lay down detailed rules about compensation and liability. But that was not what the Special Rapporteur was suggesting. The rules were to be residual, of a general nature, the purpose being not so much to regulate an activity as to provide a background against which States could be encouraged to find better ways of dealing with the problem of innocent victims.

4. A third criticism, voiced by Mr. Pellet in particular, was that members of the Commission, as public international lawyers, should not be concerned with civil liability. If anything was to be done in that field, it should be through harmonization of private law and the establishment of treaty-based regimes of liability and compensation. Yet public international law contained a great deal of material that regulated activity conducted by private actors. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, for instance, was a treaty that fell under public international law but regulated activity based on private contracts, and the same was true of much of international environmental law.

5. A fourth criticism was that the Commission should not deal with the matter because its members were legal experts, not negotiators or government representatives who could reconcile the various interests involved. True, important economic interests were at stake in the work on liability, and at some point the stakeholders would have to be involved in the work. Yet there was a long tradition of fruitful interaction between legal experts and negotiators, the first preparing the way for the second by, for example, producing substantive proposals or legal documents as the basis for negotiation. In any case, it had been negotiators at the Sixth Committee who had requested the Commission to complete its work. So there should be no worry about the Commission stepping beyond its mandate.

6. The fifth criticism, already addressed exhaustively by Mr. Mansfield, was that the topic did not fall within the Commission's mandate. The Commission itself had decided otherwise, however, in setting the liability issue aside from that of State responsibility for further development—a decision that had been endorsed by the Sixth Committee. Though the five criticisms were not absurd, it seemed to him that they should not paralyse the Commission.

7. The overview of the sectoral regimes on liability set out in paragraphs 47 to 113 of the report was an excellent and up-to-date description of the kinds of regimes in existence and the differences between them, pointing to the near-impossibility of regulating activities in a detailed fashion. By and large, he agreed with the conclusions, termed "policy considerations", contained in paragraphs 43 and 44. The expression "innocent victims", while perhaps not analytically correct, was useful in that it pointed to the overriding policy goal. The Commission should be concentrating not on a technical fine-tuning of liability regimes but on what might be seen as a human rights issue:

when major industrial or technological activities broke down, innocent people bore the burden, and that was unacceptable. The victim's standpoint, not the technical concerns behind setting up a workable compensation regime, should be the focus of the Commission's attention.

8. Ms. Escameia had pointed out that in paragraph 43 the Special Rapporteur spoke of "encouraging" States to conclude international agreements, and he agreed with her that stronger language was desirable. On the other hand, the Commission was not in a position to create binding, detailed rules. The new title of the topic, "Legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities", was somewhat misleading, tending to point to the work of an expert technical or environmental body rather than a legal body. The report referred to "models", possibly a euphemism for "draft convention". All of those instances of linguistic uncertainty, which perhaps reflected the Commission's uncertainty about the nature of the final result, added up to one conclusion: the Commission should draft a declaration of principles which, through mandatory language, would focus the attention of States on their duty to protect the human rights of innocent victims. The document would, by definition, not be a detailed set of articles regulating the various activities, but it would certainly be more than a protocol. Existing protocols on the environment, for example, the Montreal Protocol on Substances That Deplete the Ozone Layer, were full of technical detail, but that was not really the Commission's objective, which should be to draw the international community's attention to the dangers faced by individuals who lived in proximity to industrial and technological activities entailing a significant amount of risk.

9. In short, the criticisms of the topic should be taken seriously but not viewed as vitiating it, and there was an achievable objective that could be conceived as the drafting of a declaration of principles.

10. Mr. FOMBA said the report was a scholarly work, but conceptual and epistemological difficulties continued to plague the topic. The very feasibility of the exercise was open to question because of the thorny problem of how to clearly delineate State responsibility and liability. It was too late to turn back, however, since the Commission had been engaged in the exercise since 1978 and its very credibility might be at stake.

11. Mr. Pellet had argued that the exercise did not consist of codification and progressive development but rather of negotiation, while Ms. Escameia had rightly recalled the favourable reaction to the topic in the Sixth Committee. The Commission must try to do useful work by finding the common denominator between the *lex specialis* which reigned virtually unchallenged in that area and the *lex generalis* that seemed so hard, if not impossible, to find. A way must be found of squaring the circle.

12. Therein lay the merit of the Special Rapporteur's work. After outlining the Commission's previous efforts, reviewing the sectoral and regional approaches to the central issue of allocation of loss and addressing the difficult subject of civil liability, the Special Rapporteur made a summation and offered submissions for consideration. His attempt to reconcile what should be done from the



policy and legal standpoint with what the Commission could do from a technical standpoint should be supported, and he should be encouraged to go forward as far as possible without prejudging the final form the draft would take. Accordingly, for his own part, he accepted the spirit of the Special Rapporteur's recommendations.

13. Ms. XUE said that the first report on the topic was an impressive work containing a thorough review of existing liability regimes as a basis for further deliberation. In her view, it was difficult to codify and develop rules of international liability for transboundary damage caused by hazardous activity based on the existing regimes as examined by the Special Rapporteur. Allocation of loss caused by ultra-hazardous activities, both internally and externally, was not simply a matter of compensation of the injured: it involved various economic, political and social factors. Whether to allow an activity such as nuclear energy production often required important political decisions based on economic analysis, financial arrangements and the balancing of various social interests. The problem of how to handle possible mishaps was simply part of the package.

14. An examination of existing regimes revealed that neither the limits of liability nor the amount of financial guarantee given by the Government had remained unchanged, and they had sometimes been increased, indicating a gradual leaning towards public safety and environmental protection as opposed to industrial promotion in terms of policy concerns. Over the years, industrial countries had managed to develop a set of generally applied mechanisms for engaging in ultra-hazardous activities: technical standards, safety criteria, insurance-reinsurance schemes and harmonized procedural rules for compensation. At the international level, the extent of cooperation among States was determined not only by the nature of the activity itself but also by practical needs, particularly geopolitical considerations and economic conditions. A typical example was the differing practices adopted by the Western European countries under the Convention on Third-Party Liability in the Field of Nuclear Energy and by the United States under its national legislation on the same subject.

15. Even for activities characterized as ultra-hazardous, liability regimes differed, although they shared some common elements. The extent of State participation depended to a great extent on an activity's possible adverse effects internationally. A case in point was maritime oil shipping. The imposition of a loss allocation scheme would mean higher operating costs for the industry, higher prices for consumers, a more sophisticated insurance market and a heavier financial burden on the State. A balance thus had to be sought between economic development and the interests of the public in safety and environmental protection.

16. Could one conclude that the Commission should not proceed with the topic and leave liability to be covered by special regimes? She thought not, for a number of reasons.

17. The "polluter pays" principle had been incorporated into national legislation and reflected in international legal instruments. Specific rules on liability under which

the polluter was required to bear responsibility for damage caused to other countries were being negotiated in a number of areas. That was important for controlling the large-scale, high-risk-bearing industries that could inflict catastrophic damage on vulnerable developing countries which had limited means of coping with such damage. International law should look into the question and offer general principles for the conduct of such activities.

18. Transboundary damage did not affect the interests of one country alone. Conflict of interest between the author State and the injured State often began when an activity was still in the planning stage and did not end even after preventive measures were taken. General principles on damage recovery would help States to make appropriate arrangements to be applied to specific cases. Existing regimes on international liability had a strong regional and sectoral character. When ultra-hazardous activities were moved from one region to others owing to environmental concerns, general principles regarding allocation of loss became especially pertinent.

19. In short, despite the difficulties involved, States rightly expected the Commission to go ahead with the topic and come up with useful legal guidance. All the doubts about the topic had not yet been cleared up, however. The tough questions recently raised by Mr. Brownlie needed to be considered and answered. Were most cases of international liability that arose in fact cases of State responsibility, and if so, was there any need for rules on international liability? Such questions had often been raised when the rules on State responsibility were being drafted, and Mr. Brownlie had once described the whole topic as being misconceived. Now that the rules on State responsibility had been adopted, the subject could be re-examined.

20. In order for State responsibility to be invoked, there must be a breach of an international obligation through a wrongful act, and the act must be attributed to a State. In the case of transboundary damage caused by hazardous activity, it was questionable whether there was always a wrongful act on the part of a State. The principle enunciated by the tribunal in the *Trail Smelter* arbitration, namely that no State should allow activities in its territory to cause serious damage to another State, was often cited as an international rule prohibiting transboundary damage. If applied to its full extent, however, it would mean that international law should look into each and every case of transboundary damage. In reality, the law did not go that far.

21. Besides, under such a rule, a State would be held responsible for every act within its territory and any act carried out by its subjects. More importantly, when technology could not provide absolute safety, the injured State might insist on termination of the activity concerned, which indeed often happened in real life. Rules on State responsibility might be used by the injured State but might also provide a legal argument for the author State to walk away from the injurious consequences of its act, because no wrongful act in itself had been committed. When primary rules of conduct were not well-developed, it would be difficult to apply secondary rules based on breach of obligation. From that standpoint, she endorsed the Commission's approach of first working out preventive rules, and she appreciated why the Special Rapporteur had

changed the topic to allocation of loss. She agreed with the conclusions contained in paragraphs 150 to 152 and the recommendation that the model proposed should be general and residual in character.

22. With regard to the Special Rapporteur's submissions, she experienced no difficulty with those set out in paragraph 153, subparagraphs (a), (b) and (c), and agreed with subparagraph (d) in principle, but thought that the operator of an activity should first be held liable, since the word "operator" was understood to mean the person who carried out the activity and who was in practice responsible each step of the way. Otherwise, the person who was actually in control of the operation should be held liable. Without that premise, the words "in control" and "in command and control" in subparagraph (e) might give rise to differing interpretations as to who controlled the activities (the ship owner or the ship operator, for instance).

23. As to paragraph 153, subparagraph (e), the test for causal connection should be proximity. With regard to the exceptional cases referred to in the report, the first one might concern joint or several liability—to use the term for convenience—if the harm was caused by more than one source. The second might relate to situations where the operator should be exonerated from liability, for example, *force majeure* or fault of the injured or third party.

24. The phrase "in accordance with their national law and practice", in paragraph 153, subparagraph (f), should be deleted so as to give States more leeway for settlement through negotiations, arbitration or other options.

25. The assumption behind paragraph 153, subparagraph (g), was that limited liability was clearly inadequate for compensation. She wondered whether that was always true with every existing regime on liability. That kind of arrangement depended on the type of activity and the targeted economies.

26. She endorsed paragraph 153, subparagraphs (h) and (i), and, referring to subparagraphs (j) and (k), said that compensation for damage to persons and property was the norm. Damage to environment and natural resources was a more complicated issue. In principle, the distinction drawn between environment under national jurisdiction and control and environment *per se* was also acceptable. It should be noted that in some cases prevention, response measures and restoration measures could be quite different. The restrictions suggested in the report were very useful.

27. Mr. ECONOMIDES, commending the Special Rapporteur for a remarkable report, said that, like Mr. Pellet and Mr. Pambou-Tchivounda, he was somewhat reticent about the use of the word "loss" in the title of the topic and proposed that it be replaced by "compensation", which was employed several times throughout the report, in particular in paragraph 38, where the Special Rapporteur spoke of "a more equitable and expeditious scheme of compensation to the victims of transboundary harm".

28. The assertion in the footnote to paragraph 32 of the report to the effect that "States do have the sovereign right to pursue activities in their own territory even where they cause unavoidable harm to other States ... provided

they pay equitable compensation for the harm done"<sup>2</sup> was not in keeping with international law. On the contrary, States were under an obligation to respect the sovereignty and territory of other States. Paragraph 43 of the report mentioned that the Working Group created at the Commission's forty-eighth session, in 1996, had noted in that connection that the articles must ensure to "each State as much freedom of choice within its territory as is compatible with the rights and interests of other States".<sup>3</sup>

29. The question of liability posed many difficult problems, including that of its legal basis. Yet there was virtual consensus that liability was applicable to hazardous activities and that for such activities, the most suitable regime was that of strict or absolute liability. The relevant regime did not require the commission of a wrongful act or a prior violation of an international obligation, but only harm arising from hazardous activities. The harm alone gave rise to liability and opened the way to compensation. Finally, there was virtual consensus that no customary rules had ever existed imposing the regime of strict liability in international law. Such a regime had been instituted exclusively through international conventions for each particular hazardous activity.

30. A number of conventions and other texts had already adopted strict liability and had been discussed by the Special Rapporteur. Another example was the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, signed by 22 States, including Greece, at the Fifth Ministerial Conference "Environment for Europe" held in Kiev from 21 to 23 May 2003. The Protocol, prepared in Geneva by UNECE, filled a gap, because such damage was not covered by any existing instrument, with the exception of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, whose entry into force was very doubtful. The Protocol sought to avoid the Convention's tactical errors, such as the vague definition of "damage to the environment", its very general scope, which even included non-transboundary damage, and the clause in favour of European law that made the Protocol inapplicable to the major part of the territory of Europe and thus considerably reduced its normative scope.

31. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters fit in well with the international instruments cited by the Special Rapporteur which focused on the civil liability of the author of the damage. It contained mechanisms for the application of strict liability which enabled victims to have access to the courts without losing themselves in the complexities of private international law, and it introduced compulsory insurance arrangements which protected the victims against the insolvency of the author of the damage. The Protocol had a number of innovative elements,

<sup>2</sup> A. Boyle, "Codification of international environmental law and the International Law Commission: injurious consequences revisited", in A. Boyle and D. Freestone, eds., *International Law and Sustainable Development* (Oxford University Press, 1999), p. 78.

<sup>3</sup> *Yearbook ... 1988*, vol. II (Part Two), para. 82; text reproduced in the report of the Working Group of 1996 [*Yearbook ... 1996*, vol. II (Part Two), annex I, p. 112 (para. (4) of the commentary to art. 5)].

which he would refer to in commenting on the Special Rapporteur's submissions.

32. It would be premature to take a position on paragraph 153, subparagraph (a), of the report, but it would be noted that the Protocol allowed the victim of the damage to choose the applicable law: either the domestic law of the party on whose territory the industrial accident took place, or the provisions of the Protocol itself. The possibility open to the victim of "law shopping", an innovation in the area of civil liability in connection with damage caused to the environment, was motivated by the desire to give a maximum of options to the weaker party. As for the second part of the subparagraph, it would be easier and safer to rely from the outset on existing solutions in regard to strict liability, which was more suitable for hazardous activities. If due account was taken of existing precedents, the Commission would complete its mandate properly.

33. Again, it was too soon to express a view on paragraph 153, subparagraph (b), but on subparagraph (c) he agreed that the Commission should restrict the scope of the topic to the one adopted for the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>4</sup> It would be difficult to do otherwise. The threshold for compensation must be such that harm which was more than negligible or minimal had to be taken into account (paras. 31, 39 and 114 of the report).

34. While he endorsed paragraph 153, subparagraphs (d) and (e), it would be preferable in regard to subparagraph (f) to provide for the principle of equitable apportionment in a general form, leaving application of the principle to States or third parties.

35. Paragraph 153, subparagraph (g), was acceptable. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters required the operator's strict liability to be covered up to a given amount by a financial security, which would usually take the form of insurance, a bond or a declaration of self-insurance with regard to State-owned operators.

36. He supported the submissions contained in paragraph 153, subparagraphs (h) and (i). As to compensable damage (subpara. (j)), it should indeed take account of damage to the environment as broadly as possible, something the Protocol already did, since it allowed for measures to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred or, where that was not possible, to introduce the equivalent of those components into the transboundary waters (that being an innovative development), as well as response measures following an industrial accident to prevent, minimize or mitigate the damage.

37. Concerning paragraph 153, subparagraph (k), he noted that the Protocol contained a provision on loss of income. To cut short claims which causally were very remote from transboundary damage, it used another approach, that of legally protected interest. Only persons

with a legally protected interest in any use of the transboundary waters could claim loss of income, which was a reasonable approach.

38. The draft should take the form of an international convention. A binding instrument would render the best service to States and to international law and would be the best addition to the draft articles already prepared on transboundary harm arising out of hazardous activities.

39. The draft should also contain dispute settlement provisions, which would contribute to the development of international law and even facilitate the friendly settlement of disputes by the parties themselves. The Protocol made provision for arbitration before the Permanent Court of Arbitration in accordance with the Court's recently adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.<sup>5</sup> The Rules, mentioned for the first time in a convention, opened the courts to private individuals. But the Protocol also paved the way to the settlement of disputes between States. States parties thus had excellent opportunities to exercise diplomatic protection in cases in which the courts of other States parties improperly applied the provisions of the Protocol to their nationals.

40. Finally, the Commission should include in its future long-term programme of work the subject of protection of the environment of the global commons, which was of great interest to the entire international community.

41. Mr. GALICKI noted that the Special Rapporteur's informative and comprehensive report had highlighted the important work of his predecessors, Mr. Quentin-Baxter and Mr. Barboza, on the basis of which the Commission had rightly concluded that questions concerning the responsibility of States for internationally wrongful acts needed to be dealt with separately from the topic of international liability for injurious consequences arising out of acts not prohibited under international law. Their experience had shown that a comprehensive approach to the topic might not be the best one and that partial, sectoral solutions might be more effective.

42. The report included an interesting presentation of recent models of allocation of loss negotiated and agreed upon in respect of specific regions of the world or a specific sector of harm. However, those models did not really provide sufficient grounds for codification or even progressive development; more analytical work would be needed.

43. The Special Rapporteur identified a number of common features from the models, including the rule that State liability was an exception and that, as was stated in paragraph 153, subparagraph (d), of the report, liability and obligation to compensate should be first placed at the doorstep of the person most in control of the activity at the time the accident or incident occurred. Although States should have some secondary obligations, the picture became so vague that considerable efforts would be required before codification was possible.

44. It was unfortunate that the only clear system of State liability, which was accepted in the case of space activi-

<sup>4</sup> See 2762nd meeting, footnote 7.

<sup>5</sup> The Rules are available at [www.pca-cpa.org](http://www.pca-cpa.org).



ties, was of an exceptional nature and must be treated instead as an example of a “self-contained regime”. The Special Rapporteur examined the background of that regime solely on the basis of the 1972 Convention on International Liability for Damage Caused by Space Objects. Yet the principle of State liability for such damage had already been established in article VII of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and, even earlier, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.<sup>6</sup> The Principles Relevant to the Use of Nuclear Power Sources in Outer Space might also be cited in that context.<sup>7</sup> Those three texts had also introduced a distinction between the international responsibility of States for national activities in outer space and their international liability for damage caused by space objects launched from their territories or facilities. It might be useful to analyse whether and to what extent that approach could affect other models of international liability or whether the space model could be modified in the future under the influence of other sectoral liability models, especially with reference to the possibility of introducing liable subjects other than States.

45. The Special Rapporteur rightly argued that the scope of the topic should be limited to the same activities as those covered by the 2001 draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. Such continuity and consistency would make for greater flexibility in deciding whether to have a separate document or an addition to the existing articles on prevention.

46. While it was too early to decide definitively on whether the topic was ready for codification or progressive development, it would still be useful to draft a recommendation or a set of guidelines to assist States in their practice. The Commission should continue its work on producing its own model of allocation of loss, which should be both general and residual in character, leaving States sufficient flexibility to develop schemes of liability to suit their particular needs.

47. The submissions in paragraph 153 were largely acceptable, although some required further clarification. For example, with regard to subparagraph (e), it was not clear what criteria should be used for the proposed “test of reasonableness” in the case of liability of the person in command and control of the hazardous activity, given the variety of activities to which such a rule might apply.

48. He agreed on the need to follow, as far as possible, the approach used in the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. The same threshold of significant harm should be applied as in the case of prevention and certain kinds of harm; for instance, harm to the global commons should be excluded.

49. He was convinced that the Commission should be able to develop the Special Rapporteur’s proposals into

basic general rules. An appropriate first step would be to reconvene the working group on the topic.

50. Mr. YAMADA commended the Special Rapporteur for an excellent report which provided a sound foundation for future work.

51. At an earlier meeting, Ms. Escameia had asked why the Commission had taken so long to address the issue and failed to produce tangible results. It had always been his view that the topic of international liability was relevant and met the current needs of Governments. But until 1996, the discussions in the Commission had run around in circles, despite the efforts of its members. It had been very difficult to conceptualize the topic, which was very broad. The breakthrough had come when the Commission decided to proceed step by step, an approach Mr. Tomuschat had been instrumental in devising.

52. Two categories of activity had been identified: those having a risk of causing significant transboundary harm, and those which in fact caused transboundary harm if accumulated. It had been decided to deal first with activities having a risk of causing significant transboundary harm, namely, hazardous activities. It had also been decided that the aspects of prevention and liability were distinct, though related, and that the prevention aspect should be tackled first. Within the short five-year period of the last quinquennium, the Commission had been able to complete the two readings of the draft articles on prevention of such activities, under the able guidance of the present Special Rapporteur, and had reported on them to the General Assembly. The approach adopted had proved to be correct.

53. The Commission was now in the second stage of its step-by-step approach. What it should do was to build upon the first stage. As the Special Rapporteur rightly pointed out, the scope of the activities must be exactly the same as that for prevention. To change the scope by altering the level of the threshold, by expanding it to include activities of creeping pollution or to include global commons would bring the Commission back to square one, and to the situation in which it had found itself before 1996.

54. The case it was now dealing with was the one in which, in spite of fulfilment of the duties of prevention to minimize the risk, significant transboundary harm had been caused by hazardous activities. In most cases such activities were conducted by non-governmental operators. That gave rise to the questions of liability of operators on the one hand, and the liability of the States that had authorized such hazardous activities on the other. The majority of operators would be limited liability corporations. Thus, the questions of compulsory insurance schemes and the establishment of compensation funds would arise. As those activities were not unlawful and were in many cases essential for the advancement of the welfare of the international community, the other parties, including those who suffered direct injury, must also bear some of the burden. Accordingly, the Special Rapporteur’s decision to focus on the allocation of loss was the most appropriate approach.

55. Any failure to abide by the duties of prevention—primary rules formulated in the draft articles on preven-

<sup>6</sup> General Assembly resolution 1962 (XVIII) of 13 December 1963.

<sup>7</sup> General Assembly resolution 47/68 of 14 December 1992.

tion—entailed the responsibility of the State. In that context, he was rather disappointed that the General Assembly had not indicated its position on the draft articles on prevention. A firm position on prevention was essential if the Commission was to complete its work on the liability topic.

56. Some comments were called for on the Special Rapporteur's extremely useful analysis of the various sectoral and regional regimes. First, the Commission might also need to study the classical case of civil aviation, which also entailed hazardous activities. Since the Convention for the Unification of Certain Rules relating to International Carriage by Air, a series of treaty arrangements had been put in place. Second, as the Special Rapporteur had noted, the outer space regime was an exceptional case. At the time of its negotiation, it had been assumed that space activities were generally conducted by State agencies for public service purposes. Accordingly, State liability, strict liability and unlimited liability had been adopted. Now that private corporations also participated in space activities for commercial purposes, the outer space regime might need to be reconsidered.

57. All those regimes were set up as a result of new legislation, through negotiations by governments. Each regime had its own characteristics, and most of them were self-contained—a typical case of the fragmentation of international law. While consideration was given to alleviating the burden on the victims by establishing strict liability or transferring the burden of proof to operators, Governments tended to try to limit their liability, as Mr. Brownlie had pointed out. One such example was nuclear damage and liability under the Convention on Third-Party Liability in the Field of Nuclear Energy and the Convention on Supplementary Compensation for Nuclear Damage. Japan had not acceded to those conventions because Japanese domestic law provided much more comprehensive relief to the injured parties. In that connection, he strongly endorsed the Special Rapporteur's submission in paragraph 153, subparagraph (a), of his report that any regime that might be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. He had no problem with the Special Rapporteur's other submissions in paragraph 153, and he also endorsed the Special Rapporteur's approach based on the recommendations of the Working Group established at the Commission's fifty-fourth session, in 2002.<sup>8</sup>

58. The Commission's task was thus to examine whether it would be possible to extract generally applicable rules from those special regimes. Aware as he was of the extraordinary difficulty of that task, he nonetheless looked forward to receiving draft articles from the Special Rapporteur at the Commission's next session.

59. Mr. BROWNIE said that, doubtless through inadvertence, Mr. Koskeniemi had totally misrepresented his position, which was not a negative one. As a member of the Commission of seven years' standing, he had participated in the work of the 1997 Working Group and in the execution of the step-by-step approach, and had played a cautious but constructive role in the development of the

work. It was not his position that there was no subject. His main concern, whether as an academic or as a practitioner, was that the Commission should not inadvertently construct a set of rules that would then be widely misunderstood by the outside world—by people in the Sixth Committee and people in government. The result would be a set of principles that were not understood in relation to other existing important areas of international law. State responsibility was not simply a chapter in a book: it was the very cement binding together international law. And it would be particularly ironic if the Commission were to damage that bond, as it had only recently completed a vast enterprise devoted to the codification and clarification of the principles of State responsibility. It was crucially important to isolate the actual topic to be dealt with, and having listened to other members' contributions, he was, with all due respect, not at all assured that that had yet been achieved.

60. There were two major policy problems. The first was to identify the nature of the subject, which, in his present view, was precisely to deal with those situations in which there was no responsibility according to existing general principles of State responsibility but in which there had been catastrophic damage to innocent parties. It was a form of social engineering that was very difficult—but not impossible—to perform in a codification mode. The Special Rapporteur had already pioneered the step-by-step approach, so he was not particularly dismayed by the task ahead. But that task must be undertaken with care; and one problem was that, when there had been no determination of responsibility, quantification was difficult.

61. The second policy problem was the social cost, to which Ms. Xue and Mr. Koskeniemi had referred. The problem was that social cost was differentiated from sector to sector. The issues of social cost, the process of trading off the cost of an adequate compensation regime against the reduction of a certain type of activity within the State concerned, tended, quite rightly, to be solved on a sectoral basis. The Commission's enterprise, on the other hand, was to produce general principles. That seemed to him to present quite a considerable problem.

62. Mr. Sreenivasa RAO (Special Rapporteur) thanked those members who had contributed to the debate thus far. Many ideas had been touched upon and some clarifications requested. On the issue of the scope and legal basis of the topic, some old bones of contention had again resurfaced. While he could see the case for revisiting those arguments, he was not enthusiastic about the prospect of the Commission going over them yet again if there was no realistic prospect of any final solution. It seemed to him that, after so many years of debate, no more time should be spent on mere procedural issues, or on reopening issues which might conceivably admit of some solution.

63. In that connection, he reminded members of the suggestion, endorsed by the Working Group in 2002, to focus on a model of allocation of loss keeping in mind the interests of the innocent victim who suffered damage even after all obligations of prevention had been met. On the definition of "innocent victim", he wished to make it clear that it was not to be expanded to include the environment, as some had suggested. It referred essentially to

<sup>8</sup> See 2763rd meeting, footnote 2.

those persons who were not directly involved in the conduct of hazardous activities.

64. The suggested focus on allocation of loss would obviate the need to go back to the debate on the relevant basis for compensation. State responsibility as a legal basis was, however, not to be prejudiced. Attribution of private acts to a State was acknowledged to be a truly difficult legal exercise and one that could not assure the innocent victims compensation in all circumstances. It was therefore useful to avoid designating the topic in terms of “reparation”, which might suggest a return to the topic of State responsibility. Equally, reference to the concept of compensation was to be avoided, so as not to link the topic too closely to the topic of civil liability, which was better addressed in the domestic legal context. Further, it would be hard to attempt to establish a comprehensive legal regime reconciling different elements of a civil liability regime, since that would involve many national jurisdictions and different legal systems. Moreover, it might also be helpful to leave the innocent victim some scope for forum shopping. However, it was also important to prevent claims for compensation for the same injury from being pursued simultaneously in different forums.

65. Members would recall that the Commission had in the past discussed extending the scope of the topic to the global commons, but that it had proved impossible to reach agreement on the inclusion of that issue because it was difficult, first, to identify the geographical scope, and second, to determine the quantum of damages in the absence of any impact on persons or property.

66. There were also other issues, such as *locus standi*. But to the extent that environment within a national jurisdiction could not be separated from environment outside that jurisdiction, the problem that remained uncovered was that much less significant. In any case, the issue could be revisited once the Commission had finalized the model of allocation of loss covering the same scope of activities as had been covered by the draft articles on prevention. Allocation of loss had the advantage of not involving liability or State responsibility, making it possible for the Commission to mix different elements, drawing on the outcomes of various international negotiations until a universally acceptable solution was found.

67. Some members had questioned whether the Commission was suited to engaging in a task that was best left to States to negotiate. Rejecting that line of argument, he noted that it had not prevented the Commission from working on draft articles on the law of the sea and the law of treaties which had later become the subject of negotiations among States. Indeed, the Commission had a duty to complete a mandate given to it by the representatives of States. He was concerned, however, to ensure that the exercise undertaken by the Commission did not drag on interminably. While he offered his assistance, as Special Rapporteur, to the Commission in discharging its mandate, it was up to members themselves to decide when it would succeed in discharging that mandate.

68. The CHAIR said that the Commission had received a mandate from the Sixth Committee, which had certain expectations of it. He trusted that it would not take another 20 years to complete the topic. It seemed to him that

the approach taken in 2002 and 2003 was more realistic than in the past and that the Commission was considerably closer to a final draft that would fulfil the Sixth Committee’s expectations. The Commission must achieve its objective by specifying certain principles that could be deduced from its past work and from new developments. Countries drew up agreements on the basis of principles of general international law, and there was a lot of substance on which the Commission could work constructively and realistically to clarify the topic. Admittedly the task was a difficult one, but the Commission could not give up when it had been entrusted with the progressive development of international law. The Special Rapporteur’s comments were therefore very timely.

69. Mr. KATEKA said that he sympathized with the Special Rapporteur and appreciated his worthwhile efforts. The Special Rapporteur should bear in mind that members of the Commission had also demolished his predecessors’ reports. The Commission had to make sure its proposals were up to standard. The topic posed a number of terminological problems, such as the definition of “innocent victim”, whether to replace “allocation of loss” by “liability and compensation” or how to define the “global commons”. He believed that a global commons did exist and hoped that, once the Commission had defined the necessary legal principles, a residual regime would be applied to it. The Special Rapporteur should not consider abandoning his important task, no matter how thankless.

70. Mr. PAMBOU-TCHIVOUNDA noted that when Luc Ferry, France’s embattled Minister for Education, had said recently that he would gladly resign his post, President Jacques Chirac had had to express his personal support for Mr. Ferry. The Commission must do the same for the Special Rapporteur. Even the pessimists among its members eagerly awaited his next report, which they trusted would contain proposals guided by the suggestions they had made at the present session. No one had ever doubted the Special Rapporteur’s abilities.

71. He wished to suggest two further avenues that the Special Rapporteur might explore. First, he could draw on the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>9</sup> to determine how to approach the question of compensation and what form it should take. The concept of “significant harm” could also be developed. With regard to modalities, compensation would have to be compartmentalized. The Special Rapporteur could help the Commission draw conclusions on those questions. A second avenue would be transboundary harm as it related to the global commons. The latter evoked the idea of cooperation, since more than one State would have to respond to the harm. The Commission might also draw on the idea of cooperation in discussing the modalities of compensation. Thus far, it had adopted a somewhat individualistic interpretation of who should pay for transboundary harm. It might be preferable to adopt a more open interpretation and advocate a shared, community approach to liability for harm.

<sup>9</sup> See 2751st meeting, footnote 3.



72. Again, the Commission might approach UNEP for help in integrating the idea of shared responsibility and compensation in its future work. He wished to reiterate his encouragement to the Special Rapporteur and trusted that his next report would contain some new ideas for the Commission to consider.

73. Mr. MANSFIELD said that the Commission could and must deal with the topic within five years. The Working Group's excellent work in 2002 had provided a solid basis for the Special Rapporteur's first report. It was precisely because of its earlier decisions on State responsibility that the Commission was having to deal with the topic at all. At present, in a situation where lawful activities caused catastrophic losses even though the State had fulfilled its duty of prevention, the relevant countries were under no obligation to do anything. The Sixth Committee and Governments were aware that that situation reflected a widening gap in international law. The Commission did not need to complicate matters so much. It might have to develop general principles based on existing regimes, or its task might be far easier than that. All it had to do was stipulate that loss could not fall entirely on the innocent victim and that countries must at least get together to work out an effective remedy and allocate loss. Failure to do so would entail responsibility. He was confident that, with the Special Rapporteur's guidance, the Commission could complete its work on the topic within five years.

74. Mr. ROSENSTOCK recalled that the United Nations Conference on the Human Environment had adopted a principle that was expected to provide a basis for legal responsibility in such matters.<sup>10</sup> The principle had never been put into effect, however. The same would doubtless happen with the three instruments adopted at the Fifth Ministerial Conference "Environment for Europe".<sup>11</sup> The Commission was in danger of drafting yet another instrument that might be supported by a handful of States but was unlikely to obtain universal acceptance.

75. Mr. Sreenivasa RAO (Special Rapporteur) expressed appreciation for members' words of encouragement and pledged to continue his task, although its success was in the Commission's hands. With all due deference to Mr. Rosenstock's vast experience, he felt that if the Commission did only what it felt Member States would fully accept, it would end up doing nothing. It could not be faulted if countries failed to implement and recognize the articles it drafted. As long as it did its work as mandated by the Sixth Committee, it was up to States whether or not they applied the resulting instruments. Even so, many courts used the various instruments developed by the Commission as a basis for their judgements. The Commission

should not compromise, therefore, simply because States were reluctant to apply what it had developed.

*The meeting rose at 1.05 p.m.*

## 2766th MEETING

*Tuesday, 3 June 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### **International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. RODRÍGUEZ CEDEÑO, commenting on the concerns to which the topic had given rise in the Commission and in the Sixth Committee, said that, despite the doubts expressed and the problems involved, the topic could be the subject of codification and progressive development, and the Commission should deal with it as such. The rules relating to liability arising out of activities resulting from technological advances were not clearly established in international law, although international instruments of a sectoral nature did embody rules on international liability, prevention, civil liability, reparation and compensation, and important principles had been established on strict liability, the allocation of loss, the limited liability of the owner or the operator and damage, not to mention the rules stated in the very recent Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Despite the gaps in international law and the national law of States with regard to the allo-

<sup>10</sup> See the Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

<sup>11</sup> The Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context; the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters; and the Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

cation of loss and the prompt, full and adequate compensation of innocent victims, doctrine, practice and jurisprudence contained enough elements for the codification and progressive development of general principles governing allocation of loss and compensation. As had been stated in the Sixth Committee, that was also justified by the fact that the consideration of the topic was the logical extension of the Commission's work on prevention and State responsibility.

2. The possibility of formulating relevant rules of international law applicable directly or indirectly to natural and legal persons had been considered on other occasions. In his view, the purpose of the Commission's work must be not only to encourage States to adopt national law rules allowing to some extent for the proper allocation of loss and the protection of innocent victims, but also to establish general principles on the basis of which to formulate rules applicable to States and operators. Even though an overly "human rightist" approach should not be adopted, the main question was the protection of innocent victims from transboundary harm arising out of a hazardous activity. On the basis of a minimum standard of equity, victims not benefiting from the activity must be excluded from the allocation of loss. Although, as the Special Rapporteur indicated in paragraphs 13 and 14 of his report (A/CN.4/531), the Commission had already adopted "the principle that the victim of harm should not be left to bear the entire loss", which meant that compensation did not necessarily have to be full and complete, everything must be done to ensure that the innocent victim was compensated promptly and fully, subject to conditions and exceptions related, *inter alia*, to the measures he might have taken to mitigate loss.

3. The obligation to provide compensation for transboundary harm arising out of a hazardous activity might give rise to liability on the part of the State when the latter had not adopted the necessary measures to prevent such harm. The liability might be shared, but in all cases it must lead to the prompt and full compensation of the innocent victim. The regime for allocation of loss and compensation might provide that the company engaging in the activity in question had to compensate the victim and repair the environmental damage, even when no wrongful act had been committed. The liability of the State would be residual and would come into play when the victim had not been promptly, fully and completely compensated by the operator or the operator's insurance.

4. There could be practically no question of an obligation to compensate for harm arising out of lawful but hazardous activities carried out by a State which had fulfilled its obligations of prevention as a principle of customary international law, even if that principle could be derived from some of the instruments referred to in the report of the Special Rapporteur.

5. In order to formulate rules that would be acceptable to all, limits must be set, on the one hand, on scope, which must be hazardous activities or even ultrahazardous activities exclusively, and, on the other, on the level of harm in question, whence the concept of "significant harm". This concept was defined by the Special Rapporteur in paragraphs 31, 33, 34 and 39 of his report, reflected the

practice of States and was used in various international treaties.

6. Another question warranting careful consideration was that of rules which were different from the rules of private international law and which guaranteed victims access to national courts. Victims must be able to apply indiscriminately, at their convenience, to the courts of the State where the activity had been carried out or to those of the State in whose territory the damage had occurred in order to obtain compensation. That was how the ruling of the European Court of Justice in the *Mines de Potasse d'Alsace* case had interpreted article 5, paragraph 3, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

7. The establishment of appropriate rules relating to allocation of loss and compensation had a preventive effect because it encouraged companies to adopt more effective safety measures to prevent damage but did not hamper the activities they carried out with a view to the development of new technologies.

8. He generally agreed with the conclusions and proposals the Special Rapporteur submitted in paragraphs 150 to 153 of the report. Paragraph 153, subparagraph (c), stressed the need for harmony between the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, in 2001,<sup>2</sup> and the draft articles on allocation of loss and compensation. That was logical and therefore acceptable. The same was true of the statement in paragraph 153, subparagraph (d), concerning the liability of the State and that of the person in command and control of the activity, as well as the analysis of joint and several liability. In paragraph 153, subparagraph (g), emphasis had rightly been placed on additional funding mechanisms, which must come primarily from the operators concerned, as provided in the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, referred to in paragraphs 66 and 67 of the report. Paragraph 153, subparagraph (i), stressed that each State should ensure that domestic remedies were available in order to guarantee victims equitable and expeditious compensation. Damage to the environment and to public areas in general, even if only to areas within the jurisdiction of a State, should also be taken into account. Consideration should be given to the possibility of the rehabilitation of the environment and of natural resources that had been damaged or other similar formulations. The case of damage to the global commons must nevertheless not be ruled out completely, even though that question was not dealt with in the draft articles on prevention—something that had, incidentally, given rise to criticism by the Sixth Committee and by several Governments. In any event, it was still too early to adopt a final position on the outcome of the Commission's work.

9. Mr. CHEE said that the allocation of loss amounted to the allocation of damage to persons, property and the environment. As to the scope of the work to be undertaken by the Special Rapporteur, he endorsed the position the Special Rapporteur had adopted on the three criteria relating to the definition of "transboundary damages" and

<sup>2</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97.

the four recommendations made in paragraphs 37 and 38 of the report. The definition of damage and compensation was a particularly important and difficult question involving both economic loss and moral damage. As far as moral damage was concerned, reference might be made to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>3</sup>

10. In chapter III of the report (Summation and submissions for consideration), the Special Rapporteur concluded that the models for liability and compensation schemes he had surveyed made it clear that “States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss”, but he was in favour of the idea expressed by the Special Rapporteur in paragraph 153 of the report that the model of allocation of loss should be both “general and residuary in character”. He agreed with the argument put forward in paragraph 153, subparagraph (a), that the innocent victim should be given the possibility of obtaining compensation through civil liability and that the “polluter pays” principle available in the national law of many States should be applicable. He also agreed with the suggestions made in subparagraphs (b), (c), (d) and (e). Subparagraph (f) referred to joint and several liability. In such a case, could liability be equitably apportioned? That principle would be difficult to apply in practice. He therefore supported the proposal in the last sentence that the option of equitable apportionment could be left to States to decide in accordance with their national law and practice.

11. The idea stated in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms was commendable, but difficult to realize: Would a State be willing to make an additional contribution? However, he was entirely in favour of the idea stated in subparagraph (h) that a State should assume responsibility for designing suitable schemes to solve problems of transboundary harm. In that connection, he referred to principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>4</sup> which provided that “States have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. Although the Stockholm Declaration was not legally binding, it was as much a source of law as the Universal Declaration of Human Rights. The idea was reaffirmed in principle 13 of the Rio Declaration on Environment and Development (Rio Declaration),<sup>5</sup> which had in turn been confirmed by the World Summit on Sustainable Development held in Johannesburg, South Africa, from 26 August to 4 September 2002. The principle that States had an obligation to ensure that transboundary air pollution did not cause any

harm to other States had also been affirmed in the *Trail Smelter* case and in the advisory opinion handed down by ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case. Those international instruments and decisions thus imposed an obligation on States to ensure that they did not cause any environmental harm to other States. That obligation could be characterized as being *de lege lata*. He therefore agreed with the Special Rapporteur that States must take measures to prevent transboundary harm caused by atmospheric pollution.

12. With regard to paragraph 153, subparagraph (i), he pointed out that, if a State had an obligation under international law to prevent harm to persons, property and the environment, it would be logical that a State should also have a duty to introduce means of redress for injuries sustained as a result of an internationally wrongful act of a State or the failure of a State to fulfil its international obligations. In that connection, it should be noted that a denial of the right of an injured person to access to the courts to obtain redress for environmental harm arising out of transboundary air pollution would be contrary to article 8 of the Universal Declaration of Human Rights, which provided that every person had a right to an effective remedy by the competent national tribunals, and to article 3, which guaranteed everyone the right to life, liberty and security of person. The right of access to the national courts of the wrong-doing State should therefore be guaranteed to individuals seeking compensation for damage caused by transboundary atmospheric pollution. He asked what was meant by the term “evolving international standards”, as used in subparagraph (i). He also endorsed subparagraphs (j) and (k), which reflected current State practice.

13. As to the outcome of the Commission’s work on liability, he agreed with the Special Rapporteur that it should take the form of a protocol to the instrument on prevention. In concluding, he recalled that the current work had been undertaken in accordance with a General Assembly resolution and the provisions of the Rio Declaration.

14. Mr. KOLODKIN said that the problem was complex because it affected the interests of persons, corporations and States, and those interests were certainly not always the same. Points of view on the question of liability for harm arising out of activities not prohibited by international law continued to differ. In 1985 Akehurst stated that there were few actual cases of liability for the consequences of activities not prohibited by international law, and those cases were not related to the environment.<sup>6</sup> More recently, in 2001, in the monograph *Liability and Environment*,<sup>7</sup> Bergkamp expressed doubt about the applicability of the concept of environmental liability.

15. States, groups of States and regions with different levels of development and hence different priorities could not view the concept of development in the same way, and that explained why the positions of States on that question differed. A great deal of rule-making activity was going on, particularly in Europe.

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> See 2765th meeting, footnote 10.

<sup>5</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex I.

<sup>6</sup> See M. B. Akehurst, “International liability for injurious consequences arising out of acts not prohibited by international law”, *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3–16.

<sup>7</sup> See L. Bergkamp, *Liability and Environment* (The Hague, Kluwer, 2001).



16. But national legislation was not uniform. Within States, approaches could differ according to the types of activities in question. For example, in the Russian Federation, the 1999 Air Protection Act provided for liability in the event of wrong-doing, whereas the 2001 Use of Nuclear Power Act provided for the no-fault liability of the operator in the event of loss or damage caused by radiation.

17. The report also contained an analysis of many sectoral agreements establishing different systems of liability and compensation. Because there were so many different regimes, a regime of liability or at least civil liability for hazardous activities could not be formulated at the present time. There was the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which not only had not yet entered into force, but was not all-embracing in nature. In particular, it did not apply to harm caused by nuclear substances or the transport of dangerous goods.

18. It was necessary to point out that treaties concluded in the 1990s on issues of responsibility were mostly not ratified by States.

19. The diversity of the approaches adopted by States was illustrated by the comments received from Spain and the United Kingdom. Spain was very much in favour of the work being carried out and even considered the draft to be too restrictive, stating that it would be possible to develop a more ambitious treaty regime that would encompass liability for harm to the environment, as well as to areas beyond the territory of a State, whereas the United Kingdom had reservations about the success of the Commission's work in that regard and the possibility of harmonizing the positions of States. The truth probably lay somewhere between the two.

20. Despite their fragmentary nature, treaty regimes reflected certain trends and contained some common elements, as the Special Rapporteur pointed out in his report. For example, they attached great importance to the "polluter pays" principle, which emphasized the liability of the operator.

21. In his own view, the framework of prevention that had been defined continued to be valid, and the Commission should restrict the scope of the topic to the consideration of the types of activities to which the articles on prevention applied and, for example, limit the threshold for the implementation of the articles on compensation. In other words, the harm in question must be significant, since it was caused by an activity not prohibited by international law. He also agreed with the comment that the regime the Commission was proposing should not relate to activities under special regimes, which were governed by *lex specialis* and should be of a general nature.

22. He was of the opinion that, at the current stage, the Commission's work should not relate to harm originating beyond the limits of the territorial jurisdiction of States. There was a great deal of vagueness in that regard. Who, for example, could be regarded as an innocent victim if reference was being made to the idea of the common heritage of mankind? Who would determine the extent

of damage? Who would be the subject of the request for compensation?

23. With regard to allocation of loss, the Commission should focus on a single model. One could argue about the relationship between absolute and objective liability or cases genuinely involving liability for injurious consequences arising out of activities not prohibited by international law, as opposed to responsibility for acts contrary to international law. There was nevertheless a consensus on certain fundamental principles, which were stated in paragraphs 43 to 45 of the report and which might serve as a basis for the Commission's work.

24. The Special Rapporteur's approach, which was to avoid the question of the form of liability and to deal directly with a regime of allocation of loss, was not very clear. If such a regime was based directly on the "polluter pays" principle and the purpose was to provide compensation for loss from harm arising out of activities not prohibited by international law, what was the legitimate basis for the residual liability of the State that was intended to compensate for loss not assumed by the polluter, namely the operator? If the State was not the polluter and had not broken any rule, why should it pay? The State's obligation to earmark funds for that purpose, as provided for in paragraph 153, subparagraph (h), of the report, would be an acceptable solution, as long as the basis for that obligation was known. If the State had to assume that residual liability, it must also be asked whether it must do so in every case or only in certain specific situations.

25. Since the Special Rapporteur proposed, in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms, should it be assumed that the liability of the State must always be limited? If so, on the basis of which criteria? He himself believed that liability was limited in the case of objective liability, and that was reasonable because the purpose was to compensate for harm arising out of an activity that was not unlawful.

26. In the case of liability of the guilty party, a reasonable question was whether the harm must be compensated in full. For example, the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters did not make the limitation of compensation provided for in the event of objective liability applicable to the case of liability for the operator's fault. It must then be asked whether the residual liability of the State was justified in the event of the operator's liability. All in all, his view was that the system of allocation of loss caused by activities not prohibited by international law was closely linked to the forms of liability.

27. He shared the Special Rapporteur's view that liability must be attributed not to the operator but to the person who was most in command and control of the activity at the time when the harm had occurred, but it was possible to define the operator as the person who had exercised such control, thereby solving the problem. He also supported the Special Rapporteur's proposal that the Commission should encourage States to conclude international agreements and provide in their national legal systems for intervention and compensation. It was to be expected that

the part of the thesis relating to encouragement of states to make agreements would be further developed. In this respect the provisions of articles 21 and 22 of the draft articles prepared by the Working Group of the Commission at its forty-eighth session, in 1996, and the commentaries thereto were of great importance.<sup>8</sup>

28. He also considered that damage to the environment as such could not give rise to compensation, as indicated in the first sentence of paragraph 153, subparagraph (k), but the idea the Special Rapporteur had put forward in the second sentence, namely, that “loss of profits and tourism on account of environmental damage are not likely to get compensated”, should be given more thought because it did not relate directly to the question of damage to the environment *per se* and because it had not been backed up by any argument in the report.

29. The Commission must continue its work on the topic, but it was too early to decide what form the final product of its work should take.

30. Mr. MELESCANU said that the topic was a difficult one because the practice of States in respect of liability was nearly nonexistent and the conventions adopted related to very specific types of activities, and because the different theoretical and doctrinal approaches to the question went from the outright denial that the topic existed to recognition of the existence of objective liability based on risk. He personally considered that the Commission should formulate rules, without which the regime of international liability would be incomplete. That was all the more important because in the future there would probably be more transboundary harm arising out of activities not prohibited by international law than harm arising out of activities that could be characterized as conventional.

31. The question dealt with in the report was linked to the work the Commission had already done on the prevention of transboundary harm. There was a relationship between prevention and the allocation of loss from hazardous activities. The Commission must therefore carefully consider that relationship, which was the basis for compensation, because it might otherwise end up in a grey area that involved social welfare, not law. The problem was that of the liability of the State in a situation where harm, and particularly transboundary harm, occurred despite its diligence and the adoption of measures of prevention in accordance with its international obligations. The Commission must thus consider the question whether the objective liability of the State for risk actually existed in public international law. If so, such liability would be exceptional because it would be based not on a wrongful act but on a principle of solidarity or of the protection of innocent persons, however controversial such a concept might be.

32. The approach which the Commission had adopted and which was pragmatic in the sense that it was intended to dissociate the question of objective liability from that of the allocation of loss would have to be provisional because of the problem of drafting a regime that was generally acceptable to all members.

33. The second question that the Commission had to consider related to the link between national regimes and treaty provisions on liability for risk and international law. A comparative study of national legislation showed that in civil-law countries the existence of objective liability was recognized, as in the case of the liability of building owners for damage caused by their property. In most of those countries, such provisions of the civil code, which came from Roman law, were regarded as the basis for objective liability for damage caused by the operators of nuclear power stations or by polluters, and in many of those countries no-fault liability had even been made applicable to administrative law. A study of international conventions on transboundary harm showed that they covered a variety of fields, such as damage resulting from oil pollution or the transport of dangerous substances, the disposal of hazardous wastes and the exploitation and exploration of outer space. In view of that diversity, the Commission's task was not so much to find a common denominator in such practice in order to codify it, but to establish general principles which could be applied and would serve as a model that States could follow, since in many cases national legislation was not enough to cover transboundary harm. In that connection, he believed that allocation of loss should be based not on a particular idea of the protection of human rights, as Mr. Koskeniemi had suggested, but on the idea of liability for risk, which was recognized in many civil-law countries. Those principles, which must be of a general and residual nature, as the Special Rapporteur had stressed, were already outlined in paragraph 153, subparagraphs (b) to (h) and (k), of the report. As to the idea referred to in paragraph 153, subparagraph (g), of supplementing limited liability by additional funding mechanisms, he was of the opinion that liability must be limited to a certain amount, because otherwise the burden to be borne by operators and States might be undefined and might hamper economic activities that were very important for the countries concerned.

34. To these principles which he approved of, he proposed to add others. First, the relevant regulations should take into account the double imperative of protecting innocent victims while not creating overly heavy burdens for operators. One should also establish the principle, mentioned by the Special Rapporteur in paragraph 44 of his report, according to which full restitution might not be possible in every case. This idea, which might be covered by a special rule, could also be combined with that of a minimum threshold, namely that of significant damage, and a maximum threshold such as was provided for in insurance contracts and in the complementary compensation regimes of States.

35. The Commission could also explicitly recommend that operators take out insurance to cover the risks. In reality, such insurance should be obligatory for risky activities that might cause transboundary damage. Otherwise it would in practice be difficult to ask operators to be responsible for such accidents. The establishment of a regime covering damages was absolutely necessary in order to enable insurance companies to set a ceiling for damages, for, if responsibility was not capped, one could not require operators to enter into insurance contracts, since the damages caused by accidents such as that in Chernobyl were not really insurable.

<sup>8</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 143–146.

36. With regard to the scope of the topic, he agreed with the Special Rapporteur that the principles and rules to be established should be linked to the draft articles on prevention, since the two questions were related. He was also in favour of the idea of establishing a drafting group to start formulating general and residual rules on allocation of loss in case of transboundary harm arising out of hazardous activities, based on the recommendations contained in paragraph 153 of the report.

37. Mr. KOSKENNIEMI said that he was concerned about the approach to the topic. At earlier meetings, he had taken the side of the victims of harm and suggested that rules or principles should be drafted from the viewpoint of those victims. Mr. Melescanu had probably been right to say that such an approach was not balanced, since the Commission had to find a happy medium between protecting the interests of victims and carrying out activities for the benefit of society as a whole, but it was specifically that idea of balance that should be called into question, because it could lead only to a dead end in terms of codification, since a balance between differing interests could not be struck without taking account of circumstances. Since circumstances could not be known in advance, such an approach amounted to remaining silent. A rule that only referred to “balancing of interests” in fact transferred decision-making powers to those interests that were well represented in the institutions whose task such “balancing” was. In fact, the victim’s standpoint was rarely represented in the relevant public or private institutions. A “balancing” rule would, in fact, work in favour of powerful commercial or industrial interests. Here the Commission was called upon to take a stand, and he suggested that such a stand should openly favour the interests of victims.

38. Mr. MOMTAZ said that he sympathized with the Special Rapporteur, who had, in a way, been a victim of his own intellectual honesty because he had openly recognized—for example, in paragraphs 2 and 3 of his report—that global and comprehensive liability regimes had failed to attract States, that the attempt to gain compensation for damage through the instrumentality of civil wrongs or the tort law of liability had its limitations, that State liability and strict liability were not widely supported at the international level, that case law on the subject was scant and that the role of customary international law in this respect was equally modest. Those statements, which explained why the Commission had not made any further progress, must not in any way serve as arguments for abandoning the topic. At most, it could be concluded that the task entrusted to the Special Rapporteur was very difficult and sensitive and that a great deal of ingenuity would be required. The excellent survey in the report of what were, of course, sectoral and regional treaties prepared thus far by States clearly showed that the international community was concerned about the need not to abandon the innocent victims of transboundary harm arising out of hazardous activities to their fate.

39. It had rightly been maintained that such harm was often the result of the fact that the State on whose territory the incident had occurred had not fulfilled its obligation of prevention. In such a case, harm would be compensated on the basis of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission

at its fifty-third session. It was now well established that the implementation of the best methods of prevention did not rule out the risk of accidents, and that harm could be caused even in the absence of breaches of international obligations. It would be interesting to consider the extent to which that could apply to the ecological disasters that had taken place in different parts of the world in recent years.

40. In any event, there was no doubt about the relevance and feasibility of the topic and the Special Rapporteur’s competence. The study was based on the assumption that the State in whose territory the harm had occurred had fulfilled its obligation of prevention. In such a case, the operator must be primarily liable and the State might have residual liability, but in both cases such liability could only be limited. Most of the treaty regimes that had been drafted to date were based on the civil liability of the operator and the “polluter pays” principle, which could be regarded as a general principle of international law. It was obvious that, where several operators were involved, joint and several liability could always be claimed.

41. When the operator could not be identified or was not solvent, the basis for the residual liability of the State concerned might be the principle that States were responsible for the activities carried out in their territory. States would then be entitled to require multinationals which carried out hazardous activities in their territory to inform them of the risks that such activities might involve. States whose national enterprises carried out such activities abroad should, in turn, ensure that such operations were carried out in accordance with international safety standards. That approach was entirely in keeping with the principle of the equitable allocation of loss among subjects of law which, in one way or another, benefited from the activities in question. The result would probably be that such activities would be more closely supervised and the risks would be reduced accordingly. A solution based on solidarity, which would draw inspiration from the approach of the law of cooperation, not that of coexistence, might lead more easily to a result. The question would thus be one of establishing a kind of collective insurance for innocent victims, something which the Special Rapporteur described as “joint and several liability”.

42. In any event, such liability could not be absolute, and harm would have to reach a given threshold in order to bring it into play. In that connection, the threshold of “significant harm” proposed by the Special Rapporteur was entirely acceptable and would cover environmental damage in the case where tourist activities were the key sector of a country’s economy and the damage seriously disrupted a tourist season.

43. There should be a savings clause which would rule out harm resulting from armed conflict and natural disasters.

44. It would be better to wait and see how the work on the topic progressed before taking a decision on the form the study should take.

45. Mr. DAOUDI, thanking the Special Rapporteur and congratulating him on his first report, which was clear and complete, said that it was too late to question whether the topic under consideration could be codified, since the



proposal the Commission had made in 2002<sup>9</sup> had been endorsed by the Sixth Committee and by the General Assembly.<sup>10</sup>

46. He agreed with the criticism levelled by some members concerning the restrictive criteria which had been used by the preceding Special Rapporteurs to define transboundary harm, and which ruled out harm to the global commons. He did, however, support the recommendation the Special Rapporteur had made in paragraph 39 of his report for the endorsement of the Commission's decision to designate "significant harm" as the threshold for the obligation of compensation to come into play. But he pointed out that, as was recalled in paragraph 31 of the report, the way that term had been defined by the Working Group in 1996<sup>11</sup> might cause disputes among States and give the courts broad powers of interpretation. The terms used to translate that idea, particularly in Arabic, must be given careful attention.

47. In paragraph 46 of his report, the Special Rapporteur noted that States had attempted to settle the issue of allocation of loss in most recently concluded treaties by relying on civil liability. In part II of his report, he gave a detailed description of the regime which had been established by various international conventions and which varied according to the type of activities in question. Depending on whether such activities were stationary or mobile, the person responsible could be the operator or the owner or the generator, the importer or the disposer. In some cases, the "polluter pays" principle was applied, while, in others, it was not. Some conventions provided for the establishment of an additional compensation fund, while others did not. Of all the conventions referred to by the Special Rapporteur, only the Convention on International Liability for Damage Caused by Space Objects referred to State liability and civil liability. In paragraphs 114 to 121 of his report, the Special Rapporteur nevertheless tried to describe the common features of civil liability. The problem was how to turn those features into rules of international law, and it was not at all certain that codification was the right method; the progressive development of international law in that field was essential.

48. He was very impressed by Mr. Melescanu's proposal that a body of principles should be drawn up to serve as guidelines for the practice of States. He nevertheless wondered whether such principles, apart from the "polluter pays" principle, were in fact general principles of international law recognized by civilized nations, in accordance with Article 38 of the Statute of the International Court of Justice. That was the crux of the problem, but the Special Rapporteur would undoubtedly be able to deal with it.

49. He endorsed the arguments the Special Rapporteur put forward in paragraph 153 of his report concerning the formulation of a model of the allocation of loss. He pointed out that environmental damage, as mentioned in paragraph 153, subparagraph (j), was extremely difficult to quantify, and he suggested that reference should be made to the work being done by the United Nations Compensation Commission (Iraq-Kuwait).

50. Mr. KABATSI said that the topic had been under discussion by the Commission for a quarter of a century and had already been the subject of 21 reports prepared by three different special rapporteurs, as well as several reports by working groups. Its original title had been internally contradictory and had been bound to give rise to problems because its purpose had been to promote the construction of regulatory regimes without resort to prohibition activities regarded as entailing actual or potential dangers of a substantial nature and having transnational effects. The topic was less easy to codify or progressively develop than that of harm arising out of wrongful acts under international law or internal law. The topic had nevertheless continued to attract interest in the Commission and among the majority of States in the General Assembly because, as was only fair and logical, the innocent victims of activities from which some persons nearly always benefited must not be left without compensation. That was why the topic could not be abandoned and progress had been made in studying it. In 2001, the Commission had thus completed a set of draft articles on the prevention of transboundary harm arising out of hazardous activities.<sup>12</sup> That progressive step had to be pursued by navigating through narrow straits between the provisions on State responsibility and those on special treaty regimes, at the international level, and between civil liability and various local arrangements at the internal level. Those narrow straits could be only the general and residual rules advocated by the Special Rapporteur, who had also rightly advocated that the threshold of seriousness of harm should be the same as that adopted in respect of prevention—in other words, the regime to be drafted must be limited to significant harm. With regard to the continuation of the Commission's work on the topic, the proposals made by the Special Rapporteur in paragraphs 152 and 153 of his report were a step in the right direction, and it would therefore be appropriate to establish a working group which would, under the chairship of the Special Rapporteur, continue to discuss and refine the general and residual rules in question, bearing in mind that whatever regime might be established should be without prejudice to claims under international law and, in particular, the law of State responsibility.

51. Mr. AL-BAHARNA, reviewing the history of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission had decided at its twenty-second session, in 1970, to confine the study of international responsibility to the consequences of wrongful acts of States.<sup>13</sup> That decision had led the General Assembly to declare in 1973 that it was also desirable to consider the injurious consequences of activities which were not regarded as unlawful.<sup>14</sup> The Commission had then decided in 1997 to divide the topic into two parts, one on prevention and the other on liability.<sup>15</sup> The Commission had thus established a working group in that year and had requested the present Special Rapporteur to begin the study of the first part of

<sup>9</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 517.

<sup>10</sup> See 2763rd meeting, footnote 3.

<sup>11</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 119 (paras. 4 and 5 of the commentary to art. 2).

<sup>12</sup> See footnote 2 above.

<sup>13</sup> *Yearbook ... 1970*, vol. II, document A/8010/Rev.1, p. 331, para. 66.

<sup>14</sup> General Assembly resolution 3071 (XXVIII) of 30 November 1973, para. 3 (c).

<sup>15</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

the topic.<sup>16</sup> In 2001, the Commission had adopted the final text of the 19 draft articles on prevention proposed by the Special Rapporteur. In 2002, a new working group had begun studying the second part of the topic on liability and had submitted a report in which it had recommended that the scope of liability should continue to be restricted to the activities dealt with in the part on prevention. The Working Group had reaffirmed the importance of the role of the State and its obligation to ensure that there were regimes of international and national liability to guarantee equitable loss allocation.<sup>17</sup> In his first report on the legal regime of allocation of loss in case of transboundary harm arising out of hazardous activities, the Special Rapporteur adopted many of the Working Group's recommendations, such as those relating to the duties of the State and the need to ensure that the legal regime to be recommended was without prejudice to the law of State responsibility.

52. In part II of his report, the Special Rapporteur referred to a set of international instruments and sectoral and regional arrangements constituting models of allocation of loss. States had concluded a number of conventions and other international instruments which covered a wide range of environmental aspects and dealt generally with international liability arising out of transboundary harm caused by various types of activities, including nuclear and space activities, activities in Antarctica, and the transport of hydrocarbons and noxious and hazardous substances. He also referred to principle 13 of the Rio Declaration calling on States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and to cooperate to develop further international law regarding liability and compensation.<sup>18</sup> He himself did not dispute the judgement by the Special Rapporteur in paragraph 114 of his report, but the list of instruments was not exhaustive. The Commission should give those instruments further consideration, preferably on the basis of a separate list which would serve as a reference, in order to come up with some common principles and factors that could constitute a legal regime on allocation of loss.

53. The summations and submissions contained in part III of the report showed that the purpose of the study of the topic should be to draft rules governing the allocation of loss that transboundary harm might have caused despite prevention efforts or when prevention had not been possible. Such loss should be allocated between the operator and those who authorized, managed or benefited from the activity, in accordance with the "polluter pays" principle. Those rules should be designed to ensure that innocent victims, whether natural or legal persons or States, were not left to bear the loss caused by transboundary harm. The principle that the innocent victim should be protected was no doubt generally acceptable, but, as the Special Rapporteur pointed out in paragraph 44 of his report, full compensation might not be possible in all cases. The regime to be established should therefore be designed to encourage all parties concerned to take preventive and protective measures in order to avoid damage. There were, of course, States which were unwilling to accept any form

of liability not arising out of the breach of an obligation under internal law or international law. However, the treatment of the subject from the viewpoint of the allocation of loss between the different players, including the State, might be a generally accepted solution to the problem of liability not involving a wrongful act.

54. With regard to the respective roles of the State and the operator, it was the operator, whether private or public, which must assume primary liability, but, in order to facilitate the compensation of innocent victims, loss should be shared by the different players responsible for the transboundary harm through the establishment of special compensation or insurance schemes. If harm in any way gave rise to the liability of the State, such liability could only be secondary or residual in relation to that of the operator, unless the State itself was the main operator of the activity. The residual liability of the State could, for example, be the result of its function of monitoring the activity or of the fact that the private operator concerned could not fully compensate the victims. In such a case, the State could assume that liability by contributing to a compensation fund or an insurance scheme.

55. The criterion of significant harm adopted in the draft articles on prevention should be used as the threshold of harm as of which the regime of allocation of loss would apply. "Ultrahazardous" activities, such as nuclear activities and the transport of oil, might require a more restrictive criterion, but for the time being there did not have to be a separate regime for those activities, which were in any event covered by their own sectoral regimes.

### Organization of work of the session (*continued*)<sup>\*</sup>

[Agenda item 2]

56. Mr. KATEKA (Chair of the Drafting Committee) announced that Mr. Economides would replace Mr. Baena Soares on the Drafting Committee for the topic of the responsibility of international organizations.

*The meeting rose at 1 p.m.*

## 2767th MEETING

*Wednesday, 4 June 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi,

<sup>16</sup> *Ibid.*, paras. 162 and 168 (a).

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 455.

<sup>18</sup> See footnote 5 above.

<sup>\*</sup> Resumed from the 2764th meeting.

Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. AL-BAHARNA, continuing his statement from the previous meeting, noted that some members of the Commission, as well as several delegations in the Sixth Committee, clearly supported the proposal to extend the topic to areas beyond national jurisdiction. It seemed to be acknowledged that the issue should be discussed further.

2. The global commons was a different matter. It did not fall within the scope of the present topic and, moreover, had not been dealt with in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>2</sup> However, it could be taken up as a separate topic at a later stage if the Commission thought necessary.

3. In formulating the concept of a legal regime for allocation of loss, a fair balance should be struck between the rights and obligations of the operator, the beneficiary and the victim, as well as any other actors who might be involved.

4. The recommendations made by the Working Group established at the Commission's fifty-fourth session, in 2002,<sup>3</sup> had focused on models for allocation of loss, to which the Special Rapporteur referred in paragraph 37 of his report (A/CN.4/531). They had gained general approval in the Commission and were largely reflected in chapter III. With regard to the submission in paragraph 153, subparagraph (d), he was not sure that State liability was an exception and was accepted only in the case of outer space activities. The Commission had yet to explore other models for allocation of loss based on various treaties and international instruments and it should not close the door too soon on such a possibility. As for subparagraph (e), the test of reasonableness should be accepted in preference to that of strict proof. With reference to subparagraph (f), he agreed that liability could either be joint and several or could be equitably apportioned. He also believed that the principles in subparagraphs (g) and (h) would further strengthen the legal regime of liability

and that the principle in subparagraph (i) should be acceptable. In line with that principle, States should seek to harmonize their laws of compensation, for, as the Special Rapporteur noted in paragraph 45 of his report, harmonization could be a means of avoiding conflicts of law and contributed to creating certain shared expectations on a regional basis.<sup>4</sup> The submission in subparagraph (j) about compensation for damage to persons and property and damage to the environment and natural resources seemed fair and should be acceptable, whereas the limitations in subparagraph (k) required further consideration.

5. The liability regime should take the form of guidelines to States for negotiating allocation of loss, but he remained open to the suggestion that the draft articles should take the form of a convention similar to the one adopted for the draft articles on prevention. Once the articles were complete, they would need to be cemented by an international dispute settlement mechanism that provided for conciliation and arbitration procedures, perhaps similar to those for the prevention regime.

6. Finally, he supported the Special Rapporteur's intention to speed up the conclusion of work on the topic. The Commission should not spend any more time arguing about the viability of the topic for the purposes of codification or progressive development. The General Assembly had approved the topic at its fifty-sixth session, in 2001,<sup>5</sup> and the time for such arguments was past. As was indicated in paragraph 36 of the report, the Assembly had urged the Commission in 2001 to proceed promptly to the study on liability.<sup>6</sup> The debate in the Sixth Committee in 2002 had been constructive and supportive. He therefore endorsed the proposal to establish a working group.

**Statement by the Legal Counsel**

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

8. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) congratulated the newly elected members of the Commission and also the Commission on having added three new topics to its agenda. He looked forward to the results of its work and recalled that the General Assembly, in paragraphs 4 and 5 of its resolution 57/21, had reiterated its invitation to Governments to provide information on State practice for two topics on the Commission's agenda. Such inputs were certainly valuable and he wished to emphasize that without them the Commission did not receive the requisite guidance.

9. In paragraph 8 of the same resolution, the General Assembly noted the Commission's position on cost-saving measures and encouraged it to continue taking such measures. He trusted the Commission would bear that in mind not only when considering the duration of its

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2762nd meeting, footnote 7.

<sup>3</sup> See 2763rd meeting, footnote 2.

<sup>4</sup> P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002), p. 279.

<sup>5</sup> General Assembly resolution 56/82 of 12 December 2001, para. 3.

<sup>6</sup> *Ibid.*



next session and whether it should be a single or split session but also when planning its weekly programmes and conducting its meetings. It was a matter of some concern to him that the Commission's use of conference services had dropped to 80 per cent of available time in 2002, a matter that he would be discussing with the Committee for Programme and Coordination and the Advisory Committee on Administrative and Budgetary Questions on his return to New York.

10. In paragraph 57 of his report entitled "Improving the performance of the Department of General Assembly Affairs and Conference Services",<sup>7</sup> the Secretary-General had introduced a policy of "enforcing page limits", under which the 20-page limit would henceforth serve as a guideline for all reports not originating in the Secretariat. Despite his objections as the Legal Counsel, the Department had been determined to apply those guidelines very strictly. Consequently, he had had to request specific waivers, which had been granted, for all the reports of special rapporteurs. It was meaningless if the Commission could not develop its thinking in the space needed when its work generated the major documents adopted by the Sixth Committee.

11. The Rome Statute of the International Criminal Court had entered into force on 1 July 2002, and the first session of the Assembly of States Parties had taken place from 3 to 10 September 2002. The first session had resumed in February 2003 for the election of judges. Eighteen had been elected in accordance with an innovative procedure, involving complex maximum and minimum voting requirements, which had successfully ensured an adequate regional and gender distribution in the Court's composition. The judges had been inaugurated at a solemn ceremony held in The Hague on 11 March, and Judge Philippe Kirsch of Canada had been elected President of the Court. At its resumed session on 21 April, the Assembly of States Parties had by consensus elected Mr. Luis Moreno Ocampo of Argentina as Prosecutor. At the same meeting, 10 of the 12 members of the Committee on Budget and Finance had been elected. The remaining two members, from the Group of Eastern European States, would be elected in September. Nominations had been invited for members of the Board of Directors of the Trust Fund for victims and their families. The judges were expected to appoint the Registrar of the Court soon, thereby filling the last remaining principal position on the Court.

12. The Assembly of States Parties would be holding its second session at United Nations Headquarters from 8 to 12 September 2003, at which time it would also hold the first meeting of the special working group on the crime of aggression which was to continue work on the definition of that crime.

13. The purpose of the Special Court for Sierra Leone set up on 16 January 2002 pursuant to Security Council resolution 1315 (2000) of 14 August 2000 was to prosecute persons who bore the greatest responsibility for committing crimes against humanity, war crimes and other serious violations of international humanitarian law, as well

as certain crimes under the relevant laws of Sierra Leone. Unusually, the Court had been set up by an agreement between the United Nations and the Government of Sierra Leone, and its expenses were covered by voluntary contributions from the international community. The Prosecutor, Mr. David Crane, acted independently as a separate organ of the Court. The Government of Sierra Leone had appointed Mr. Desmond da Silva as Deputy Prosecutor, while the Secretary-General had appointed the Registrar, Mr. Robin Vincent. The Secretary-General had also appointed two Trial Chamber and three Appeals Chamber judges, while the Government had appointed one Trial Chamber and two Appeals Chamber judges. The judges had elected Mr. Geoffrey Robertson of Australia as their President. Again unusually, a management committee composed of representatives of the Government, the United Nations and the major contributors had been overseeing the Court's non-judicial functions since January 2002. On 10 March 2003, the Prosecutor had announced that he had indicted seven individuals, five of whom were currently in Court custody; one had reportedly been murdered in Liberia, and active efforts were being made to secure the arrest of the seventh. The trials might begin in 2003.

14. The Commission would recall that negotiations had begun in 1999 between the Secretary-General and the Government of Cambodia on United Nations assistance in drafting a national law for a special national court to try Khmer Rouge leaders and for the participation of foreign judges and prosecutors in the proceedings. The Secretary-General had reluctantly discontinued the negotiations in February 2002. In paragraph 1 of its resolution 57/228 A of 18 December 2002, the General Assembly had requested the Secretary-General to resume them, and exploratory meetings had been held in New York in January 2003, following which he, as the Legal Counsel, had travelled to Cambodia in March to conduct detailed negotiations with the Government. The result had been the draft 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, which the General Assembly had approved in its resolution 57/228 B of 13 May 2003. He would be signing the agreement in Phnom Penh on 6 June, after which it would have to be ratified by the relevant constitutional authorities of Cambodia and would enter into force once the necessary legal requirements had been met on both sides. In the meantime, much work remained to be done, especially to prepare for the practical implementation of the agreement and to raise the necessary funding. The General Assembly had decided that the assistance to be provided to the Government by the United Nations should be funded from voluntary contributions, although it could be argued that, as a matter of constitutional principle, courts should be financed by assessed contributions.

15. The Commission would recall that the General Assembly, in paragraph 2 of its resolution 57/16 of 19 November 2002, had decided to reconvene the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property to make a final attempt at consolidating areas of agreement and resolving outstanding issues with a view to drafting a generally acceptable instrument based on the

<sup>7</sup> A/57/289. The Department of General Assembly Affairs and Conference Services was renamed the Department of General Affairs and Conference Management as of 16 January 2003.

draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session<sup>8</sup> and on the discussions of the open-ended working group of the Sixth Committee and the Ad Hoc Committee. Outstanding issues had included the criteria for determining the commercial character of a contract or transaction under article 2, paragraph 2; the concept of a State enterprise or other entity in relation to commercial transactions under article 10, paragraph 3; contracts of employment under article 11; pending issues relating to articles 13 and 14; pending issues relating to the effect of an arbitration agreement under article 17; and issues concerning measures of constraint against State property under article 18. There had also been issues concerning criminal proceedings in the context of the draft articles, as well as the relationship of the draft articles with other agreements.

16. Informal consultations on article 2, paragraph 2, had been coordinated by Mr. Yamada; those on article 10, paragraph 3, and article 11, criminal proceedings and the relationship with other agreements had been coordinated by Mr. Bliss, Legal Adviser to the Permanent Mission of Australia to the United Nations; and those on articles 13, 14 and 17 and on measures of constraint under article 18 had been coordinated by Mr. Hafner of Austria, Chair of the Ad Hoc Committee.

17. Under Mr. Hafner's able chairship, the Ad Hoc Committee had successfully completed its work. The full text of the draft articles and understandings was contained in the Ad Hoc Committee's report to the General Assembly.<sup>9</sup> The Ad Hoc Committee had referred back to the Assembly the matter of the final form of the draft articles.

18. In its resolution 57/27 of 19 November 2002, the General Assembly had renewed the mandate of the Ad Hoc Committee on International Terrorism, which had been established under Assembly resolution 51/210 of 17 December 1996, and which, under Assembly resolution 54/110 of 9 December 1999, was to consider the drafting of a comprehensive convention on international terrorism. The substantial progress achieved in negotiations launched in late 2000 was reflected in the reports of the Ad Hoc Committee.<sup>10</sup> Despite that progress, serious difficulties remained on the key elements of the future convention, namely the definition of terrorism; the relationship of the draft convention to existing and future instruments on international terrorism; and differentiation between terrorism and the right of peoples to self-determination and to combat foreign occupation.

19. Work on the convention had been very nearly finished by October 2001, but events in the Middle East had poisoned the climate for negotiation, and, until the political atmosphere improved, little progress was likely to be made. The Ad Hoc Committee had met from 31 March to 2 April 2003 and continued its work on the convention, in spite of the divergent viewpoints. The Sixth Committee

would carry on with that work at the fifty-eighth session of the General Assembly. The Ad Hoc Committee also had on its agenda the draft international convention for the suppression of acts of nuclear terrorism, an initiative of the Russian Federation, but the project was so closely linked to the work on the comprehensive convention that he thought it unlikely that one endeavour would move ahead without the other.

20. Since February 2000, the Ad Hoc Committee had also been concerned with the convening of a high-level conference on terrorism. Some delegations had expressed support for such a conference, which could, *inter alia*, focus on concrete measures to strengthen the existing framework of international cooperation; look into preventive measures such as promotion of cooperation among national law enforcement authorities; and develop a definition of terrorism. Other delegations, however, had doubts about the practical benefits of such a conference and considered that the outcome of work on the comprehensive convention should be awaited before convening a conference.

21. The United Nations Secretariat had made strong efforts to draw attention to existing anti-terrorism conventions. Special treaty events had been held at Headquarters in November 2001 and November 2002, with particular emphasis on the main anti-terrorism instruments. Another such event was to be held in late 2003. In 2001, the Office of Legal Affairs had published a collection of international instruments related to the prevention and suppression of international terrorism,<sup>11</sup> and in 2002, it had issued a compendium of national laws in that field.<sup>12</sup> It maintained close cooperation with the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime in Vienna.

22. The Security Council had been active in the anti-terrorism effort. On 20 January 2003, it had held a special ministerial meeting whose main objective had been to give new impetus to the struggle against terrorism. As a result of that high-level meeting, the Security Council had adopted resolution 1456 (2003), annexed to which was a declaration on combating terrorism. In the declaration, the Security Council encouraged Member States of the United Nations to cooperate in resolving all outstanding issues with a view to the adoption, by consensus, of the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism.

23. On 6 March 2003, the Counter-Terrorism Committee established in accordance with Security Council resolution 1373 (2001) of 28 September 2001, had held a meeting with representatives of 60 international, regional and subregional organizations to exchange views on adopting a coordinated approach to combating international terrorism. In his opening address, the Secretary-General had stressed the need to develop an international programme of action to fight terrorism and uphold the rule of law and

<sup>8</sup> *Yearbook ... 1991*, vol. II (Part Two), document A/46/10, p. 13, para. 28.

<sup>9</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22 (A/57/22)*, annex.

<sup>10</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 37 (A/56/37)*; *ibid.*, *Fifty-seventh Session, Supplement No. 37 (A/57/37)*; *ibid.*, *Fifty-eighth Session, Supplement No. 37 (A/58/37)*.

<sup>11</sup> *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

<sup>12</sup> *National Laws and Regulations on the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E/F.02.V.7).

the importance of fighting poverty and injustice so as to address the conditions used as justifications by terrorists. Many references had been made to promoting the ratification and appropriate implementation of the 12 anti-terrorism conventions.<sup>13</sup> A communiqué issued at the end of the meeting had emphasized exchange of information, complementarity and giving priority to counter-terrorism initiatives. A follow-up meeting to be hosted by OAS would be held later in the year in Washington, D.C.

24. Another matter of great concern was the protection of United Nations personnel. The cable traffic at Headquarters brought news every day of the difficult and exposed situation of staff in the field, and, sadly, many staff members lost their lives every year. The Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had met for a week in March 2003 to continue its discussion of measures to enhance the existing protective legal regime for United Nations and associated personnel. The Committee had focused on the Secretary-General's recommendation that the scope of the Convention be extended to all United Nations operations and to associated personnel from non-governmental organizations. It was a cause of serious concern that United Nations staff members were now being deliberately targeted by participants in armed conflict.

25. The United Nations Convention on the Law of the Sea, which had had its genesis in the Commission's work in the 1950s, now had 142 Parties, including the European Communities. A report prepared for the forthcoming fifty-eighth session of the General Assembly and available on the website of the Office of Legal Affairs covered all the latest developments in relation to the law of the sea. The website of the Office's Division for Ocean Affairs and the Law of the Sea had recently been updated and offered most official documents in all the official languages.

26. The twentieth anniversary of the opening of the Convention for signature had been commemorated from 9 to 10 December 2002, and the thirteenth meeting of the States Parties would be held from 9 to 13 June 2003. The Commission on the Limits of the Continental Shelf had received its first submission and would be holding its twelfth and thirteenth sessions from 28 April to 2 May 2003 and from 25 to 29 August 2003, respectively. The second round of informal consultations on the conservation and management of straddling fish stocks and highly migratory fish stocks was to be held from 21 to 25 July 2003 at United Nations Headquarters. While the latest po-

litical events and international crises tended to attract attention, the materials and meetings he had just mentioned conveyed a gloomy message about the state of the world's oceans, and it was to be hoped that awareness of the problem would be heightened.

27. The thirty-sixth session of UNCITRAL was to be held in Vienna from 30 June to 11 July 2003. The membership of UNCITRAL had been increased from 36 to 60 under General Assembly resolution 57/20, of 19 November 2002. The session would address the adoption of the draft model legislative provisions on privately financed infrastructure projects, arbitration, electronic commerce and the draft legislative guide on insolvency law.

28. Information on publications, including the question of responsibility for maintaining the *Repertory of Practice of United Nations Organs*, technical support, websites, and other activities that might be of interest to the Commission would be provided to members in writing. Finally, he wished to raise an issue about which the legal advisers of the United Nations system, whose annual meeting he chaired, had recently expressed concern. They had observed that the Internet was basically operating without any international legal regime, although in the past, when communication systems that had international consequences had been developed, States had got together to regulate the new phenomenon. While regulation of the Internet was primarily a policy issue, the legal advisers wished nevertheless to convey three of their concerns to the Commission. First, the Internet was of fundamental importance as an instrument of communication, commerce, political and cultural expression, education and scientific cooperation. Second, national laws and court systems were not able to provide a sufficient legal framework for much of the activity on the Internet. Third, it was urgent to develop a legal architecture and international institutions that favoured the further development of Internet activities within an environment of legal certainty, respect for the rule of law and respect for their international character. Website hijacking—for example, when persons seeking information on women's issues found themselves in a highly objectionable environment—was one of the many problems that had to be dealt with.

29. The CHAIR thanked the Legal Counsel for his valuable report on the activities of the Office of Legal Affairs. Of particular interest had been the information on the work of the International Criminal Court and other international tribunals, jurisdictional immunities of States, the law of the sea, terrorism, protection of United Nations personnel and the new phenomenon of Internet activity.

30. Mr. BROWNIE asked for further information on the problems with the world's oceans.

31. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the report prepared for the fifty-eighth session of the General Assembly dealt with a variety of aspects of the overall problem, and he would merely mention a few. Depletion of the ocean's resources was an unexplained and disturbing phenomenon. Coral reefs, which served as nurseries to many varieties of fish, had suddenly and inexplicably become bleached. Both land-based and sea-based pollution had to be tackled. In the aftermath of the recent *Prestige* disaster, thought

<sup>13</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism.



needed to be given to flag State jurisdiction, namely, how to deal with a situation in which States had no proper authority over ships flying their flags. Were global warming and depletion of the glaciers, with the corresponding potential rise in the ocean's level, part of natural cycles or were they the result of human interventions?

32. Mr. DUGARD said that special rapporteurs of the International Law Commission fulfilled very different functions from special rapporteurs of other bodies. For the Commission on Human Rights, for example, special rapporteurs wrote reports that facilitated political debate, whereas the studies done by special rapporteurs of the International Law Commission formed the very basis for that body's work. The submission of very brief reports would be difficult to contemplate, since that would only restrict the Commission's debates and thus the progress of its work. He appealed to the Legal Counsel to use his influence to try to persuade members of the Fifth Committee of the special nature of the Commission's work.

33. There was no need to recall that members of the Commission were unhappy that their honoraria had been withdrawn as from 2002, but he wished to place on record his personal view that the withdrawal of the honoraria of the special rapporteurs was exploitative and unfair. It meant that they had to work for several months each year, in addition to during the Commission's sessions, for no remuneration whatsoever, and in many instances that they were denied the possibility of employing research assistants.

34. As to the anti-terrorism measures described by the Legal Counsel, a dangerous phenomenon had followed the adoption of Security Council resolution 1373 (2001) invoking Chapter VII of the Charter of the United Nations to direct States to take action to suppress terrorism. Many States had gone overboard in the adoption of domestic legislation. One State, for example, had simply defined terrorism as an illegal act, while others had defined it as an unlawful act involving violence designed to influence government policy, which in effect meant that any anti-governmental activity fell within the ambit of terrorism. Yet human rights standards had to be balanced with measures to suppress international terrorism. Accordingly, when working on the definition of international terrorism, the international community should also work to prevent States from taking advantage of the opportunity to settle domestic disputes by taking firm action against the opposition.

35. Ms. ESCARAMEIA asked the Legal Counsel to provide details on any steps being taken to follow up the proposal in paragraph 62 of the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services"<sup>14</sup> for a study of the practical and cost implications of replacing summary records with digital recordings. It would be very bad for the Commission if the summary records were replaced. She would also appreciate an explanation of what was meant in paragraph 54 by the reference to a "new system of improved advance upstream planning".<sup>15</sup> Did it entail the page limit on reports of special rapporteurs

and the replacement of summary records? What could be done to avoid such developments? The Commission would probably address those issues in its report, and the Sixth Committee might also take them up in its resolution relating to the Commission. The very practice of requesting a waiver of the 20-page limit was a repetitive task requiring considerable work in the Codification Division and in other bodies. In her view, the page limit should be waived once and for all. Would the Legal Counsel be meeting with senior officials in the Department to discuss changing that practice? It was disturbing that the waiver practice might remain unchanged despite the Commission's expression of concern.

36. With regard to the reference to the need for a legal regime for the Internet, had the Legal Counsel discussed the issue with other bodies within and outside the United Nations system, requested studies from them or consulted any Internet experts? How far had the plan matured?

37. Mr. MELESCANU, noting that the legal advisers had decided they should convey their legal concerns about the Internet *inter alia* to the Commission, asked whether they had done so to other bodies in the United Nations system or to Internet experts. Was the Commission expected merely to take note of the legal concerns expressed, or was more concrete action wanted, and if so, in what form?

38. Mr. Sreenivasa RAO said it was quite surprising to learn that a 20-page limit had been placed on the length of reports of special rapporteurs and that a waiver was required for any report that exceeded that limit. In the case of his own report, he could have shortened it from the current 52 pages to 20, but then it would have taken three sessions, and thus three years, for him to present it in its entirety. Surely that would not be in the interest of efficiency. If members were to grasp the topic quickly, they needed to have all the material at once, something that would be impossible if the report was restricted to a certain number of pages. Nor would a special rapporteur be able to obtain the reaction of the other members to the subject matter as a whole. The discussion would lose itself in constant requests for clarifications, which were unnecessary when all the material was available. With the 20-page limit, the topic would require a time frame that was inefficient and, as such, unacceptable.

39. Another issue was the assistance special rapporteurs needed and were normally entitled to. Honoraria were only a modest contribution to meeting their needs. If they were not forthcoming, that too would have an adverse impact on the efficiency of the Commission's work and, indeed, on its very purpose. The honoraria must be seen in the broader context, and not merely as a cost-cutting question. Apparently, the United Nations had begun to undervalue the aspects of its work on legal issues. This was a dangerous development.

40. Mr. MANSFIELD said that the need to coordinate issues relating to the oceans and the law of the sea involved the responsibilities and mandates of a wide range of United Nations bodies that were separate legal entities answerable to their members, and that even the Secretary-General had no authority to order such coordination. Another problem was that Member States gave different levels of instructions. He hoped the Legal Counsel could

<sup>14</sup> See footnote 7 above.

<sup>15</sup> *Ibid.*

provide some positive news on how the legal and structural issue could be addressed. If the Commission were to take up the question of the Internet, it would raise the same kind of problem, namely, some mechanism would be needed to deal with the separate legal existence of the various United Nations specialized agencies and find a way to adopt a coordinated approach.

41. Mr. PELLET thanked the Legal Counsel for engaging in what he personally had always regarded as a very useful exchange of views. The suggestion to discontinue the work on the *Repertory of Practice of United Nations Organs* and to ask an academic institution to maintain it was completely absurd, the product of bureaucratic inventiveness gone mad. Academic institutions could not take on such a task. On the contrary, it was up to the Secretariat to provide the Commission with data on the *Repertory of Practice*. It was inconceivable for such work to be done otherwise than from within.

42. His other concern was the very serious threat hanging over the secretariat of the Commission. As he understood it, it was planned—in another fit of bureaucratic delirium—to have the secretariat of the Commission serviced by some sort of bureaucratic monster, a secretariat in charge of all United Nations conferences. That, too, sounded like a completely insane idea. It was inconceivable that those who serviced and assisted the Commission should have no idea about international law. The Commission's staff had very extensive legal training that was invaluable and indispensable. If the proposed idea was really taken further, the Commission must issue a very strong formal protest.

43. He associated himself fully with the comments by Mr. Dugard and Mr. Sreenivasa Rao regarding the obstacles to the work of special rapporteurs. Everything seemed to suggest that the Commission was being subjected to the whims of people who had no idea of what the Commission did; even assuming that they had a slight idea of what its purpose was, the way the Commission was treated did not testify to any high esteem for its work. The current developments, far from being encouraging, were worrisome and, indeed, alarming.

44. Mr. MOMTAZ, referring to the Convention on the Safety of United Nations and Associated Personnel, said that the threats hanging over such personnel were very worrying. He gathered that negotiations were under way to extend the scope of the Convention. The Legal Counsel had spoken of the need to extend the scope of the Convention to include not only all United Nations activities but also all field staff of non-governmental organizations. He could not imagine what the obstacles were to such a step, or why negotiations had not been successful to date.

45. Mr. KOSKENNIEMI said he was concerned about the emphasis the Office of Legal Affairs placed on the issue of terrorism and the suggestion that regulation of the Internet might be of great importance in the future. Those two subjects came from a very narrow sector of the international community and reflected the concerns of the developed world. International terrorism quickly faded to insignificance when compared to other problems. Given the enormous disparities in wealth between the developed and the developing countries, and in view of the—preventable—death every year of millions of children due to

malnutrition, the priorities of the international community or, for that matter, of the Office of Legal Affairs should not be terrorism or the Internet. Clearly, it was not easy for the Office of Legal Affairs to address development issues, but he could cite two examples it might find instructive. One was in the field of law and development. He was personally associated with the Asian Development Bank, whose legal office had embarked upon a very successful, wide-ranging programme on law and development in East Asia, where legal cultures were not well rooted in the traditional economic and social systems. The other example had to do with the Global Compact, the Secretary-General's initiative of several years earlier, in which the Secretary-General himself had undertaken to work with transnational corporations on standards and good governance practices in their activities in the developing world. One of the attractions of the Global Compact was that it did not aim to create legally binding standards, although there was in fact an undercurrent in the debate that binding standards on good governance and transparency might be envisaged at some point. Thus, such avenues did exist, and he suggested that, in order to get their priorities right, the United Nations and the Office of Legal Affairs might do some useful work there.

46. Mr. GALICKI said it was gratifying that the tradition of the Legal Counsel meeting with the Commission every year had been continued at the present session.

47. He endorsed Mr. Pellet's remarks. It was inconceivable for the Commission to be serviced by a general unit of the Department of General Assembly Affairs and Conference Management. It was worth noting that, at the meeting on the subject in the Sixth Committee, all the representatives of States had spoken out against such a measure. The Commission had long had excellent experience working with the secretariat of the Codification Division and was aware of the burden of servicing the session, preparing reports, and so on. He asked the Legal Counsel to provide additional information on recent developments and to inform all those concerned that the members of the Commission were strongly opposed to such a change, which would be very detrimental to its work. He entirely agreed with Mr. Pellet about the need for a strong protest, which should be included in the Commission's report.

48. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel), replying to Mr. Dugard, who had raised the issue of the length of reports, said the decision to enforce page limits had been taken by the Department of General Assembly Affairs and Conference Management, in response to requests by Member States that the work of the General Assembly should be made more relevant, more coordinated and less bureaucratic. At the coordination meetings convened by the Under-Secretary-General for General Assembly Affairs and Conference Management, he consistently emphasized that simply reducing the length of reports served no purpose, as a meaningful discussion of the contents would thereby be precluded. While it was regrettable that such an obvious point needed making, it had to be said that his requests for waivers had never yet been turned down.

49. On the question of terrorism, the Secretary-General himself had on a number of occasions highlighted the issue of protection of human rights. Human rights stand-

ards must be borne firmly in mind when the Commission started to address the question of terrorism; failure to do so would result in the creation of precisely the kind of society that the terrorists would like to see, and the whole purpose of the exercise would be defeated. In his own—perhaps simplistic—view, terrorist acts were acts already criminalized in the penal code of every Member State. The real issue was the different context in which crimes of terrorism were committed, since the victims were innocent people unconnected with the purposes of the perpetrators. Nevertheless, irrespective of whether the crime was an act of terrorism or an “ordinary” crime, the same human rights standards must be observed—a point that had been stressed by the United Nations High Commissioner for Human Rights.

50. He was not apprised of the details of the measures proposed in paragraph 62 of the Secretary-General’s report, to which Ms. Escameia had referred. The proposals represented one possible means of making the work of the General Assembly more efficient. The effects of those across-the-board measures on the various bodies would need to be evaluated. As he had already stated, his intention was to bring the views expressed at the present meeting, as reflected in the summary record, to the attention of the Under-Secretary-General for General Assembly Affairs and Conference Management.

51. The Internet was a remarkable tool that could be put to the service of all humankind, but also one that could be abused. It was thus important that all those who had a mandate in any particular field should be aware that they might be under an obligation to take up the matter. The issue, which was basically one of policy, had been discussed for several years by the legal advisers to the entire United Nations system, including its specialized agencies. On the copyright aspects, for example, the Legal Adviser of WIPO was taking measures to bring the various concerns to the attention of the relevant bodies, and he himself had addressed a WIPO body on behalf of his fellow legal advisers. The other legal advisers would also raise the issue in their respective organizations. However, it was not for him, as Legal Counsel, to take steps that were basically political: it was for Member States to take those steps. The most he could do was to raise the question in the bodies with which he interacted, and that was why he had raised it in the Commission, which might or might not wish to discuss it. The legal advisers had agreed, not on steps to be taken, but on talking points. The talking points on the Internet issue had been circulated to members of the Commission.

52. On the question of honoraria, in cases where they had already been earned before the General Assembly had taken its decision, he had taken the very firm position that the Organization must honour its commitment. However, the question of the legality of the decision of the General Assembly was a different matter and had proved to be less straightforward than it might at first appear. Nonetheless, the issue had given rise to such extensive debate that he was confident the General Assembly, and the Fifth Committee in particular, would return to it.

53. As to the coordination of ocean affairs, the legal advisers had very efficient means of communicating important developments via the Internet. The idea put forward at

the previous session of the General Assembly had been to seek better coordination of ocean issues at the Secretariat level. The intention was not to bring everything together under a single umbrella: agencies such as FAO, UNESCO and IMO should be allowed to continue to work with their own special expertise within the area of the law of the sea. Nonetheless, there were some areas, such as refugee issues, oil transportation and flag State jurisdiction, where a gap between mandates needed to be bridged. After the new mandate had functioned for a year or so, it might perhaps become clearer how the new ideas put forward had been addressed by Member States. He had requested the Division for Ocean Affairs and the Law of the Sea to come up with further ideas, to enable terms of reference to be drafted with a view to enhancing the various mandates and providing a further basis for interaction.

54. There had indeed been a proposal to discontinue publication of the *Repertory of Practice of United Nations Organs* in its present form. One idea had been to consult with academia, and in that context he had had the benefit of Mr. Pellet’s advice in the latter’s professorial capacity. The emerging message seemed to be that the activity was not one that could be easily undertaken by any academic institution. That view would be brought to the attention of the legislative bodies when the matter was discussed in the Fifth and Sixth Committees at the next session of the General Assembly, as would the views concerning bureaucracy and the secretariat of the Sixth Committee. The problem was one of scarce financial resources.

55. Mr. Momtaz had asked for information about the negotiations in connection with the Convention on the Safety of United Nations and Associated Personnel. The Director and the Deputy Director of the Codification Division might be better qualified than himself to give a precise answer to that question, and the Chair might thus wish to give one or the other the floor to respond.

56. The socio-economic issues raised by Mr. Koskenniemi were certainly on the agenda, and the Secretary-General never failed to draw attention to them in major international forums. However, while he fully agreed with Mr. Koskenniemi’s comments regarding development issues, it had to be asked to what extent the Office of Legal Affairs was mandated to deal with those matters. The Office had only 160 staff members and, in his view, it should not undertake services of general assistance in law and development, which were already provided by other units within the Organization. Its task was to offer guidance in locating such assistance: legal advisers requested by foreign ministers to identify possibilities for technical assistance were able to access such information instantaneously via the Office’s website. However, it was in UNDP and the World Bank, bodies with the mandate and the means, rather than the Office of Legal Affairs, that the expertise needed to formulate programmes was to be found. Similarly, ILO and OHCHR were the bodies best placed to help States enhance their human rights legislation. While in Kosovo and East Timor—to cite just two examples—the Office of Legal Affairs had reviewed every regulation from a constitutional perspective, to ascertain whether it was in accordance with the Charter of the United Nations, the relevant resolution and human rights standards, it had not tried to second-guess the technical solutions in, for instance, banking legislation. In short, he had tried to take a



strategic view, singling out knowledge, language, money and need as the key elements which, if combined, could lead to the creation of projects.

57. Mr. Galicki had asked about the current status of the proposal regarding the Commission secretariat. The Advisory Committee on Administrative and Budgetary Questions had examined the proposal, and it had been forwarded to the Fifth Committee. To what extent the Fifth Committee would consult the Sixth Committee remained to be seen. In any case, a decision on the matter would be taken at the next General Assembly.

*The meeting rose at noon.*

## 2768th MEETING

*Thursday, 5 June 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of diplomatic protection (A/CN.4/L.631), said that the Committee had held five meetings from 8 to 14 May and on 28 May 2003. The Committee had begun its work on the topic at the Commission's fifty-fourth session and had adopted, on first reading, articles 1 to 7 covering Parts One and Two of the draft articles. At the current session, the Committee had turned its attention primarily to the draft articles on the rule on the exhaustion of local remedies. It had also discussed several draft articles on the diplomatic protection of legal persons, but, owing to the

lack of time, had been able to work only on one such provision. It had therefore decided to postpone the referral of the provision to the plenary until the next session so that all the provisions on legal persons could be submitted in a single package.

2. With regard to the structure of the draft articles, he recalled that draft articles 1 to 7, which had been adopted at the preceding session, dealt with general provisions (Part One) and natural persons (Part Two). At the current session, the Committee had decided to include the articles on the exhaustion of local remedies in a separate part so that they would apply both to the part on natural persons and to the future part on legal persons. The structure of the draft articles would thus include Part Three on legal persons, followed by Part Four on the exhaustion of local remedies rule. When the Committee had considered the three draft articles on that rule, it had not yet had before it the draft articles constituting the future Part Three, and it had therefore renumbered the draft articles it had considered to follow on those already adopted on first reading (1 to 7). The three draft articles previously proposed by the Special Rapporteur as articles 10, 11 and 14 thus became articles 8, 9 and 10, respectively. A footnote to the Committee's report nevertheless explained that those three provisions would again be renumbered when Part Three of the draft articles had been completed. As to the title of Part Four, the Committee had decided on "Local remedies" rather than "Exhaustion of local remedies" so that that part and article 8 [10] would not have the same title.

3. The titles and texts of the draft articles adopted by the Drafting Committee read as follows:

#### DIPLOMATIC PROTECTION

##### *Article 8 [10]. Exhaustion of local remedies*

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]\* before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

##### *Article 9 [11]. Classification of claims*

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].\*

##### *Article 10 [14]. Exceptions to the local remedies rule*

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible, or the circumstances

\* Resumed from the 2764th meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.\*\*

\* The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

\*\* Subparagraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver".

4. Article 8 [10] was intended to codify the customary rule that local remedies had to be exhausted as a prerequisite for the presentation of an international claim. It had been clear from the Commission's discussions that that was an accepted rule of customary international law. With regard to paragraph 1, the Committee had retained the basic thrust of the Special Rapporteur's proposal, but had streamlined its formulation. It should be noted that, in the articles adopted at the preceding session, reference was made to the "presentation" of the claim, but the Committee had considered that, in the context of article 8 [10], the word "bring" more accurately reflected the process involved, since the word "present" suggested a formal act to which consequences were attached and could best be used to identify the moment when the claim was formally presented. As to the term "bring an international claim", alternative formulations had been considered, such as "exercise diplomatic protection in respect of an injury". The Committee had nevertheless taken the view that such wording would cover a much longer time frame, including the time of the initial presentation of the claim, while, in the context of the provision under consideration, the relevant moment was that when the requirement of the exhaustion of local remedies was provided for. The Committee had therefore been of the opinion that, while earlier articles referred only to a "claim" and not to an "international claim", it was clear in those cases that reference was being made to the exercise of diplomatic protection. However, in the context of the local remedies rule, there were various possible types of claims, and a more specific reference to "international claims" was therefore necessary. The Committee had also decided to bring the text more into line with draft article 1, as adopted at the preceding session, by replacing the words "international claim arising out of an injury" by the words "international claim in respect of an injury".

5. The Committee had also decided to amend that provision in the light of exceptions to the nationality rule introduced by article 7 [8] on stateless persons and refugees by adding the words "or other person referred to in article 7 [8]". As was indicated in the corresponding footnote, the Committee had left the door open to the possibility of amending that provision in the light of any further exceptions to the nationality rule that the Commission might see fit to include in the draft articles. The Committee had decided to delete the words "whether a natural or legal person", contained in the text proposed by the Special Rapporteur as being unnecessary, since the draft articles as a whole dealt with both natural and legal persons. The text of paragraph 1 had been further aligned on the texts adopted at the preceding session by replacing the words "injured national" by the words "injured person".

6. With regard to the words "all local remedies", the Committee had first discussed whether the original ver-

sion, namely, "all available remedies", did not set too high a standard for an injured national. However, the prevailing view had been that the provision should be read in the light of draft article 10 [14], so that the injured national was required only to exhaust all available local remedies which provided a reasonable possibility of an effective remedy. The original version as proposed by the Special Rapporteur referred to "legal" remedies in order to encompass both judicial and administrative remedies, but not to remedies as of grace or favour. The Committee had also streamlined the text by reducing the number of words modifying the word "remedies". It had taken note of suggestions made in the Commission and in the Sixth Committee that article 8 [10] should contain a reference to local remedies' being adequate and effective. It had observed, however, that the principle of effectiveness was dealt with in draft article 10 [14], and it had therefore preferred not to deal with it in draft article 8 [10], mainly because the onus of proof was on the respondent State to show that there were available remedies within the meaning of article 8 [10], whereas the onus of showing that there were no adequate and effective remedies within the meaning of article 10 [14] was on the applicant State. The Committee had therefore preferred to provide for the principle of effectiveness in a separate article.

7. Paragraph 2 defined the scope of the words "local remedies" used in paragraph 1. It reflected the principle embodied in various judicial decisions that remedies should be judicial or administrative in nature or before authorities which recognized a right that might lead to a remedy. It did not matter whether the courts or authorities were ordinary or special. The emphasis was on the fact that the remedies must be open to the injured persons as of right and not as of favour or grace. The original version referred to "legal" remedies. The Committee had considered the possibility that limiting the text to "legal" remedies might exclude other types of remedies, such as access to an ombudsman as a form of administrative remedy. It had also been realized that ombudsmen had different powers in different jurisdictions, thereby making it difficult to draft an appropriate provision. In some jurisdictions, there were "authorities", such as ombudsmen, which had only recommendatory powers. It was unnecessary for such remedies to be exhausted in order to satisfy the exhaustion of local remedies requirement in paragraph 1. That conclusion also arose out of the application of article 10 [14], in that such non-binding remedies would not provide a reasonable possibility of effective redress. The commentary would make it clear that, when local remedies could not result in a binding decision, they should not be considered to be local remedies that had to be exhausted. Instead, what was being referred to was the normal legal system—in other words, remedies that had binding consequences. The Committee had decided to replace the term "authorities" by the term "bodies" because "authorities" could have a discretionary connotation, while "bodies" implied some sort of structure. Following the deletion of the reference to "legal" remedies in paragraph 1, the same deletion had been made in paragraph 2, but, as had already been mentioned, largely for stylistic reasons, in order to limit the number of adjectives modifying the term "remedies" and without prejudice to what he had just stated about the type of local remedies that had to be exhausted. In other words, what he had said also applied to the term "local

remedies". The other amendments related to the words "natural or legal" persons, which had been replaced by the words "the injured person", and the addition at the end of paragraph 2 of the words "of the State alleged to be responsible for the injury", which added further precision to the concept of "local remedies". The Committee had also decided that article 8 [10] should be entitled "Exhaustion of local remedies".

8. Article 9 [11] was concerned with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It was the "Mavrommatis principle", according to which an injury to a national was an injury to a State. The draft articles dealt with such "indirect" injury to the State, and the exhaustion of local remedies rule therefore applied in such circumstances. It did not apply when a direct injury was caused to the State, whence the need for a provision indicating when an injury to the State was "indirect" for the purpose of determining whether the local remedies rule was applicable and, indeed, whether the act in question was governed by the draft articles at all. With regard to wording, it should be noted that the terms "direct" and "indirect" did not appear in article 9 [11], largely to take account of the concerns expressed by some members of the Commission about the use of those terms in languages other than English. The problem at hand was to draft a provision that required the exhaustion of local remedies only in the context of indirect injury. However, in some cases it was not clear from the facts whether the injury was to the State directly or to the State through the individual. The Committee had considered two possible tests for determining whether an injury was direct or indirect: first, the preponderance test, approved in both the *ELSI* and the *Interhandel* cases, whereby the injured individual was obliged to exhaust local remedies where the claim was preponderantly the one that related to the injured individual, as opposed to the State. The second test was the *sine qua non* test—in other words, whether the claim would have been brought if there had been no injury to the national.

9. The Committee had proceeded on the basis of the Special Rapporteur's proposal, which used the two tests to emphasize that the injury to the national must be the dominant factor in the bringing of the claim if local remedies were to be exhausted. However, the Committee had observed that, in the *Interhandel* case, ICJ had resorted only to the first of the two tests and that, in the *ELSI* case, it had noted the existence of both tests but had not required that they should be exhausted in combination. It had been proposed that the two tests should be used as alternatives, but the prevailing view had been that the preponderance test had received the most attention in judicial decisions. It had thus been agreed that only the preponderance test should be retained in the article and that the other test should be dealt with in the commentary. It had also been maintained that the "but for" test raised difficult issues of the onus of proof. The Special Rapporteur's original proposal contained an exposition in square brackets of the various factors that could be taken into account in determining whether the claim was preponderantly weighted in favour of an injury to a national or whether the claim would have been brought if such injury had not occurred. The Committee had nevertheless taken account of the prevailing view in the Commission that it was not desirable

to legislate by example and had therefore decided that examples should be discussed only in the commentary to the article.

10. As in the case of article 8 [10], the Committee had decided to align the provision on the draft articles adopted at the preceding session by recognizing the exceptions to the nationality rule introduced by article 7 [8] and including the words "or other person referred to in article 7 [8]". In this connection, the Committee had considered the possibility of including a separate provision, in an earlier part of the draft articles, that would provide that the term "national" included, *mutatis mutandis*, the persons referred to in article 7 [8], but that proposal had not been adopted. The Committee had considered two options for the title of article 9 [11], namely, "Claims of a mixed character" and "Classification of claims", and had settled for the latter.

11. Article 10 [14] on exceptions to the local remedies rule was the one on which the Drafting Committee had spent the most time, because of its length and the complexity of some of the issues it raised, particularly that of the "voluntary link". It was structured in the form of a chapeau followed by a list of four situations regarded as exceptions to the basic rule. There had been some discussion in the Drafting Committee on whether the last exception in subparagraph (d) relating to waiver was really an exception or not. The Committee had based itself on the Special Rapporteur's fundamental proposal (contained in what had then been article 14), but had reduced the number of exceptions from five (the sixth proposed by the Special Rapporteur had not been referred to the Committee) to four, primarily on the basis of the Commission's discussions at its preceding session. The exceptions had been reordered to group the provisions relating to the effectiveness and nature of local remedies together, with the provision dealing with the unique situation of waiver coming last.

12. Subparagraph (a) dealt with the situation where, even though local remedies existed, they did not provide any reasonable possibility of effective redress. The text proposed by the Special Rapporteur contained three options: local remedies were obviously futile; they offered no reasonable prospect of success; or they provided no reasonable possibility of an effective remedy. Acting on the strong support expressed in the plenary debate, the Drafting Committee had decided to adopt the third option, which was based on the wording of the separate opinion of Judge Lauterpacht in the *Norwegian Loans* case. In so doing, the Committee had noted that the first option of obvious futility had been considered as being too high a threshold and that, conversely, the second option of no reasonable possibility of success was too low a threshold. In order to avoid the awkward situation of saying, in the English text of the new subparagraph (a), that the remedies provided a remedy, the Committee had decided to replace the words "of an effective remedy" by the words "of effective redress". As to the scope of the provision, the Committee had considered whether it would cover the situation where a remedy might be technically available, but at a prohibitive cost beyond the means of the injured national. It had noted, however, that there was no authority supporting such an interpretation of subparagraph (a). It had also noted that that issue might arise in the context of subparagraph (c), in connection with situations where it



might be unreasonable to want to exhaust local remedies. It had therefore considered that situations of that kind, which were not only of a financial nature, would best be covered by subparagraph (c).

13. The exception provided for in subparagraph (b), the former subparagraph (e), on undue delay had been considered uncontroversial. The Committee had noted that authority for the exception existed in case law, but it had limited itself to expounding the basic principle without going into what constituted undue delay, which the court would be in a better position to evaluate. It had also been noted that the plenary had supported the inclusion of such an exception, by way of codification. The original version proposed by the Special Rapporteur stated that the delay was “in providing a local remedy”, but that was inaccurate because the remedy already existed, and what was delayed was its implementation. The Committee had next considered an alternative formulation whereby the State was responsible for undue delay in providing redress. However, the reference to “redress” was itself considered inaccurate because it assumed that the process would end with the injured individual obtaining redress. The Committee had then considered leaving the wording simply as “is responsible for undue delay”. However, it had subsequently decided to bring the text into line with article 8 [10] by replacing the reference to “respondent State” by “State alleged to be responsible”, but the provision would then contain the word “responsible” twice. After having considered various possible formulations, the Committee had decided that a clear-cut link must be established between the delay and the remedies, and that it should also be clearly indicated that the undue delay was attributable to the State alleged to be responsible. It had therefore finally settled for “There is undue delay in the remedial process which is attributable to the State alleged to be responsible”. The Committee had found the words “remedial process” to be preferable because they were broader than just the end product of “local remedies” and included the various processes through which local remedies would be channelled.

14. With regard to subparagraph (c), which provided that the local remedies did not have to be exhausted where “there is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable”, the Special Rapporteur had initially included two separate exceptions in subparagraphs (c) and (d) of what had then been article 14 dealing with the so-called voluntary link and the absence of a territorial connection, respectively. Those issues had taken up a substantial proportion of the debate in plenary, and the Drafting Committee had also spent most of its time on them. At the beginning, the issue had been whether a provision on the voluntary link should be included in article 10 [14]. At the conclusion of the plenary debate at the previous session, the Special Rapporteur had also proposed that a provision on the voluntary link might not be necessary, and that it could be considered instead in the context of the commentary to article 8 [10], where it could be pointed out that frequently the voluntary link was a rationale for the local remedies rule and a precondition for the exercise of diplomatic protection in many cases; and that another possibility was to refer to it in the commentary to arti-

cle 9 [11], given that in most cases there would be a direct injury, and the need to exhaust local remedies would therefore not arise. In addition, the issue could be considered in the commentary to article 11 [14], subparagraph (a), explaining that there might not be the possibility of effective redress. The Commission had been strongly divided on the subject, and support had been expressed for all the options he had mentioned, as well as for the option of reformulating the provision as a general provision dealing with unreasonableness.

15. At the end of the plenary debate at the previous session, the Special Rapporteur had submitted a further proposal, according to which local remedies would not be required to be exhausted where “any requirement to exhaust local remedies would cause great hardship to the injured alien [be grossly unreasonable]”.<sup>3</sup> The proposed text would have covered the situations initially envisaged in subparagraphs (c) and (d) of the earlier text, although it would set a higher threshold. It would also have covered the situation where the costs involved would be exorbitant, as well as the situation, in what was then article 14, subparagraph (f), of denial of access to institutions which could provide remedies. That proposal by the Special Rapporteur had laid the foundation for the Drafting Committee’s approach. The Committee had had three options: to do nothing and have the Special Rapporteur deal with the issue in the commentary; to draft a provision referring to the voluntary and territorial link, thereby merging former subparagraphs (c) and (d); or to include a general provision on unreasonableness.

16. The Committee had first concluded that a provision was necessary in the text, since the issue was too substantive to be left to the commentary. It had also felt that the kind of examples being considered would not be aptly covered by the concept of “effectiveness” in subparagraph (a). In addition, the Committee had been of the view that the concept of “voluntariness” did not adequately solve the problem in the cases of hardship being dealt with. What was decisive was the degree of reciprocity and reciprocal expectations of the individual when the link was being established. The questions were therefore how substantive the link between the injured person and the State was and how much the individual gained from that link. The Committee had considered various options. The first option was to include the words “or substantial commercial relations” in the version proposed by the Special Rapporteur, although the Committee had considered that option too narrow, since injury could occur in other contexts. The second option was to delete the former subparagraph (c) on the voluntary link and to prepare a text based on the territorial link connection in subparagraph (d). The third option was to qualify the words “voluntary link” in order to elucidate the concept by focusing on its rationale, which was the acceptance of the risk that the injured person should exhaust local remedies first. Accordingly, the Committee had considered a proposal that would contain the following definition of the voluntary link: “The voluntary link must amount to a form of conduct which constitutes acceptance of local remedies in the event of injury caused by the respondent State.” However, it was considered preferable to draft a more objective pro-

<sup>3</sup> *Yearbook ... 2002*, vol. I, 2729th meeting, p. 124, para. 2.

vision and to avoid any possible suggestion that the validity of the rule was based on its acceptance by the persons concerned. It was also considered that the interpretation of conduct as constituting acceptance might be too difficult to prove. The fourth option was to reformulate the provision to provide for a more objective test by stating that “local remedies need not be exhausted where there is no material connection between the individual and the respondent State.” However, the Committee had considered the “material” connection test to be too inaccurate. The fifth option was to reformulate the text as a general provision relating to situations where it would be unreasonable to exhaust local remedies; it might read: “where in the circumstances it would be unduly harsh or unreasonable to require the exhaustion of local remedies”. That proposal had been considered to have the virtue of more fully encompassing all the possible situations that might arise. At the same time, such a formulation could be regarded as vague. The Committee had therefore questioned whether such general wording should be more rigorous, and it had been proposed that reference should be made to “the relationship between the injured person and the respondent State”. A further proposal had involved combining the material connection test and the formulation dealing with the situation where it would be unduly harsh/onerous or unreasonable to require the exhaustion of local remedies. The Committee had then moved in the direction of abandoning the reference to the “voluntary” link in favour of a more general provision. It had nevertheless been agreed that the commentary would explain that the provision would deal with the voluntary link, the assumption of risk and extraterritoriality.

17. The Committee had focused on several formulations combining the concept of a material connection between the injured person and the respondent State, together with the more general concept of “unreasonableness”. It had concluded that it would be better to place the burden of proof on the injured individual, despite the problems that would create for that person, since placing the burden on the respondent State could have the effect of eliminating the local remedies rule entirely. In considering the various options before it, the Committee had borne in mind the possible impact such an exception might have on the rule itself, since the objective was not to weaken the rule but to provide an adequate exception to cover hardship cases. The Committee had therefore preferred wording that would place the onus of proof on the applicant State in order to show that the situation warranted an exception to the general rule of the exhaustion of local remedies. Conversely, the respondent State would have an interest in showing that the individual in question had such a relationship with the host State and had accepted its internal legal system and therefore had to exhaust any remedies offered by that system. Such an approach implied a certain balance between the rights of the individual and the interests of the respondent State.

18. The Committee had reached the conclusion that a provision to that effect should be included in the article; that the provision should refer to the fact that, in some circumstances, it would be unreasonable or unduly harsh to expect the individual to exhaust local remedies; and that wording capturing the concept of the “voluntary link” should be included, without using the phrase itself.

It had narrowed its options to two formulations, namely: “[t]here is no relevant/substantial connection between the injured individual and the responsible State or the circumstances of the case make the exhaustion of local remedies [grossly] unreasonable” or “[i]t would be unreasonable to require the exhaustion of local remedies because there is no material connection between the injured individual and the responsible State or the circumstances of the case so indicate”. Eventually, the Committee had settled for the first option, without the reference to “gross” unreasonableness, which had been considered unnecessary. It had considered that that wording was broader and covered more aspects of unreasonableness, such as acts by third persons (including threats by criminal conspiracies).

19. In reaching that conclusion, the Committee had considered the difference between the terms “relevant” and “substantial” and had discussed using both those terms or the term “material”. The term “relevant” referred to the connection between the injured individual and the responsible State in relation to the injury suffered, on the understanding that the term would be explained in the commentary. As to the word “substantial”, the Committee had considered that the lack of a “substantial” connection might unnecessarily modify the local remedies rule, in the sense that the provision could be read as requiring a substantial presence or time period for the local remedies rule to apply. The test was, however, not one of quantity but one of quality. By including the word “relevant” instead, the Committee had attempted to include some elements of the concept of assumption of risk within a more general provision.

20. The Committee had considered other formulations in order to add more precision to the provision, but, except for adding the word “otherwise” in the second half of the sentence, had been unable to agree on one such formulation and had decided that only the reference to the “relevant” connection would be included in the commentary.

21. With regard to other drafting changes, the Committee had decided to ensure consistency with formulations adopted in the past by replacing all references to “respondent State” by “responsible State” or “State alleged to be responsible” and had settled for the latter formulation, in line with the wording of article 8 [10], paragraph 2.

22. The Committee had first considered article 10 [14], subparagraph (d), on the basis of the Special Rapporteur’s original proposal, namely, draft article 14, subparagraph (b), as contained in his third report and discussed in 2002. It had been agreed early on that the words “expressly or implicitly” should be deleted as superfluous. During the plenary debate, the bulk of the discussion had focused on implied waiver. In the light of the position adopted by ICJ in the *ELSI* case, namely, that the waiver of the local remedies rule was not to be readily implied, the Commission had considered that waiver should be clear and unambiguous. It had agreed that there might be circumstances where waiver might be implied and that such a possibility should be acknowledged, but the question was whether it was advisable to introduce that element into the provision or not. The Committee had also noted that the provision set out the application of a principle of general international law, which would apply even if there were no provision along

those lines. As to estoppel, the Committee had noted that, according to some sources, estoppel might give rise to the finding that the respondent State had waived the local remedies rule. Some members of the Commission had argued in plenary that estoppel might be read into the concept of implied waiver. However, the Committee had decided that it was not necessary to include a reference to estoppel in the provision, since it could give rise to problems as to what estoppel was meant to cover. It had been decided that the Special Rapporteur would deal with the issue in the commentaries.

23. In order to bring the wording into line with that of article 8 [10], the words “respondent State” had been replaced by the words “State alleged to be responsible”.

24. The Committee had decided to place the provision on waiver at the end of article 10 [14]. However, the Committee had considered the possibility of placing the paragraph on waiver in its own provision, since it was different from the other exceptions provided for in article 10 [14]. Some of the problems the Committee had faced related to the title of the provision, namely, “Exceptions to the local remedies rule”. The Committee had questioned whether the provision on waiver could really be seen as an exception to the local remedies rule in the normal sense or as a “condition” for the application of the rule. According to one of the viewpoints expressed, waiver was not an “exception”, but arose by virtue of the application of a principle of international law. Nevertheless, placing the provision on waiver, as now drafted, in its own article would have resulted in repetition and in the question why provisions dealing with situations where the local remedies rule was not applicable were not included in one text. The Committee had even briefly considered the possibility of reformulating the paragraph on waiver entirely so as to place it in its own provision, but, in the end, had decided against doing so. As was indicated in footnote 3, the Committee had left open the possibility of reconsidering the issue later on, perhaps on second reading, and drafting a separate provision, which might be entitled “Waiver”.

25. Several amendments had been made to the text of article 10 [14] in order to bring it into line with texts previously adopted. For example, the words “the injured individual” had been replaced by the words “the injured person”. On behalf of the Drafting Committee, he recommended that the Commission should adopt the articles submitted.

26. Mr. MELESCANU said that he did not understand the use of the words “declaratory judgment” in article 9 [11]. He pointed out that the Statute of the International Court of Justice referred to “advisory opinions”, not “declaratory judgments”. Article 9 [11] seemed to be based on the practical consideration that a party could apply to an international court not in order to request a decision resulting in an action or compensation, but simply in order to request it to take note of a factual situation or a rule of law. In the event of success, the party might then submit an application for redress. In any case, he thought that the commentary to article 9 [11] should explain in greater detail what that term meant, and that practical examples should be provided.

27. Mr. ECONOMIDES said that the title and contents of article 9 [11] (“Classification of claims”) were not clear. Moreover, if the Commission was to deal with classical diplomatic protection, the claim must be based exclusively, not “preponderantly”, on an injury, as was stated in the article. In the *Mavrommatis* case, PCIJ had created a fiction when it had stated that an injury to an individual must be regarded as an injury to the State. In his own opinion, however, the question with which the Commission should deal related not to the injury a State might inflict on another State, but only to classical diplomatic protection. Moreover, the thrust of the provision was already contained in the definition of diplomatic protection and in article 8 [10], paragraph 1.

28. The term “effective redress” in article 10 [14], subparagraph (a), should not be used because it was not clear what it covered. Reference was made to fair, adequate, equitable or reasonable compensation or compensation commensurate with the injury, but not to “effective redress”. On a less important point, the term “There is ... delay” in subparagraph (b) was not appropriate. In his view, however, subparagraph (c) involved a substantive problem. Since exceptions to the exhaustion of local remedies rule were blatant restrictions on State sovereignty, each one must be very carefully weighed. That paragraph was also very vague and ambiguous because it referred to two separate cases, not to one, as was shown by the use of the term “or”. If it was to be retained, the word “or” should be replaced by the word “and”.

29. The CHAIR reminded the members of the Commission that they could no longer discuss the substance of the articles, which had already been considered at the previous session. The comments by Mr. Melescanu and Mr. Economides would be reflected in the summary record of the current meeting.

30. Mr. KATEKA (Chair of the Drafting Committee), referring to the term “declaratory judgment” in article 9 [11], recalled that the *ELSI* decision stated: “The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment” [para. 51]. That excerpt showed that ICJ had used that term.

31. With regard to Mr. Economides’ comment on the word “preponderantly”, he pointed out that ICJ had referred to the preponderance criterion in the *ELSI* and *Interhandel* cases.

32. Mr. DUGARD (Special Rapporteur) said that article 10 had created a number of problems when the Commission had considered it at the previous session and had discussed it in depth. He regretted that Mr. Melescanu and Mr. Economides had not been present at that time.

33. Not only was “declaratory judgment” a recognized expression, as Mr. Kateka had indicated, but it should also be dealt with in article 9 because otherwise a State might simply request a declaratory judgment and would then not be bound to exhaust local remedies, thereby defeating the purpose of the rule. He had dwelt at length on that question in his third report but was prepared to give further explanations in the commentary.



34. With regard to the title of article 9 [11], he agreed that the words “direct or indirect claims” could have been used, but at the previous session Mr. Pellet had pointed out that they were not suitable in French and they had therefore been ruled out. Since the cases covered by article 9 [11] involved both direct and indirect claims, the scope of the provision, which related only to indirect claims, as Mr. Economides had rightly pointed out, must be restricted.

35. Referring to article 10 [14], he recalled that the Drafting Committee had used the words “effective redress” in subparagraph (a) because it had not wanted to repeat the term “remedy”. The term “redress” was broader than the term “remedy” because it included elements of compensation and was therefore more accurate. Subparagraph (b) had given rise to a lengthy debate in the Commission at the previous session, as had subparagraph (c), in which the Committee had decided that the two concepts should be included. It had therefore chosen the term “or” rather than the term “and”.

36. In any event, he assured the Commission that all the comments made on those questions would be included in the commentary.

37. Mr. MELESCANU said that, in the *ELSI* case, the United States had wanted to show that it was unnecessary to exhaust local remedies in order to bring a claim in an international court. In his opinion, paragraph 51 of the judgment by ICJ referred to that very specific aspect of the question, namely, that the United States had requested the Court to find that there had been a breach of a treaty obligation and that, consequently, the company which had enjoyed the diplomatic protection of the United States had not been required to exhaust local remedies. The purpose of article 9 was, however, entirely different, since it provided that local remedies must be exhausted. There was thus a contradiction between article 9 and paragraph 51 of the Court’s judgment, and it would be well to explain what “declaratory judgement” meant.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the Drafting Committee’s report on diplomatic protection (A/CN.4/631), as well as draft articles 8 [10], 9 [11] and 10 [14].

*It was so decided.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>4</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

39. Mr. OPERTTI BADAN welcomed the quality of the Special Rapporteur’s report (A/CN.4/531), which

contained a number of issues on which it was difficult to reach a consensus at the present time. He endorsed the Special Rapporteur’s method, which was to use concepts, such as that of significant harm, that the Commission had already discussed during its consideration of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>5</sup>

40. One such concept was that of the liability of the State as an active or passive subject of rights and obligations. At present, private agents were involved in international trade and were investing more and more in services, port infrastructures and telecommunications—essential areas that had previously been under State control. The situation had changed enormously during the second half of the twentieth century and it was now much more widely accepted that some major activities were not controlled by the State. The challenge the Commission faced was thus to formulate guidelines that would reconcile the two elements of a sharp decline in State-controlled activities and the continuing existence of State liability in those areas.

41. With regard to the problem of classical civil liability, which lay at the very heart of contract law, the Special Rapporteur had rightly acknowledged that the existence of a causal link between the harm and the activity had to be proved. That was one of the key points of the Commission’s work.

42. Other international agencies were also dealing with the topic under consideration, and the Commission should try to ensure better coordination between its work and theirs. The Special Rapporteur himself referred in his report to Bernasconi’s work, which was very useful because it stated a number of rules *de lege ferenda* on the question.<sup>6</sup> It should also be noted that, in his statement in the Commission, the Observer of the Inter-American Juridical Committee had indicated that one of the topics on which the Committee was now working was that of extracontractual liability (see 2764th meeting, para. 31), a basic question which was not only part of classical private law (conflicts of laws) but also part of the much broader subject of efforts to formulate criteria and material rules to serve as guidelines for solving the problem of compensation for loss or injury. The Commission must therefore take account of the fact that other international bodies were dealing with the topic. Accordingly, its first task should be to define the exact limits of its own work in order to avoid any conflict with other bodies.

43. The question of extracontractual liability had been discussed at the Sixth Conference on Private International Law held in Washington, D.C., from 4 to 8 February 2002. The Conference had defined a number of criteria from which the Commission might draw inspiration and which might include access by applicants to the courts, the possibility of benefiting from a favourable legal system and the right not to be tried by courts or under laws which did not have a reasonable link with the purpose of the ap-

<sup>5</sup> See 2762nd meeting, footnote 7.

<sup>6</sup> See C. Bernasconi, “Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?” Hague Conference on Private International Law, Preliminary Document No. 8 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference.

<sup>4</sup> See footnote 2 above.

plication or with the parties. As far as compensation was concerned, those criteria applied not only to relations between private individuals but also, for example, when a State formulated a claim as a result of harm attributable to a subject of private law.

44. The Special Rapporteur raised the question of the applicable law and the court to be applied to in order to obtain compensation, and in reply he proposed classical criteria, namely, the place where the harm had occurred and the place where the harm had been suffered. Following the *Mines de Potasse d'Alsace* case, court decisions had confirmed those criteria, thereby providing for dual jurisdiction. In other words, the liability of the State also gave rise to the problem of a conflict of jurisdiction, since there was not necessarily only one international court which had jurisdiction. The criterion adopted in the above-mentioned decision had thus been in the victim's favour.

45. The Special Rapporteur recognized that the topic did not easily lend itself to codification, that States should be allowed the necessary freedom to establish systems of liability suited to their particular needs and that a general and residual model of allocation of loss should be adopted. In his own view, the Commission's codification work, however limited, should be carried out in a coordinated manner, and the Special Rapporteur should define the framework more clearly in his next report, using as a basis, for example, the work of other bodies on the topic. For example, there were many bilateral agreements between Latin American countries on the question of liability that the Commission could use to give its work a regional dimension.

46. Mr. BROWNLIE said that he agreed with the idea of setting up a working group because he had the feeling that, until now, he and the other members of the Commission, except perhaps for Mr. Momtaz, had given the Special Rapporteur only limited assistance. Having been entrusted with an extraordinarily difficult task, the Special Rapporteur had done what was necessary and had provided a panorama of options. He proposed some formulations in paragraph 153 of his report, but they were of a very general nature, like the study itself. Before advancing much further, however, the Commission had to face up to some specific legal issues, including structural relations. The first issue was the overlap with State responsibility. Several delegations in the Sixth Committee had taken the view that there really was not much overlap. The point had been made that it was indeed far from clear whether the duty to compensate for harm arising from lawful harmful activities by the State which had in fact performed its duty of prevention existed in positive law. It had also been asserted that, while the principle of strict liability was accepted for certain specific regimes, such as damage caused by space objects, there was no evidence that the principle was part of customary international law.

47. The general approach of courts was to rely on the principle of objective responsibility, which was very close to that of strict liability, and to link obligations under State responsibility to fault only in exceptional cases. When it came to compensating for loss or injury, the regime of State responsibility was much more relevant than some delegations in the Sixth Committee thought. In his own view, such overlap was not necessarily antagonistic, and

he urged the members of the Commission to make sure that there was no antagonistic or colliding relationship. In the case of State responsibility, the Commission had merely codified something that had already existed in customary international law. In contrast, there were no existing principles of general international law on State liability. It was therefore up to the Commission to prevent overlap. In paragraph 153 (b) of his report, the Special Rapporteur recalled the recommendation by the Working Group established by the Commission at its fifty-fourth session that a regime of liability should be without prejudice to issues of State responsibility.<sup>7</sup> That general precaution would not be sufficient in practice, for a number of reasons. For example, it could be asked whether the local remedies rule would be applied or, in other words, whether the civil claims system in the municipal courts of States Parties which had acceded to the future instrument would replace that rule. A related question was whether remedies available under civil liability in municipal courts would qualify as another available means of settlement.

48. Liability must be absolute, not just strict. As the Special Rapporteur indicated in paragraph 153 (e) of his report, it should be dependent upon strict proof of the causal connection between the harm and the activity. In that connection, the standard of proof must be questioned. He was not convinced that the Special Rapporteur had settled that question by invoking the threshold of "significant harm". If the issue of social cost was taken into account, the whole structure would founder in the sense that the Sixth Committee might be satisfied with the work done, but States would not accede to the draft. For all those reasons, it was necessary to establish a working group which would refocus the topic.

49. Mr. KOSKENNIEMI said that he was still puzzled about how Mr. Brownlie's suggestions could help clarify the work still to be done. With regard to the overlap between State responsibility and liability that Mr. Brownlie was concerned about, he himself was not sure that it was easy to determine because the boundaries of State responsibility were not clearly demarcated. Consequently, the Commission had more leeway than some members thought.

50. He was completely in agreement with Mr. Brownlie's suggestion that some specific legal issues should be given further attention, but Mr. Brownlie had referred to four extremely difficult issues which were partly issues of internal civil law, partly issues of comparative law, but not so much issues of public international law. He himself was not sure whether the Commission was in a position to go into that level of detail. Perhaps it should stick with generalities and simply draw attention to potential problems while concentrating on its main objective, which was to ensure that the victims of harm obtained compensation.

51. Mr. PELLET said that on the whole he fully agreed with Mr. Brownlie's concerns and feared that the Special Rapporteur might become the "García Amador of liability". Mr. García Amador had not been able to complete his work on responsibility because he had tried to approach the subject from the most controversial angle. Now, the

<sup>7</sup> See the report of the Working Group in *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.

subject entrusted to the present Special Rapporteur was also a very “hot” topic and the focus of many basically political, economic, financial and technical controversies which could not be settled by legal experts, but required political negotiations. Without refusing to deal with the problems, the Commission must have the clear awareness of what it could and could not do. The topic of responsibility had been “saved” by Mr. Ago, one of whose strokes of genius had been to place himself in the area of general rules. It could be in the Commission’s interest to do the same for the topic under consideration, because it would then be staying within the realm of the law and would be in a position to make a contribution with every ounce of skill it possessed.

52. In the first place, the title of the topic was a problem because the Commission’s concern was primarily compensation for harm arising out of transboundary activities. According to the basic principle on which a consensus seemed to have been reached during the discussions by the members of the Commission, operators were liable and must provide compensation. Requesting States to encourage the establishment of insurance mechanisms and compensation funds was not within the Commission’s competence, and it would be better to deal with that question by drafting a model clause. The third key point of the study of the topic was that States were liable only on a conventional basis.

53. In any event, the Commission must not follow as dangerous a course as the one that had led to the “García Amador deadlock”.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that he had tried to indicate in his humble way which options were available to the Commission, without advocating any of them, because he had wanted to know the preferences of the members, who would all be able to choose what suited them best. Mr. Pellet’s proposal, which was, of course, welcome, might be discussed in the working group whose establishment had rightly been suggested by several members, including Mr. Brownlie.

55. The purpose of his study was to find ways of ensuring that an innocent victim could obtain compensation without running into legal problems unless he wanted to. With regard to ways of supplementing limited liability, he had suggested in paragraph 153 of his report that a State should have “an obligation to earmark national funds”, and that was very different from having to pay as a party to the damage under some kind of liability. Of course, the State would then only be helping to compensate the loss or injury caused to the victim, and that corresponded to the principle of social cost, as seen from another point of view. He wondered why the Commission could not deal with that question from the viewpoint of primary rules of law, without worrying about international law or politics.

*The meeting rose at 1 p.m.*

## 2769th MEETING

*Friday, 6 June 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### **Tributes to Mr. Robert Rosenstock, outgoing member of the Commission**

1. The CHAIR announced that, for personal reasons, Mr. Rosenstock, who had served the Commission for the past 12 years, was resigning with effect from the present meeting. Mr. Rosenstock had been the Special Rapporteur for the topic of the law of non-navigational uses of international watercourses, and his legal expertise, diplomatic skills and leadership had been instrumental in ensuring the final completion of the work on that topic<sup>1</sup> and its adoption as an international convention.<sup>2</sup> He had been a dedicated member of the Commission, participating in every drafting committee, working group and planning group on every subject. There was no aspect of the Commission’s work that he had not seriously studied and commented on.

2. Those members who had known Mr. Rosenstock from other international conferences and Sixth Committee meetings over the years had come to admire him as a man of impeccable dignity, with a wonderful sense of humour and a unique New York accent, one who liked a good fight, but always remained professional and looked for a solution to the problem at hand. On behalf of the Commission, he thanked Mr. Rosenstock, who would be remembered as a remarkable and productive colleague, and conveyed to him the Commission’s best wishes for his future endeavours.

3. Mr. PELLET said that, contrary to custom, he would address Mr. Rosenstock directly rather than through the Chair, and in the second person singular, for Mr. Rosenstock’s inimitable mastery of Shakespeare’s language did not preclude a thorough familiarity with the language of Molière. With characteristic dignity, courage and dis-

<sup>1</sup> At its forty-sixth session the Commission adopted the final text of 33 draft articles on the law of the non-navigational uses of international watercourses and a resolution on transboundary confined groundwater (*Yearbook ... 1994*, vol. II (Part Two), para. 222).

<sup>2</sup> Convention on the Law of the Non-navigational Uses of International Watercourses.



cretion, Mr. Rosenstock had decided to leave the Commission after 12 years' service. In the course of those 12 years he had soon made his highly influential presence felt: not because he hailed from the United States of America—even if, in that capacity, he had initially employed a royal plural that could occasionally be disconcerting—but because he had placed at the Commission's disposal his long experience of the United Nations; because he had accommodated himself to the collaborative approach that was one of the Commission's richest assets; and because, despite some memorable occasions when he had crossed swords with the late Doudou Thiam, or with Mr. Arangio Ruiz and himself, Mr. Rosenstock had been a moderating element, stating his often very firm point of view with moderation, winning his point or remonstrating without recourse to bullying and threats. He had been scrupulous in his attendance of plenary meetings, drafting committees and working groups; and, latterly, had even desisted from his celebrated habit of raising points of order.

4. When he had felt strongly about a point, Mr. Rosenstock had not hesitated to stick to his guns for as long as he felt the match was winnable, elegantly conceding defeat when he had seen that his cause was lost, seeking mutually acceptable compromises and always respecting his opponent. He had been a highly competent special rapporteur on the—ironically—somewhat arid topic of the non-navigational uses of international watercourses, which he had successfully shepherded to the General Assembly; and, despite recent ill health, an effective, dignified and courageous Chair of the Commission's previous session. He had been a noble brother-in-arms, bold but not rash, determined but not obstinate, learned but not pedantic, circumspect but not timid. He would be sorely missed.

5. Mr. Sreenivasa RAO congratulated Mr. Rosenstock on a productive and brilliant career in international law. Mr. Rosenstock was one of the best international law practitioners it had been his privilege to work with and a spirited advocate and defender of the interests he had chosen to represent with such distinction in the United Nations and the International Law Commission. He had contributed in no small measure to the codification and progressive development of international law as Special Rapporteur on the international watercourses topic and through his vigorous participation in other topics, particularly that of State responsibility. Honest, pungent, to the point, he went straight to the heart of the issues, but always worked to ensure agreeable outcomes. His fighting qualities and sense of accommodation were truly worthy of emulation. He wished Mr. Rosenstock a happy and healthy retirement.

6. Mr. MELESCANU said that it was always a sad moment when a member left the Commission. Yet it was also a source of satisfaction to members to have worked closely with a colleague from whom they had learned so much; one who had served as an exemplary Chair of the Commission; one with so great a fund of practical experience and common sense; and one who had so often brought his more speculative and theoretically inclined colleagues back down to earth and to reality—a reality in which international law was not what international lawyers might like it to be, but what States wanted it to be. Mr. Rosen-

stock's contributions were part of the history of the Commission, but would also remain as an inspiration for the Commission's future activities.

7. Mr. DUGARD, speaking for the African continent and on behalf of Mr. Kateka, who was unfortunately unable to be present, said that Mr. Rosenstock had been an exemplary colleague from whose wisdom the Commission had benefited tremendously. His interventions in plenary had been short, sharp, sometimes caustic, often good-humoured, his words carefully chosen, wise and amusing; and he had on many occasions brought those members who had tried to fly too high back down to earth. As a special rapporteur, he personally had particularly benefited from Mr. Rosenstock's invaluable contributions to the work of drafting committees, through his ability to effect a compromise. Mr. Rosenstock had been a great team player and a great team leader. He took the opportunity to say *au revoir* to a great international lawyer and a model member of the Commission and to wish him every happiness in his retirement.

8. Mr. OPERTTI BADAN said that he heartily endorsed the Chair's words and those of other members. His tribute to Mr. Rosenstock differed from others, in that his duties as President of the fifty-third session of the General Assembly had prevented him from devoting to the Commission the time and dedication it demanded of its members. Nonetheless, he had had the opportunity to recognize in Mr. Rosenstock a solid, straightforward and frank lawyer whose indispensable assistance to him during his term as President of the General Assembly he wished to acknowledge personally.

9. Mr. BROWNLIE offered Mr. Rosenstock his best wishes for the future. In his seven years as a member of the Commission, he had always had the benefit of Mr. Rosenstock's humour, patience and professional skills. It had been a great pleasure to work with him, and he would indeed be missed.

10. Mr. ROSENSTOCK recalled that, on the last occasion when he had spoken French in the Commission, a distinguished jurist representing France who had subsequently become a judge of ICJ had waved his handkerchief in the air in token of surrender. Since then he had never inflicted his French on anyone on a public occasion. Nonetheless, he had enjoyed working in the Commission and had enjoyed, too, the cooperative spirit that had almost invariably motivated it. Members were not representatives, but sat in the Commission in their expert capacity, to seek common goals. The very excessive praise being heaped upon him had the merit of showing that that spirit of cooperation still prevailed. That was enormously encouraging, enormously important, and a note on which he felt very comfortable to leave. He was truly grateful to colleagues for their overly gracious statements and for the pleasure he had derived from working with them in the Commission and other forums.

*The Commission gave Mr. Rosenstock a standing ovation.*

*Mr. Melescanu (Vice-Chair) took the Chair.*

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/529, sect. D, A/CN.4/531<sup>3</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)\*

11. Mr. Sreenivasa RAO (Special Rapporteur) said that he was grateful for the encouragement given him to continue with the difficult task at hand. He was also gratified that several members had focused specifically on the recommendations made in his report (A/CN.4/531), particularly in chapter III. He was especially grateful to Mr. Economides, who had reviewed those recommendations in the light of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, recently adopted in Kiev. There was a need to examine, *inter alia*, the standard of proof for establishing a causal link, and to clarify the eligibility of loss of profits and tourism on account of environmental damage. There was also the issue of referring to suitable forums for the resolution of claims and to forms of dispute settlement to address any dispute concerning the interpretation and application of the model to be proposed. The need to specify minimum international standards for regulating the resolution of claims also required more thought.

12. Given the strong support within the Commission for examining his recommendations further, he felt that it was important to establish a working group for that purpose. The Working Group set up in 2002 should therefore be reconstituted to continue its development of a suitable model for allocation of loss. No one disputed that the Commission should pursue the remaining part of its mandate on international liability, especially since the General Assembly had held up the adoption of the draft articles on prevention<sup>4</sup> to allow the mandate to be completed. That was a duty the Commission could not shirk, and continued delay would undermine its credibility.

13. The Commission should therefore continue the search for a model of allocation of loss which, as Mr. Kabatsi had rightly noted, did not conflict with the regime of State responsibility or duplicate concepts better addressed under civil liability. Most members seemed to support that approach, although some would have liked a clearer and more detailed reference to the totality of the regime applicable to the resolution of claims for damage. Once the Commission had succeeded in developing a model, it could explain the difficulties it had seen in the development of a regime on international liability and request the General Assembly to treat the submission of the model on allocation of loss as a full response to its original mandate. Various members had argued that the devel-

opment of such a model was perfectly possible. Moreover, given the difficulty of addressing the concerns of innocent victims through the regime of State responsibility, it might, as Ms. Xue had said, be essential.

14. Mr. Pellet had surprisingly argued that developing such a model would amount to negotiation—a task reserved for States. That raised interesting questions about the task of codification and progressive development. Not long ago, the Commission had been asked to submit a draft Statute for an International Criminal Court,<sup>5</sup> a mandate that it had successfully completed.<sup>6</sup> Moreover, its drafts always had been, and always would be, subjected to political scrutiny and negotiation by States before their eventual adoption. The Commission's mandate was not to confine itself strictly to restating the law, and progressive development had never been understood only as an extension of codification. Otherwise the Commission could not have made such progress on State responsibility. The Commission could not, in fact, alter the mandate he had reluctantly assumed.

15. It had been asked whether it would be proper to allow claims for compensation for damage arising from a single incident to be pursued through more than one source. In that connection, Mr. Gaja had suggested that it might be desirable to develop a comprehensive regime to respond to claims arising from transboundary harm. The important point of policy was that a claimant should not be allowed to seek compensation on the same legal basis in different forums. However, claims could be made in different forums on a different legal basis and decided on their merits. To reconcile different legal systems and divergent national jurisdictions was no easy task, however, and he agreed with Mr. Pellet that the Commission was not particularly suited for it.

16. A multi-tiered approach to compensation for innocent victims was now well established in all regimes which addressed damage resulting from accidents or incidents involving hazardous activities. While the Commission's mandate was restricted to compensation for transboundary harm, the future model was expected to appeal to States to provide similar relief for innocent victims within their own jurisdiction and boundaries. The working group could consider the best way of reflecting that aspect. The multi-tiered approach provided for the first share of the loss to be allocated to the operator and the second and subsequent shares to be allocated to States and to supplementary funding mechanisms. There had been considerable support in the General Assembly for such an approach. Several members of the Commission had likewise emphasized the need to provide suitable redress for innocent victims through a model that was not limited to the liability of the operator, and Mr. Al-Baharna had even questioned the assumption that State liability was an exception.

17. The sectoral regimes reviewed in the report generally endorsed the multi-tiered approach, placing primary liability at the door of the operator or person most in con-

\* Resumed from the 2767th meeting.

<sup>3</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>4</sup> General Assembly resolution 56/82, para. 2.

<sup>5</sup> General Assembly resolution 47/33 of 25 November 1992, para. 6.

<sup>6</sup> *Yearbook ... 1994*, vol. II (Part Two), para. 91.

trol at the time of the incident or accident. While most members had agreed with that approach, some—for instance, Mr. Kolodkin—had questioned the rationale for allocating some loss to the State in the absence of any wrongdoing on its part. However, the suggestion was not that the State should participate in the regime of allocation of loss on the same basis as the operator, but that it should, out of a sense of social obligation, help make good the loss suffered by innocent victims. After all, it was the State that initially authorized hazardous activities despite the risk of harm. Moreover, as the General Assembly and many members of the Commission had emphasized, such an approach might prompt States to take their duties of prevention more seriously and to be more vigilant in monitoring hazardous activities within their jurisdiction. The social justification and equitable dimension of the subsidiary tier in any regime of allocation of loss could not be overemphasized, particularly when the operator's liability was limited, or the liable operator could not be traced or identified.

18. Mr. Koskeniemi had drawn attention to a gap in the report, in that it analysed various sectoral regimes but did not refer to them in its summation. Mr. Brownlie had rightly noted the absence of any clear signposts. The gap was intentional. He had been directed, after reviewing existing models and without confusing the role of the State in such a scheme with State responsibility, to develop a model that was not linked to any particular legal basis. Accordingly, he had focused on the results of various sectoral arrangements, rather than on their negotiating process or on States' attitude to them. It was not his mandate to seek the views of States or draw conclusions with a view to codification, but only to propose a model by developing a primary obligation.

19. There had been unanimous agreement on the operator's liability, but the legal basis for that liability was not self-evident and presented difficulties for uniform application. While strict liability was recognized in most domestic legal systems and some special treaty regimes, it was not well accepted in the context of transboundary harm. In some systems, it was acceptable for some hazardous activities but not others. It should therefore be approached with caution.

20. The review of some essential elements of civil liability had also revealed considerable variations in the way in which such elements were treated in different national jurisdictions. That was why he had taken the view that the exercise of developing a model should be general and residual, a view that had received wide support.

21. Mr. Brownlie had raised questions about the relationship between claims invoking the operator's civil liability and possible claims against the State. However, if a share of the loss was to be allocated to the State only as a matter of social obligation, rather than one of liability, that issue would be better addressed in the context of apportioning the social cost of beneficial but hazardous activities.

22. Mr. Kateka and others had raised the issue of compensation for harm to the global commons. His reason for keeping that issue separate had been the need to keep the scope of the topic suitably narrow, but the Commission could return to the issue at a later stage if the General Assembly gave it a separate mandate to do so.

23. He apologized if he had not fully addressed all the points raised. That was not because they were not important, but because they required more time and reflection. The working group would have to address those and other issues with a view to submitting a more concrete set of principles or, as Mr. Yamada had suggested, even draft articles to the Commission in 2004. The Commission must respond by completing such principles or draft articles as soon as possible. That would also help the General Assembly to expedite the adoption of the draft articles on prevention.

24. The CHAIR asked whether the Commission wished to establish a working group on international liability.

25. Mr. PELLET said that, in principle, he was not opposed to establishing such a working group. However, since pursuing the topic was the Special Rapporteur's task, he wondered what precise mandate would be entrusted to the working group.

26. The CHAIR said that the working group's mandate, as defined by the Special Rapporteur, would be to refine the principles and proposals put forward in his first report.

27. Mr. OPERTTI BADAN said that, as he understood the Special Rapporteur's thinking, the working group would be requested to develop a model for allocation of loss which would be residual and subsidiary and not require the modification of domestic models. The emphasis would be not on trying to determine the applicable law but on identifying a number of guiding principles with a view to protecting the rights of victims. Those objectives would constitute a good mandate.

28. Mr. Sreenivasa RAO said the Working Group established in 2002 had looked into ways of proceeding by clearly demarcating specific areas, without reopening issues relating to State responsibility or liability. That did not mean that matters relating to civil liability had to be completely ignored or carefully avoided, however. The model could be designed to provide sufficient guidance on the settlement of claims and the forums for doing so. Those were all just ideas on which the working group could and should reflect, and they should not be deemed to constitute a rigid mandate.

29. Mr. ECONOMIDES said he agreed that, on the basis of the material contained in the report and the debate in the Commission, the working group must map out the route to be followed. The mandate was a very broad one: to develop an approach to the topic while addressing the specific issues involved.



30. Mr. MELESCANU said that the working group's task should be to draft provisions or principles to serve as a model for allocation of loss arising from transboundary damage. Such an undertaking would be pragmatic and useful. He agreed with the Special Rapporteur's preference for not delving into the type of responsibility or liability that was the basis for allocation of loss, but he thought it must also be understood that nothing prevented reference from being made to the principles underlying the model. The components of the model would, after all, be determined by its legal foundations, which, in the present case, were State practice in respect of strict, objective civil liability.

31. Mr. MANSFIELD said he supported the idea that the entire range of issues that needed to be discussed should be discussed. He expressed confidence that the Special Rapporteur would make sure that they were. The term "model" conveyed a rather narrow view of what was to be done, but the working group would undoubtedly make constructive efforts in the right direction.

32. Mr. BROWNLIE said that he agreed with those remarks and thought the working group could be relied on to work out its own mandate, which was essentially to sharpen the focus within the boundaries of the current title of the topic.

33. Mr. Sreenivasa RAO said that the Commission should consider choosing someone other than himself as chair of the working group.

34. Mr. PELLET said that it was precisely the Special Rapporteur who must be in charge of the proceedings in the working group, and there was no need for the Commission to determine the group's mandate.

35. Mr. BROWNLIE said that, if the chair of the working group was anyone other than the Special Rapporteur, that might create greater rather than fewer difficulties for the Special Rapporteur. There had to be a single captain of the ship.

36. Mr. Sreenivasa RAO said that, if the Commission so wished, he would carry out the additional responsibilities to the best of his ability.

37. Mr. AL-BAHARNA proposed that the working group should be established under the chairship of the Special Rapporteur.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to establish the Working Group on the Topic of International Liability.

*It was so decided.*

*Mr. Candioti resumed the Chair.*

**The fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/529, sect. F, A/CN.4/L.644)<sup>7</sup>**

[Agenda item 8]

39. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law) said that the open-ended Study Group had held a useful first meeting on 27 May 2003. It had discussed how to move forward during the second part of the Commission's fifty-fifth session and at its fifty-sixth session with a view to identifying priorities in and the methodology for its future work.

40. The Study Group had held an exchange of views based on the report of the Study Group contained in the Commission's report to the General Assembly on the work of its fifty-fourth session<sup>8</sup> and on the debate in the Sixth Committee during the fifty-seventh session of the General Assembly (A/CN.4/529, sect. F). It had determined that its perspective on the topic would be substantive as opposed to institutional. It would not focus on institutional questions of practical coordination, hierarchy and the jurisprudence of various actors, but would instead consider whether and how the law itself might have been fragmented into special regimes that lacked coherence or conflicted with one another. That substantive focus was consistent with the approach outlined by the Commission<sup>9</sup> and endorsed by the General Assembly, as was indicated in paragraphs 227 and 229 of the topical summary.

41. The Study Group had agreed on a tentative outline for its future work in 2003 and 2004 and would basically proceed on the basis of the recommendations contained in the Commission's report to the General Assembly on the work of its fifty-fourth session.<sup>10</sup> Concerning the programme for 2004, it had been agreed that the Chair would undertake a preliminary study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. The study would contain an analysis of the general conceptual framework in which the entire question of fragmentation had arisen. That was in line with paragraph 226 of the topical summary, which indicated a preference in the Sixth Committee for a comprehensive survey of the rules and mechanisms dealing with possible conflicts of norms. Shorter introductory papers would be prepared by individual members of the Commission on the topics mentioned in the report,<sup>11</sup> developing the issues, fleshing out the problems and highlighting what needed to be covered.

42. Expressions of interest in preparing certain papers had already been received from members of the Commission, and during the second part of the session the Study Group would finalize the allocation of topics. At that

<sup>7</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

<sup>8</sup> *Yearbook ... 2002*, vol. II (Part Two), pp. 97–99, paras. 495–513.

<sup>9</sup> *Ibid.*, p. 98, paras. 505 and 507.

<sup>10</sup> *Ibid.*, pp. 98–99, para. 512.

<sup>11</sup> *Ibid.*, subparas. (b)–(e).

time, the Study Group would also discuss the structure and contents of the papers with a view to ensuring compatibility. To facilitate the process, he himself had undertaken to prepare a discussion paper which might be either a general outline or the basis of a substantive study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. Those issues might also be discussed at a brainstorming session which would be arranged by the Study Group and to which Judge Bruno Simma, former Chair of the Study Group, might be invited.

43. He thanked all members of the Study Group for their participation and valuable contributions.

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

[Agenda item 2]

44. The CHAIR announced that the Commission had concluded the first part of its fifty-fifth session.

*The meeting rose at 11.20 a.m.*

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\* Resumed from the 2766th meeting.





## SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-FIFTH SESSION

*Held at Geneva from 7 July to 8 August 2003*

### 2770th MEETING

*Monday, 7 July 2003, at 3.05 p.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

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

[Agenda item 2]

1. The CHAIR welcomed the members of the Commission to the second part of the fifty-fifth session and announced that he would suspend the meeting to enable the Enlarged Bureau to consider a revised programme of work for the first two weeks of the second part of the session.

*The meeting was suspended at 3.10 p.m. and resumed at 3.40 p.m.*

2. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the revised programme of work.

*It was so decided.*

#### Filling of casual vacancies in the Commission (article 11 of the statute) (*concluded*)\* (A/CN.4/527 and Add.1–3)

[Agenda item 1]

3. The CHAIR announced that the Commission was required to fill a casual vacancy that had arisen following

the resignation of Mr. Robert Rosenstock. The curriculum vitae of the candidate for the vacancy was contained in document A/CN.4/527/Add.3. He would suspend the meeting to enable the members of the Commission to hold informal consultations.

*The meeting was suspended at 3.45 p.m. and resumed at 4.20 p.m.*

4. The CHAIR announced that the Commission had elected Mr. Michael J. Matheson to fill the casual vacancy. On behalf of the Commission, he would congratulate him on his election and invite him to join the Commission.

#### Unilateral acts of States (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

##### SIXTH REPORT OF THE SPECIAL RAPPORTEUR

5. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing the sixth report on unilateral acts of States (A/CN.4/534), said that it dealt in a very preliminary and general manner with one type of unilateral act, recognition, with special emphasis on recognition of States, as some members of the Commission and some representatives in the Sixth Committee had suggested in 2002. He had tried to reflect the very interesting comments made on that question, especially by the Working Group established to consider it. It had been decided at that time to take time out to request Governments to transmit information on their practice in that regard and to give more in-depth consideration to the way the Commission's work was to proceed.

6. The question was not only complex but also full of grey areas, since it could not be said that there was a theory of unilateral acts. To define the nature of a unilateral legal act, *stricto sensu*, and particularly the applicable rules, was not easy, but that in no way meant that the act did not exist as such and did not produce legal effects. There was no doubt that, as ICJ indicated in its decisions in the *Nuclear Tests* cases, declarations that took the form of unilateral acts could have the effect of creating legal obligations, which was the premise forming the basis of the Commission's work.

\* Resumed from the 2751st meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

7. The Commission had said at its forty-ninth session, in 1997, and had repeated in the conclusions adopted by the Working Group,<sup>2</sup> that it was possible to engage in codification and progressive development. The topic was ripe for that purpose, but, despite the extensive writings on it, which were nevertheless not homogeneous, and despite the very relevant but not abundant case law, it remained highly controversial. It might be possible to consider whether or not certain rules could be codified on the formulation of an act, concentrating solely on certain aspects of a general nature, but a more rigid codification effort would be more difficult. The codification of the law of treaties had proved comparatively easier because treaties had a much clearer foundation in practice, the doctrine was much more abundant and coherent, and there were many legal decisions and arbitral awards. The law of treaties was much more structured and comprehensive than any other institution, but that was certainly not true of unilateral acts, since their still undefined nature, foundation and legal effects made them more difficult to study. The Commission's work was sometimes easier when it was a matter of choosing one option among several equally valid ones. Such was the case, for example, with diplomatic protection, where there were much clearer rules than for unilateral acts, on which State practice had not yet been sufficiently analysed. However, while government opinions had not been numerous, they were fundamental to the consideration of the topic. The fact that practice had not been sufficiently analysed was one of the major obstacles he had encountered. Unilateral acts were formulated frequently, as could be seen every day, but there was no certainty as to their nature. Without knowing the views of States, it was not easy to determine what the nature of the act was, whether the State that had formulated it had the intention of acquiring legal obligations, and whether it considered that the act was binding on it or that it was simply a policy statement, the result of diplomatic practice.

8. It was difficult to tell what final form the Commission's work might take. In that connection, he recalled the very important statements made in the Sixth Committee. If it proved impossible to draft general or specific rules on unilateral acts, consideration might be given to the possibility of preparing guidelines based on general principles that would enable States to act and that would provide practice on the basis of which work of codification and progressive development could be carried out. Whatever the final product, he believed that rules applicable to unilateral acts in general could be established, based on the definition referred two years earlier to the Drafting Committee. That definition was intended to reproduce the principle that the State could bind itself through a unilateral expression of its will, it naturally being understood that, by such an act, the State could not impose obligations on other States or even on the other subjects of law that were the addressees of the act, something which was known to be a widely established principle of international law.

9. Certain principles of a general nature which were applicable to all unilateral acts, regardless of their content, could be stated. First, a unilateral act in general and an act of recognition in particular must be formulated by

persons authorized to do so—in other words, by persons authorized to act at the international level and to bind the State they represented. Such authority was determined by internal law. Moreover, the act must be freely expressed, and that made its validity subject to various conditions, such as an examination of the causes of invalidity, some of which were related to the expression of will, the lawfulness of the purpose of the act and its compatibility with the peremptory norms of international law. A unilateral act was legally binding if it met those conditions.

10. The binding nature of the act might be based on a specific rule, *acta sunt servanda*, taken from the *pacta sunt servanda* rule that governed the law of treaties. It might also be stated as a general principle that a unilateral act was binding on a State from the moment it was formulated or the moment specified in the statement by which the State expressed its will. The act would then be binding. Similarly, the act could not be modified, suspended or revoked unilaterally or arbitrarily by its author. While the act was unilateral at the moment of its formulation, it established a bilateral relationship between its author and the addressee, in which it created an expectation, thereby limiting the possibility of modifying, suspending or revoking the act in an equally unilateral way. The State accordingly did not have the arbitrary power to modify, suspend or revoke its unilateral act in the same way. Owing to the very nature of unilateral acts, their interpretation must be based on a restrictive criterion, and great caution must be exercised in respect of a unilateral statement with no specific addressee.

11. The aim of the sixth report was to bring the definition and examination of a specific material act—recognition—into line with the Commission's work on unilateral acts in general. The introduction dealt with the viability of the topic, possible forms for the final product of work on it and the structure of the report. Chapter I contained a definition of an act of recognition. It examined acts and conduct that should be excluded, reaching the conclusion that the unilateral act of recognition with which the Commission was concerned was expressly formulated, with a precise intention. A distinction was then drawn between the institution of recognition and a unilateral act of recognition. Chapter II dealt with the conditions for the validity of such an act, still in relation to unilateral acts in general. Chapter III examined the legal effects of recognition, which were expressed by their opposability, and re-examined its legal basis, namely, the introduction of a specific rule, *acta sunt servanda*. Finally, chapter IV dealt with the possibility of modifying, revoking or suspending the temporal and spatial application of acts of recognition. Some consideration was also given to causes external to an act which could bring about its termination—the disappearance of the object of the act or a change of circumstances.

12. Chapter I dealt with the various forms of recognition and ended with an outline definition that could be aligned with the draft definition of unilateral acts in general. He attempted to show that the draft definition considered by the Commission could encompass the category of specific acts constituted by recognition. Before consideration of certain forms of recognition other than the unilateral act *sensu stricto*, unilateral acts would need to be characterized, but that would not be easy. The recognition of a *de*

<sup>2</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 64, paras. 194 and 196.

*facto* or *de jure* situation or of a legal claim could, in its turn, involve waiver, or indeed promise, which made it difficult to characterize. What was most important was to determine whether it was a unilateral act in the sense understood by the Commission, regardless of its characterization, namely, a unilateral expression of will formulated with the intention of producing certain legal effects.

13. The institution of recognition did not always coincide with the unilateral act of recognition. A State could recognize a situation or a legal claim by means of a whole range of acts or conduct. No list of acts of recognition seemed to be in existence, but there were undoubtedly acts of recognition that could be identified as such, for instance, in relation to the recognition of States or Governments or of belligerency, neutrality, delimitation of borders or sovereignty. A State could recognize a *de facto* or *de jure* situation or a legal claim implicitly or explicitly, for example. The conclusion of an agreement with an entity that it had not recognized as a State constituted implicit recognition, something that would certainly have legal effects. The State formulating the act recognized the status of the entity or Government with which it had concluded the agreement, and that established a legal relationship between the author State and the addressee. The same applied to recognition of the territorial status or claim to sovereignty of a State by an explicit act which was distinct from an express act of recognition. In the Special Rapporteur's view, such acts, which should be considered to be recognition, could be excluded from the study of unilateral acts which the Commission was seeking to define.

14. A State might also recognize a situation or a claim through conduct such as silence. Such silence could take several different forms: approval, disagreement or simply indifference. International courts had several times had to rule on such conduct interpreted as recognition, for example, in the *Temple of Preah Vihear* or *Right of Passage over Indian Territory* cases. Silence signified an absence of protest, which could mean that a legal claim was recognized or accepted. Once again, a link between various unilateral acts and conduct—silence, protest or acquiescence—could be discerned. Even though it produced legal effects, however, recognition arising out of silence should be excluded from unilateral acts proper, as understood by the Commission.

15. Recognition could also be based on a treaty, and in that regard the Special Rapporteur referred the Commission to paragraph 29 of the report. In his view, such recognition should also be excluded from the unilateral acts to be considered by the Commission. As was briefly outlined in paragraphs 30 *et seq.*, acts of recognition expressed through a United Nations resolution should be excluded as well. It was worth emphasizing that, over the past years, the practice of a vote in favour of admission of a State to an international organization had developed into a form of recognition. That applied, for example, in the case of Spain with regard to the former Yugoslav Republic of Macedonia. Acts emanating from international organizations, although they could signify recognition and have political and legal force, should also be eliminated from the scope of the study. The matter was not discussed in the report, but recognition could also arise out of a statement made in the context of judicial proceedings, and in that regard the Special Rapporteur recalled the dissenting

opinion of Judge Wellington Koo in the *South West Africa* cases in 1966.

16. Chapter I also raised some questions that were crucial to the adoption of a draft definition of a unilateral act of recognition. The questions related to the criteria for the formulation of such an act and its discretionary nature, a feature that seemed quite specific to the act of recognition but could also characterize other acts, such as waiver, protest or promise. Its discretionary nature was clearly acceptable as an appropriate characteristic of the act of recognition of a State, given its more political nature.

17. There were no criteria governing the formulation of an act of recognition. The recognition of States, in particular, was not based on any consistent criteria, although the requirements of international law had to be met with regard to determining that recognition had occurred. Recognition of a state of belligerency, insurgency or neutrality also seemed not to be subject to specific criteria, and the same seemed to apply to situations of a territorial nature. Such an absence of criteria was linked with the discretionary nature of the act. Nothing obliged a State to recognize or not recognize a given situation or legal claim. Under international law, there was no general rule imposing obligations in that context, as most of the literature acknowledged. International practice in the matter was clear, as was shown by Opinion No. 10 of the Arbitration Commission of the Conference for Peace in Yugoslavia, paragraph 4 of which stated that recognition was a discretionary act that other States might perform when they chose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law.<sup>3</sup>

18. Any consideration of an act of recognition involved the consideration, even if only cursory, of non-recognition, which could also be an express act and could thus on occasion be confused with protest. The discretionary nature of non-recognition could be approached in a different way. A State could—as was recognized in various international texts, such as the Anti-War Treaty (Non-Aggression and Conciliation) (the so-called Saavedra Lamas treaty), the Charter of the Organization of American States and various General Assembly and Security Council resolutions—be prohibited from recognizing *de facto* or *de jure* situations, such as situations arising out of violations of international law, including territorial settlements obtained by non-peaceful means or by occupation. The State was thus not obliged to take action or to formulate non-recognition, but was simply not permitted to recognize such situations. The discretionary criterion that applied to the act of recognition seemed, however, to apply equally to the act of non-recognition. The latter could thus be a unilateral and fully intentional expression of will, which made it similar to the act of recognition and, to a certain extent, protest. The declaration by the Minister of State of Cyprus on 3 October 2002 on the non-recognition of the Turkish Republic of North Cyprus fell into that category, for example. In practice, the author State often explained why it did not recognize a situation; the United Kingdom's opinion on Taiwan was a good example of such practice.

<sup>3</sup> A/48/874 – S/1994/189, annex; see also *ILM*, vol. 31, no. 6 (November 1992), p. 1526.



19. Paragraphs 52 *et seq.* of the report also discussed the general possibility that the act of recognition, besides being declaratory, might be hedged around with conditions, something which might appear inconsistent with its unilateral nature. In that context, the European Community Declaration on Yugoslavia<sup>4</sup> of 16 December 1991 had been less an act of recognition as such than a directive establishing the rules for declarations by European States on the recognition of States emerging from the former Yugoslavia. To be recognized, such States were obliged, as a first step, to adopt the appropriate constitutional and political measures to guarantee that, for example, they had no territorial claims in respect of neighbouring States. As paragraph 57 of the report stated, however, the Declaration was not in itself an act of recognition. The power of recognition had not been transferred by States to the European Community. Although based on the Community's Declaration, recognition was ultimately formulated through individual acts. A unilateral act of recognition could be formulated individually, collectively or even in a concerted manner, but, as in the case of the unilateral act in general, that did not affect its unilateral nature.

20. The intention of the author State was an important element, since, as an examination of declarations of recognition by States showed, the legal nature of the act lay in the expression of intent to recognize and in the creation of an expectation. In its judgments in the *Nuclear Tests* cases, ICJ had ruled that, when the State making the declaration considered itself bound, that intention gave its position the nature of a legal commitment.

21. As to form, an act of recognition could be formulated in writing or orally, through a diplomatic note or any other declaration expressing the intention of the State. In the non-formalist system of public international law, the form of the act of recognition was in itself of no importance. That was as true of an act of recognition as of unilateral acts in general. As ICJ had stated in the *Temple of Preah Vihear* case, where the law did not provide for any particular form, the parties were free to choose the form most convenient to them, as long as their intentions were clear. After examining, by way of reference, the various acts and conduct by which States recognized a *de facto* or *de jure* situation or a legal claim, the Special Rapporteur had concluded that the best approach was to retain the act of recognition expressly formulated for that purpose, but to link it with the draft definition of unilateral acts considered by the Commission and referred to the Drafting Committee. He had therefore proposed, in paragraph 67 of the report, the following definition of the act of recognition:

“A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself”.

22. That suggested definition, which was based on the general opinion expressed in the literature on the topic,

contained elements that resembled, to a certain extent, the draft definition that the Drafting Committee would consider during the current session: the formal, unilateral nature of the act, even if collective in origin; and the valid expression of will, formulated by a subject entitled to do so—a State, in the case in question—and by a person authorized in that regard, having a lawful purpose that did not contravene any rule of *jus cogens*, with the intention of producing legal effects, which generally meant the opposability accepted by the author State from the time of its declaration or from a time indicated in the declaration.

23. Chapter II of the report dealt briefly with the validity of the unilateral act of recognition by following closely the precedent set with regard to the unilateral act in general: the capacity of the State and of persons; the expression of will of the addressee(s); the lawful object; and, more specifically, conformity with peremptory norms of international law.

24. Chapter III examined the question of the legal effects of the act of recognition, in particular, and the basis for its binding nature, referring once again to the precedent of the unilateral act in general. He pointed out first of all that, according to most legal writers, the act of recognition was declarative and not constitutive. In particular, the declarative nature of the act of recognition of a State was provided for in various international texts, including the Convention on Rights and Duties of States, which had been adopted at the Seventh International Conference of American States, held in Montevideo in December 1933, and which stated that the political existence of the State was independent of recognition by other States. That idea had subsequently been taken up by the Institute of International Law, which considered that recognition was merely the acknowledgement of the existence of the State. The declarative nature was also reaffirmed by articles 13 and 14 of the Charter of the Organization of American States and by the arbitral commission of the European Community.

25. An interesting question was raised, albeit in a different manner, by the act of non-recognition, which, irrespective of whether it was express or tacit, also had important legal implications. The non-recognition of an entity as a State affected the exercise of its rights under international law, such as, for example, rights deriving from the law concerning State immunity and the impossibility of being admitted to an international organization. However, the effects of non-recognition were basically a question between the non-recognizing State and the entity which was the object of non-recognition and which could be recognized by other States.

26. As for the legal effects of the act of recognition, it was important that the recognizing State should conduct itself in accordance with its statement, as in the case of estoppel. From the moment the statement had been made or from the time specified therein, the State or other addressee could request the author State to act in accordance with its statement. The act was therefore opposable to its author from that moment on.

27. The binding nature of the unilateral act in general and of recognition in particular must be justified, whence the adoption of a rule based on *pacta sunt servanda* and

<sup>4</sup> See *Bulletin of the European Communities*, vol. 24, no. 12 (1991), pp. 119–120.

called *acta sunt servanda*. Legal certainty must also prevail in the context of unilateral acts. As ICJ had recalled in the *Nuclear Tests* cases, mutual confidence was an inherent condition of international cooperation. However, the binding nature hinged on good faith, and the Court had made good faith one of the basic principles governing the establishment or fulfilment of legal obligations, regardless of their source.

28. Chapter IV dealt in general with the application of the act of recognition with a view to drawing conclusions about the possibility whether and conditions under which a State might revoke a unilateral act. An act of recognition was opposable to the author State from the time of its formulation or the time indicated in the declaration of recognition itself, and that was to some extent equivalent to the entry into force of a treaty. Its acceptance was not necessary: the fact that the act was enough in itself had been confirmed by the international courts. The author State assumed a legal obligation which was opposable to it, on the understanding that it could not impose obligations on third parties without their consent. Chapter IV also referred briefly to the spatial and temporal application of the unilateral act in the case of the recognition of States in particular. Such matters, which were dealt with in detail in the law of treaties, particularly in the 1969 Vienna Convention, should be clarified in connection with the topic under consideration.

29. At the end of the report, he also considered the modification, suspension and revocation of unilateral acts, namely whether States could modify, suspend or revoke acts unilaterally, in the same way as they had formulated them. The question of the termination of acts was very important, and the general principle could be established that the author could not terminate the act unilaterally unless that possibility was provided for in the act or there had been some fundamental change in circumstances, as was stipulated, for instance, in the law of treaties. The revocation of the act would thus depend on the conduct and attitude of the addressee, which once again was similar to estoppel. In the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ had considered that, since the acceptance of the Court's jurisdiction was undeniably unilateral in form, the unilateral nature of a declaration did not imply that the declaring State could modify the scope and contents of the declaration. Further examples were those of the declaration by the Government of Guatemala of 14 August 1991 officially recognizing the right of Belize to self-determination<sup>5</sup> and the declaration of 11 September 1991 establishing diplomatic relations with that country. Guatemala's Constitutional Court had reviewed the declarations to see whether recognition was definitive and whether an official communication and declaration by the President of the Republic were valid and produced legal effects. On 3 November 1992, the Court had issued a ruling affirming the validity of those declarations on the grounds that the act of recognition was the result of a change in the dispute between the two countries following the independence of Belize, although that could not be considered as a definitive measure under the Constitution.<sup>6</sup> A minority in the Court, including the President,

had questioned the validity of the acts, stressing that in accordance with the Constitution of Guatemala they should have been submitted to the Congress for approval. Three days after the ruling was issued, the President of Guatemala had officially announced that the recognition was not definitive and had reiterated his willingness to abide by the Constitution by putting any definitive agreement on the matter to a referendum. Several days later, the Congress had endorsed the agreement, thereby complying with constitutional requirements. That was an interesting case from the viewpoint of the validity of a unilateral act relating to a matter subject to legislative scrutiny and the possibility of the unilateral revocation of an act by the author State.

30. In conclusion, he said that the sixth report was general in nature in keeping with the Working Group's decision to have a break in its work. Further consideration was required of how the Commission should complete its work on the topic. It was worthwhile establishing some general principles, and relevant practice should also be studied. During the International Law Seminar, which was now getting under way, a group of participants under his supervision and that of Ms. Isabel Torres Cazorla from the University of Malaga would conduct an in-depth study of such practice. The Drafting Committee already had several draft texts before it, and the Working Group would have the task of deciding how the topic should be studied in the future. Perhaps there could be an exchange of views on other unilateral acts such as promise, whereby the State also assumed unilateral obligations on which common rules and principles could be drafted, even though it was difficult to characterize unilateral acts definitively. The Commission's work might be based not on the sixth report but on the relationship between an act of recognition in its various forms and in relation to different objects, and unilateral acts in general, which the Commission had been studying for several years. As it had not been possible to obtain outside assistance for a systematic study, compilation and presentation of State practice in respect of unilateral acts, he suggested that the International Law Seminar might first conduct some bibliographical research, the results of which would be presented at the end of the session. Thereafter, work on the topic would continue in cooperation with the University of Malaga and would be the subject of a document to be submitted to the Commission in 2004.

31. Mr. PELLET said that the worst criticism that could be levelled at the Special Rapporteur's sixth report was that it did not indicate where it was supposed to lead the Commission. Personally, he had always championed the topic of unilateral acts of States, and so the Special Rapporteur, who had devoted most of the introduction of his report to a justification of the very existence of the topic, had had no difficulty in convincing him that the consideration of unilateral acts might be of great practical value, since it was advisable for States to know when the unilateral expression of their will or intentions would, quite apart from any treaty-based link, constitute a commitment on their part. Intellectually, moreover, the topic might be fascinating if a study of it could explain the alchemy whereby a sovereign State trapped itself by expressing its will or how

<sup>5</sup> A/46/368 – S/29953.

<sup>6</sup> See J. A. González Vega, "El reconocimiento de Belice ante la Corte de Constitucionalidad de Guatemala: la sentencia de 3 de noviembre

de 1992", *Revista Española de Derecho Internacional*, vol. 45, no. 2 (July–December 1993), pp. 580–585.

it could derive legal obligations from its sovereignty, even when it was not necessarily dealing with another State. That type of question had to be asked in order to build a conceptual framework.

32. The Special Rapporteur was much less persuasive when he went from defending his topic to defending his choice of method or, rather, the new method followed in his latest report, which plainly marked a significant methodological turning point compared with the work done so far. A move seemed to have been made away from an overall approach—which took the law of treaties or the law of State responsibility as its model and tried to give an overview of the law of unilateral acts in order to identify general rules—to a case-by-case approach, although the Special Rapporteur's oral introduction had gone some way towards lessening that impression. While he personally had not been one of the members who had advocated the new approach, he would have no objection to it in theory, provided that he could see what the purpose of a case-by-case study was. The Special Rapporteur described the general legal rules applicable to recognition, but he did not conclude with a summing up of the lessons he had learned from that description, with draft guidelines, which would be fairly pointless, despite what the Special Rapporteur explained in paragraph 8, or with draft articles, a draft resolution or a draft recommendation, even though he had, during his oral introduction, appeared to believe that he had submitted new drafting proposals for the definition of unilateral acts. That was all the more puzzling because it was hard to see how those proposals, which were scattered throughout the report, fitted in with the draft definition already referred to the Drafting Committee.

33. He himself was not radically opposed to a case-by-case approach, provided that three conditions were met. First, the Commission had to be sure that it was not giving up on its ultimate goal, which should still be a set of draft articles accompanied by commentaries, but not necessarily a preliminary draft convention. He would be in favour of the topic of unilateral acts of States only if the aim of the study was to prepare comprehensive draft articles containing general rules.

34. Second, case studies such as those the Special Rapporteur had devoted to recognition in his sixth report should be only preparatory studies, or, as had been said in the Sixth Committee by the representative of Greece (whom the Special Rapporteur quoted in paragraph 11 of his report), they should merely represent a first stage making it easier to proceed to the identification of the general rules that would be applicable to unilateral acts of States.<sup>7</sup>

35. However, the third condition was that each case study should help pave the way for the achievement of the final objective. The report under consideration did not seem to do that, for the Special Rapporteur drew no conclusions from his study of recognition. At the end of his report, he could have been expected to deduce general rules, and it would have been interesting to see how he made the transition from the specific to the general. He had seemed to

suggest, during his oral introduction, that the definition of recognition was the same as that of unilateral acts. In his own personal opinion, that was not true.

36. The question was how conclusions of that kind could be drawn from the case studies towards which the Special Rapporteur seemed to be moving. The first step would be to prepare a two-way table in which such information could be represented. The rows of the table would show the various categories of unilateral acts according to their purpose: recognition, promise, waiver and so on. That did not give rise to any particular problems, although in practice it was far from obvious, as could be seen from the difficulties mentioned by the Special Rapporteur in paragraph 21 of his report in connection with the Ihlen declaration,<sup>8</sup> named after the Norwegian Minister for Foreign Affairs. The Special Rapporteur rightly held that the declaration could be seen as a promise, a waiver or recognition, but that appeared to contradict what was said in paragraph 22 of the report, namely, that an act of recognition was not easily confused with a waiver or a promise. Unfortunately such confusion was possible and even frequent, hence the need to find distinguishing criteria. If the consideration of the topic had made it possible to dispel such uncertainty, it would have been worthwhile.

37. The columns of the table should list the various legal issues which were raised by unilateral acts in general and which should be given in-depth consideration: What was/were the criterion/criteria making it possible to tell the difference between the various unilateral acts or categories of unilateral acts? Who was entitled to enter into a commitment on behalf of a State? It was far from certain that legal authority to recognize was identical to legal authority to promise, or that legal authority to recognize a State was the same as legal authority to recognize the applicability of a rule. It would be necessary to find out on what conditions the expression of the will of a State to be bound was valid and what was/were the effect(s) of that expression of the will of a State. It was probable that the effects differed considerably from one category of act to another. Could the act in question be withdrawn, and on what conditions? The Special Rapporteur obviously had those questions in mind, and he touched on them in some places in his report, but more careful thought should be given to their formulation in order to arrive at an interpretation grid on which everyone could agree. A working group might be set up to devise a table of that kind, a task that was simple only at first sight, for the success of the study as a whole would depend on the accuracy of the headings. Nothing could be forgotten, but at the same time it was necessary to be as clear and precise as possible. Given the reason for studying the subject, once the row and column headings had been defined, the boxes would have to be filled in so as to determine the common features of the various categories of acts, rather than the features that made them different. As soon as those common features had been found, it should be relatively easy to identify the general rules which applied to unilateral acts and would form the actual substance of the draft articles.

38. The CHAIR announced that the Drafting Committee for unilateral acts was composed of: Mr. Kateka

<sup>7</sup> See *Official Records of the General Assembly, Fifty-seventh session, Sixth Committee, 24th meeting (A/C.6/57/SR.24)*, and corrigendum, para. 74.

<sup>8</sup> See pp. 69 and 70 of the PCIJ judgment in the *Eastern Greenland* case.



(Chair), Mr. Rodríguez Cedeño (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Mr. Economides, Ms. Escameia, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Ms. Xue, Mr. Yamada and, *ex officio*, Mr. Mansfield (Rapporteur).

*The meeting rose at 6 p.m.*

## 2771st MEETING

*Tuesday, 8 July 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET, continuing his comments from the previous meeting, recalled that he had expressed doubts about the methodology used by the Special Rapporteur and wondered how the Special Rapporteur could tie his monographic studies in with the ultimate objective of the exercise, namely the preparation of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will. For his own part, he had suggested the use of a detailed table with, horizontally, the various categories of unilateral acts and, vertically, the legal issues that needed to be addressed. If common elements were found in the various categories, then general rules applying to unilateral acts could be developed as the very substance of the draft articles.

2. The sixth report (A/CN.4/534) was an attempt to go in that direction, but it was not sufficiently rigorous. Horizontally, the category of recognition was proposed, but the question was whether there was really a single category of unilateral acts, a homogeneous unit that could be called recognition. He thought not. The category must be more clearly delineated, something the report failed to do.

3. The Special Rapporteur referred frequently to concepts that he rightly described as similar to recognition, such as acquiescence and acceptance. The three were by no means equivalent, however. Plainly, the horizontal categories had to be further refined. In addition, it was by no means certain that acts of non-recognition must be addressed simultaneously with recognition. The subject deserved further consideration, but, *a priori*, non-recognition seemed to be more closely related to a quite different category, namely protest.

4. The Special Rapporteur devoted much attention to the classic issue of whether recognition of States was a declarative or constitutive act, rightly concluding that it was purely declarative. But what was true of recognition of States was not necessarily true of recognition of other entities. The Special Rapporteur had given an interesting analysis at the previous meeting of Guatemala's statement in 1991 in which it had recognized that Belize had the right to self-determination.<sup>2</sup> In fact, however, that had been an acknowledgement of the existence of a legal rule, not recognition in the legal sense of the term. Acknowledgement itself could probably not be ranked as recognition. If ever it could, then Guatemala's statement had been declarative, not constitutive.

5. In paragraph 90 of his report, the Special Rapporteur wrote that in some cases, for instance the *Eastern Greenland* case, the constitutive theory of recognition had been argued. True, but there was nothing surprising about that, since the State was a fact and had an existence in international law regardless of how it was viewed. On the other hand, extension of a State's territorial jurisdiction, which had been at issue in the *Eastern Greenland* case, raised an entirely different question: it flowed, or could flow, from recognition by other States, as was demonstrated in the *Eastern Greenland* and *Temple of Preah Vihear* cases, but there, recognition of territorial jurisdiction did not have, and could not have, the same effects as recognition of a State.

6. All of this implied that totally different concepts could not be lumped together, as he feared the Special Rapporteur had a tendency to do, and that even if recognition was an individual category, it produced different effects depending on its object. Those effects varied according to parameters other than the object as well, one of them being the addressee's reaction. The addressee could make use of recognition, and that very proposition—that use could be made of a unilateral act—was the primary foundation for the notion of the unilateral act, as ICJ had recalled in the all-too-famous *Nuclear Tests* cases.

7. If the addressee said nothing and did nothing, however, the option of making use of a unilateral act was merely a virtual one, a possibility, and the State that had given the recognition was much freer to go back on that act than if the beneficiary had used it as the basis for taking certain measures that it would otherwise not have taken. In such cases, the question of estoppel came up, but that did not mean the act was bilateralized, as the Special Rapporteur wrongly suggested in paragraph 119 of his report. The act remained unilateral, but the will of the State was ensnared more firmly than when there was

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2770th meeting, footnote 5.

no reaction. In the international order, every expression of will by a State—whether by a treaty, a unilateral act or other means—was an ensnarement of that will. Yet the reaction of the addressee was probably also a unilateral act, and that changed the parameters as well as the effects of the act. Even if the addressee of the act of recognition remained passive, the author of the act could reverse it, but the whole situation changed, depending on the object of recognition. Recognition of States, however, was a poor choice for the Special Rapporteur to dwell on, as it involved too many specific problems to be used as a basis for drawing conclusions.

8. It was surprising that, in discussing recognition of States, the Special Rapporteur had made no reference whatsoever to the classic distinction between *de jure* and *de facto* recognition. It was an interesting distinction in that it posited various levels of the State's capacity to go back on its recognition, *de jure* being definitive, whereas *de facto* was conditional. When the Special Rapporteur affirmed in paragraph 52 of the report that recognition could not be conditional, he was following Strupp,<sup>3</sup> whose arguments were proved wrong later in the report.

9. He questioned the wisdom of focusing on recognition of States, which was a unique institution that had been extensively studied and which produced by virtue of its object—the State—effects too specific to permit generalization. It would have been better to look at other objects of recognition and to use recognition of States as a counterpoint for comparison of other kinds of recognition. He had expressed the fear that Mr. Sreenivasa Rao might become the García Amador of liability, and now Mr. Rodríguez Cedeño seemed to be courting the same danger with regard to unilateral acts. Mr. García Amador, the first, and talented, Special Rapporteur on State responsibility, had never discovered the angle from which to come to grips with the topic. Similarly, Mr. Rodríguez Cedeño produced stimulating reports but failed to provide any proposals for future action. Where was the Commission going with the topic?

10. Perhaps the cumulative effect of the monograph category-by-category approach taken in the sixth report would serve as a trigger, as the brilliant ideas of Special Rapporteur Ago had in the context of State responsibility.

11. Mr. MELESCANU said he agreed with Mr. Pellet that the Commission had to give serious thought to how it would proceed with the topic. The subject was a difficult and delicate one, as important to international law as reservations to treaties, aiming as it did at the codification of one of the fundamental sources of public international law. It was not surprising, then, that the Special Rapporteur was running into so much difficulty.

12. As to the table suggested by Mr. Pellet, the Commission could certainly try to work on individual categories, but it should do so only with a specific purpose: to derive from them rules that applied generally to unilateral acts. What were the common elements in the various unilat-

eral acts? For example, on the basis of the very interesting distinction between *de facto* and *de jure* recognition one could draw conclusions about the legal effects of those two categories of recognition. Another possible question to address was whether the establishment of diplomatic relations should be deemed to constitute implicit recognition. It was certainly a solemn legal act, and even if the State had not made a formal declaration of *de jure* recognition, it had established a legal situation whose legal effects could hardly be denied. Finally, recognition of States was an act in which political considerations played a very important role, even to the extent of being used as a means of exerting political pressure.

13. Mr. PAMBOU-TCHIVOUNDA said he was still undecided about a question raised by Mr. Pellet: namely, when a State had taken a certain stance, whether through recognition or protest, was it ensnared to such an extent that it could not go back to its initial position? Mr. Pellet had given the example of an addressee who reacted to an act of recognition and had suggested that, in such circumstances, the author of the act could not revert so easily to its original position. He had doubts about that, however, and about the extent to which the *Eastern Greenland* case could be generalized to provide a legal basis for prohibiting an author of an act from returning to its original position.

14. As for *de facto* recognition, while the establishment of diplomatic relations could be considered equivalent to recognition, nothing prevented a State from suspending diplomatic relations unilaterally. In such cases, did the act of recognition come to an end as well?

15. With respect to Mr. Pellet's comments on the case of Guatemala and Belize, it was somewhat difficult to understand why a State should adopt such a weak, neutral position. Had Guatemala's unilateral act *vis-à-vis* Belize been intended solely for the purposes of acknowledging the right to self-determination? Surely there must have been more to it than that?

16. Mr. ECONOMIDES said that preparing an analytical table on unilateral acts as a starting point for discussion would entail a great deal of effort, possibly with rather disappointing results. The question at issue was exactly which unilateral acts the Commission should study. The original criterion established by the Commission some years ago had been to consider all unilateral acts that created international obligations *vis-à-vis* another State or States, the international community or subjects of international law. The Commission would greatly simplify its task if it examined the various categories of acts on the basis of that criterion. The objective was not the study of unilateral acts *per se*, but their study as a source of international law.

17. Mr. DAOUDI endorsed Mr. Pellet's remarks regarding the table. It was not solely the responsibility of the Special Rapporteur to find a way of furthering the progress of work on the topic. The Commission as a whole must help him find a suitable approach for developing a set of rules on unilateral acts in public international law. Only through research could the Commission establish whether such general rules existed. The purpose of the table was to find elements in common among the different categories of acts. However, the crux of the matter lay in defining

<sup>3</sup> K. Strupp, *Grundzüge des positiven Völkerrechts*, 5th ed. (Bonn/Cologne, Röhrscheid, 1932), quoted by J. F. Williams in "La doctrine de la reconnaissance en droit international et ses développements récents", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 44 (1933), p. 210.

the *instrumentum* or procedure whereby an act or declaration of will gave rise to State responsibility. That could not be done by studying the contents of individual acts or categories of acts. A treaty was the product of the will of two parties, whereas a unilateral act was a declaration by a subject of international law that gave rise to international obligations. The subject undertook those obligations of his own will, not the will of others. As to the point raised by Mr. Pambou-Tchivounda, in the case of an international legal act whereby a subject of international law undertook certain obligations of his own will, revocation entailed international responsibility, for without the latter there would be no legal act.

18. Mr. PELLET said that the case of Guatemala and Belize was far more complex than his earlier remarks had implied. The Special Rapporteur had referred to Guatemala's recognition of the right to self-determination, whereas in his view it was merely an acknowledgement. He did not agree with Mr. Pambou-Tchivounda that such a position was neutral or insipid. A State's retraction of a statement that was in effect a legal absurdity was of significance, since it allowed the State in question to re-enter international legality. In the report the Special Rapporteur applied a very broad concept of recognition. By way of example, when a State surrendered at the end of a war, was that tantamount to recognition that the country had lost the war? He did not believe so, but the concept of recognition given in the report implied otherwise, and that irked him.

19. Mr. Melescanu had said that the subject of unilateral acts was as important as that of treaties. That was not true in quantitative terms, since there were far fewer unilateral acts. However, such acts were certainly more mysterious since they involved only one sovereign State. Mr. Pambou-Tchivounda was justifiably intrigued by the problem of retraction. It must be possible for a State to undo what it had done under certain circumstances. One example was the border dispute between Burkina Faso and Mali prompted by a statement by the Head of State effectively accepting that Burkina Faso should extend its borders halfway into Mali's territory. The relevant regional African commission having decided that Mali was in the wrong, the lawyers acting for Burkina Faso, including himself, had attempted to ensnare Mali by pointing out that since the Head of State had made such a statement he should be taken at his word. ICJ, however, in its judgment in the *Frontier Dispute* (Burkina Faso/Republic of Mali) case, recognizing that the Head of State had spoken out of turn, had decided that the circumstances of the case should be taken into account. It had, of course, been the right decision, but there was no denying that the Head of State had said what he had said. The example illustrated that everything hinged on circumstances, and there were indeed circumstances in which States were ensnared by their own will and could not always find a way out. States should be reminded that they must not do exactly as they pleased. It was one of the objectives of the topic under study, the question at issue being exactly when States should not do so.

20. He did not concur with Mr. Daoudi: it was far more difficult to find an *instrumentum* for a unilateral act than for a treaty. On the other hand, he was more persuaded by Mr. Economides' remarks that it was important to know when States wished to undertake obligations. The exist-

ence of a formal *instrumentum* would help, but it was not necessary.

21. As to the comments on the establishment and suspension of diplomatic relations, he would stress that *de facto* recognition was not the same as implicit recognition. *De facto* recognition was provisional, and there was no binding legal act involved, whereas under a unilateral act a party signified its willingness to undertake certain obligations. The establishment of diplomatic relations might be considered as recognition equivalent to a legal act, but no more than that. Hence he did not understand why the Special Rapporteur kept reverting to the subject. Moreover, when diplomatic relations had been established, which implied recognition, and were subsequently suspended, the recognition could not be retracted. It was an interesting point, since it showed that States could not make one statement and then counter it by an act to the contrary. However, it was an interesting point for the sake of argument alone, and it did not fall within the scope of the Commission's study.

22. He was not wedded to the idea of a table. Nonetheless, it was important for the Commission to refrain from issuing different instructions to the Special Rapporteur every year. Basically, he was not in favour of monographs, unlike members of the Working Group. However, if monographs were going to be used, they should be prepared in accordance with a certain methodology. What really bothered him was the prospect of the Drafting Committee's starting its work that afternoon, when it was clear from the debate that it was premature to do so.

23. Mr. GAJA said that the Special Rapporteur had attempted to comply with the Commission's request to provide an analysis of the main unilateral acts before adopting some general conclusions. As a member of the Working Group, he had been in favour of such an approach, which was intended to examine specific and common elements of the acts in question. However, the sixth report had not yielded the desired results. The analysis should have focused on relevant State practice for each unilateral act: for instance, with regard to recognition, its legal effects, the requirements for its validity and questions such as revocability and termination. State practice should have been assessed so as to decide whether it reflected only specific elements or some more general principles relating to unilateral acts.

24. The main aspects of recognition were dealt with in the report, but on the basis of theoretical and abstract propositions. Moreover, the examination of State practice was very limited. While he welcomed the initiative referred to by the Special Rapporteur for collecting information on State practice, it was regrettable that the Commission would have to take decisions without such material to hand at the present session.

25. The analysis of State practice would not provide all the answers, particularly since distinctions between the various acts were not clear-cut. However, it would have been useful for discussion on whether recognition was a form of acceptance or acquiescence or something else—a matter on which, as Mr. Pellet had observed, the report remained unclear.



26. By way of example, paragraph 96 of the report identified the legal effects of recognition following Anzilotti's textbook,<sup>4</sup> but made no reference to State practice. Subsequent references were made to another textbook. He was surprised that no reference was made to what was generally considered the main work on recognition by Verhoeven.<sup>5</sup> Verhoeven concluded that recognition had no legal effect whatsoever. Clearly, that opinion was only tenable if the effects of recognition were separated from those of acceptance.

27. ICJ tended to understand "recognition" as being a form of acceptance or acquiescence, as was clearly shown in two passages to which the report referred in the section on legal effects. Thus, in the *Arbitral Award Made by the King of Spain on 23 December 1906* case, mentioned in paragraph 100 of the report, the Court had held that Nicaragua had "recognized the award as valid" [p. 213] and had also referred to Nicaragua's "acceptance". Even more clearly, in its judgment in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court had had acceptance in mind when it considered the wording of a treaty provision in which the parties stated that they recognized the border in question. Clearly, no unilateral act had been involved, so it was not a good example for the purposes of the report, apart from the use of the word "recognition" rather than "acceptance" in relation to the States' attitude. A third example was provided by a passage in the judgment in the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case, in which the Chamber constituted by the Court had said that acquiescence was "equivalent to tacit recognition manifested by unilateral conduct" [p. 305], which the other party might interpret as consent.

28. Although such passages did not contradict the Special Rapporteur's proposition concerning the legal effects of recognition as preventing contestation in the future, they did not—since they linked recognition with acceptance or acquiescence—provide adequate support for the existence of a specific consequence of recognition. His conclusion, therefore, was that research on the question—along with others that had been dealt with more succinctly by the Special Rapporteur—should be carried much further. One way of doing so would be to appoint a small working group with the task of assisting the Special Rapporteur, in the sense of actually working alongside him in the examination of what was an extraordinarily complicated topic.

29. Mr. DUGARD said that, interesting and challenging as the report was, he took issue with some of the Special Rapporteur's statements. For example, the assertion in paragraph 1 of his report that the Commission must examine any legal institutions that it was asked to or must respond appropriately to the requests made by Governments was an exaggerated description of the Commission's subordinate role to its perceived political masters. The Commission was ultimately the master of its own house, being made up of independent experts who were not slaves to

Governments or the Sixth Committee. The use of such language merely served to confirm the opinion of those who thought otherwise.

30. The purpose of the report appeared to be to illustrate the nature of unilateral acts by the study of recognition as a unilateral act. Paragraph 17 of the report, however, drew a false distinction between recognition as an institution and unilateral acts of recognition. It was impossible to examine the one without the other.

31. Although recognition as a unilateral act had been on the list of topics suggested by Lauterpacht as a subject suitable for codification in 1947,<sup>6</sup> the topic had repeatedly been rejected by some as being too controversial or political. However, the present report came perilously close to examining recognition of States as an institution through the back door. He would welcome a direct study of the topic, despite its controversial nature.

32. Some of the Special Rapporteur's comments on recognition as an institution could not go unchallenged. As Mr. Gaja had said, too little account had been taken not only of State practice but also of theory, as developed in the work of Chen, for example. The Special Rapporteur's comments were of great interest but required further scrutiny. He had, for example, ventured into the debate on whether recognition was a declaratory or a constitutive act. That debate usually related to the consequences of recognition. The Special Rapporteur nonetheless looked at it from the standpoint of the nature of the act of recognition, whether declaratory or constitutive. The majority of writers considered it declaratory, but that interpretation did not cover all cases: an examination of State practice led to quite different conclusions. Thus, the purpose of the United States in recognizing Panama in 1903 had been to secure the right to build the Panama Canal, and that recognition, premature as it might have been, had been constitutive. Similarly, the recognition by four or five African States of the breakaway region of Biafra had taken place in order to prevent the violations of human rights occurring during the war with Nigeria. Turkey had recognized the Turkish Republic of North Cyprus, and, in the apartheid era, South Africa had recognized its own Bantustans. Most recently, Bosnia and Herzegovina had been recognized by the European Union and admitted as a Member State of the United Nations while it was still engaged in a full-scale war and had no effective Government. Its recognition, under the terms of the Convention on Rights and Duties of States, had been designed precisely to terminate the conflict. Such examples might be held to be unfortunate, but in each case the intention of the recognition had been to create a State. Hence, it could not be simply said that the act of recognition was declaratory in nature; it might well have a constitutive purpose.

33. With regard to criteria for recognition, there appeared to be a contradiction between the first and second sentences of paragraph 35 of the report. In his view, criteria undoubtedly had a role to play in the recognition of States, although the Convention on Rights and Duties of States might no longer constitute a full statement of the criteria, since it might be necessary to have regard

<sup>4</sup> D. Anzilotti, *Cours de droit international* (Paris, Sirey, 1929), p. 347.

<sup>5</sup> See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (Paris, Pedone, 1975).

<sup>6</sup> See H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947).

to human rights, self-determination and United Nations resolutions in recognizing a State. The question then arose whether recognition was discretionary. In that context, it was regrettable that paragraph 39 gave no consideration to Lauterpacht's controversial view that States were under a duty to recognize an entity that met the requirement of statehood expounded in the Convention.

34. Raising the question of whether admission to the United Nations was a form of collective recognition, the Special Rapporteur correctly dismissed the question as irrelevant to the topic. His remarks did, however, whet the appetite as to whether admission to the United Nations was a form of collective recognition or not. There was a further contradiction between the suggestion in paragraph 54 of the report that collective recognition was possible because a United Nations vote constituted a form of declaration and the statement in paragraph 32 that collective recognition did not fall within the Commission's mandate. The issue required further study.

35. A further question was whether non-recognition was discretionary. Paragraph 45 of the report suggested that it was not: the fact that the Security Council could direct States not to recognize a new entity that claimed to be a State surely gave rise to the duty of non-recognition. As for the withdrawal of recognition, in the case of failed States the Special Rapporteur suggested in paragraph 96 that no withdrawal of recognition was possible, whereas paragraph 101 acknowledged that in some circumstances such withdrawal was indeed possible. The matter was important in view of the growing phenomenon of failed States, but again the Special Rapporteur whetted the reader's appetite yet failed to pursue the topic.

36. Finally, the Special Rapporteur said that implied recognition was not relevant to the study. Nevertheless, since no form was required for the act of recognition, it surely followed that implied recognition could exist. Thus, in the past, South Africa had maintained diplomatic relations with Rhodesia, which implied recognition. Yet the Special Rapporteur dismissed the point.

37. He congratulated the Special Rapporteur on a provocative report, which nonetheless lacked the requisite clarity: it touched on a host of controversial issues, without examining any of those that had troubled jurists for over 100 years. Indeed, it simply added to the growing awareness that recognition, as a unilateral act, was very difficult to codify. The report mixed theory and practice, with the result that it was vulnerable on both counts: State practice was inadequately examined, while the account of recognition as a unilateral act was not convincing.

38. He was uncertain how the Commission should proceed—whether it should adopt a theoretical approach or should examine State practice in detail. He agreed with Mr. Gaja that the latter would be more fruitful. An examination of State practice would enable the Commission to establish the common principles relating to the nature of recognition.

*The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.*

39. The CHAIR said that, following informal consultations on how best to proceed, support had emerged for the

establishment of a small *ad hoc* group that would meet before the text was referred to the Drafting Committee. The group would convene immediately, with the task of defining the basis and objective of the study of unilateral acts with a view to progressive development.

40. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he fully supported the Chair's proposal and suggested that the *ad hoc* group should be chaired by Mr. Pellet, who had expressed a willingness to start at once, thus enabling the Drafting Committee to undertake its work on the topic during the session.

41. The CHAIR said he took it that the Commission was in favour of establishing an *ad hoc* group that would work on definitions and undertake research into State practice, beginning immediately after the end of the meeting.

*It was so decided.*

*The meeting rose at 12.25 p.m.*

## 2772nd MEETING

*Wednesday, 9 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOSKENNIEMI commended the Special Rapporteur's decision to turn from the generalities of unilateral acts to the specific topic of recognition and, in particular, the recognition of States. By the same token, he was not in favour of drawing up a grand table containing all type of unilateral acts, as advocated by Mr. Pellet. In relation to the general approach outlined in the introduction to the sixth report (A/CN.4/534, paras. 1–16), he noted that the Special Rapporteur had doubts about the

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

existence of unilateral acts as a legal institution, but argued that, even if they did not exist as an institution, the Commission would have to take them up, even though he also said that the subject might be too complex to be subjected to codification. The fact was that the topic was not susceptible to codification because it did not exist as a legal institution, unlike treaties and the succession of States, topics having an entire set of rules, principles and institutions. Unilateral acts did not describe a set of formal arrangements but rather the sociological reality of State activity, which might occur unilaterally but could often be found in the context of interaction with other States, with the result that States sometimes found themselves bound by their actions. Unfortunately, lawyers and ICJ had, in the *Nuclear Tests* cases, for example, based such obligations on a concept of unilateral acts that implied the presence of a set of formal acts fulfilling certain conditions of validity. That approach was, however, nothing more than an *ex post facto* construction, since in all such cases the obligation depended on informal considerations: estoppel, equity, reasonableness, justice or general principles of law. That being so, although the Court had ruled in the above-mentioned case that unilateral declarations bound the State making them when it was that State's intention to assume such an obligation, it had corrected its unfortunate interpretation of unilateral acts by stating that good faith and the need for confidence in international relations sometimes required a State to be bound. All such acts depended on the context. The topic of unilateral acts was not susceptible to codification because it denoted an area of informal State interaction that fell outside the formal law of treaties, even if it could justifiably be said that obligations sometimes emerged from it. It would, however, be a mistake to try to parcel up that area of law into formalistic categories.

2. As for the specific act of recognition, the report did not, as other members of the Commission had already pointed out, make any useful reference to academic research, whether recent or not, and, more importantly, it paid little attention to the academic dilemmas or the tone of the debate on the topic. Nor was it practical enough: the review of State practice was sparse and haphazard, as well as containing some contested interpretations of such practice. On the other hand, the Special Rapporteur had only recently embarked on that aspect of the subject and should be congratulated on his willingness to consider the practice, since academic abstractions in the area of recognition were indeterminate and of little use in grappling with the practical problems of recognition. Generally speaking, the Special Rapporteur's treatment of recognition was characterized by a formalistic attitude that limited recognition to a formal act, with the result that—although the report did not say so in so many words—implicit or tacit recognition would need to be excluded from the compass of the study. It was, however, fair to wonder why, in practice, recognition should include a governmental declaration communicated through a diplomatic procedure, but exclude the formal act of a bilateral treaty on the grounds that it did not expressly refer to recognition. The distinction between express and tacit recognition, which arose out of the formalistic and voluntaristic notion put forward by the Special Rapporteur and his identification of recognition as an expression of willingness to be bound, was inapplicable in practice, not only because the distinction was strange

in itself, but also because of the more general problem referred to above, namely, that recognition, promise, waiver or estoppel constituted not a legal institution but informal State activities.

3. The State would generally agree to be bound, in a reciprocal fashion, but most often it had no intention of being so. It was for lawyers to tell political decision makers that their actions could impose an obligation on the State against their will, but it was not their business to provide decision makers with a procedural device whereby they could formulate an act having the effect of binding the State, if they so wished. The topic of unilateral acts of States was on the Commission's agenda in order to deal with the grey area of State conduct in cases where the will to be bound was not clear, or where it was necessary to establish criteria to determine whether an obligation had been created outside the framework of a formal act. The topic of recognition, and recognition of a State in particular, might present a window of opportunity in that regard by enabling the Commission to deal with the reality that existed as a legal institution, having the corresponding formal characteristics. By undertaking a practice-oriented study on the recognition of States and perhaps also the recognition of governments, it could set about drawing up guidelines or articles regulating the institution.

4. Mr. BROWNLIE said that, procedurally speaking, Mr. Koskenniemi's comments raised the question whether the Commission should continue its consideration of a subject that had been on its agenda for several years, and, if so, whether it should rely on the Special Rapporteur's sixth report or should revise its agenda. Second, although the word "recognition" appeared in the rubric "recognition of States", the latter was clearly a separate topic. No one could believe that a study of the recognition of States necessitated a study of the recognition of governments. The Commission would therefore be turning from the question of unilateral acts to that of the possible subject matter of such acts, which would include much, if not all, of international law. It was a little unfair to say that no such legal institution as unilateral acts existed, since they were quite widely accepted as a category of study and as an area of problems. Indeed, they could cause difficulties. The United Kingdom had decided some time ago that the subject was so complex that it was not susceptible to codification. It could, however, be the topic of a structured study using the material contained in the Special Rapporteur's previous reports, which could be refined and presented in a systematic way. The sixth report, meanwhile, dealt with recognition, with what was recognized and with the legality of the act itself; and that went beyond the scope of the subject.

5. Mr. PAMBOU-TCHIVOUNDA said that it was impossible not to be shocked by Mr. Koskenniemi's questioning of the existence of unilateral acts of States as a legal category and his assertion that such acts reflected the sociological reality of relations between States. After all, the same could be said of treaties, which were also concluded within a given context, since the realities that governed the development of law on the international stage were realities of interest. Unilateral acts of States had both a theoretical and a practical existence, as was evidenced by the numerous references to State practice appearing in the Special Rapporteur's sixth report.



6. Mr. MELESCANU said that he endorsed Mr. Brownlie's view. The current discussion was pointless, since the topic of international acts was indeed on the agenda of the Commission, which should do its best to carry out its mandate. He had not been convinced by Mr. Koskenniemi's argument: the assertion that only the will of the State was of any account, together with the denial of the legal existence of unilateral acts whereby States decided unilaterally to undertake international obligations, was self-contradictory. Unlike Mr. Koskenniemi, who also thought that, if States expressed their will clearly, there was nothing to codify, he believed that there was a need for the codification of the rules governing issues such as the conditions for the validity of a unilateral act and its consequences, from the point of view of liability, for example. In any case, if the Commission decided, once the study had been completed, that there was insufficient material for codification, it was free to adopt a resolution to that effect to submit to the General Assembly. At the current stage, to ensure that the work advanced, it would be preferable to refrain from casting doubt on both the topic and the manner of its treatment.

7. Mr. CHEE said that he could not agree with Mr. Koskenniemi's statement that recognition was not an institution of international law. He read out to the Commission the definition of recognition contained in two public international law treaties.

8. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he would respond to all the comments that had been made when the general debate continued at the Commission's next meeting, but he felt compelled to give a reply to Mr. Koskenniemi, who would not be present at that meeting, on the question of existence of unilateral acts of States. It could hardly be argued that international law covered acts, conduct, activities or absences of reaction that could be attributed to States in international relations but were not linked to treaties. He was referring to specific acts, which had specific characteristics and produced legal effects. They were acts whereby States unilaterally undertook obligations in the exercise of their sovereignty. As such, they should be regulated by specific rules in order to increase confidence and security in international relations.

9. Mr. ADDO said that unilateral acts undoubtedly existed, but whether the topic was really ready for codification was open to question, given the paucity of State practice. The Commission should, perhaps, wait for the *ad hoc* working group to complete its work, so that it could suggest the best way forward.

10. Mr. MANSFIELD (Rapporteur) said he had not heard Mr. Koskenniemi saying that unilateral acts of States did not exist, but had understood him as saying that it was difficult, even impossible, to codify rules governing such acts with the same clarity and degree of detail as rules for the law of treaties. Moreover, he tended to agree with Mr. Koskenniemi that it was pointless to try to find the will of States to be bound by a series of acts where such will patently did not exist, and that a study of practice and cases where States had undertaken obligations might result in the formulation of guidelines, but not the drafting of detailed rules and precise definitions such as those on the law of treaties. Whatever the case, it showed the wisdom

of the Commission's decision to set up a working group on the subject.

11. Ms. XUE said she was of the opinion that what was important was to determine whether certain unilateral acts by States constituted a separate source of international obligations. If State practice showed that that was indeed the case, there was ample justification for considering the matter. The Special Rapporteur had done the right thing by beginning the study of different acts with the concept of recognition, for, although the acts tended to be based on political considerations, they also had legal effects in relations among States, for instance, in the field of treaty obligations or diplomatic privileges and immunities. Thus, when a State recognized the Government of the People's Republic of China as the sole legitimate Government in China, the country was legally entitled to expect a certain conduct on the part of the State concerned.

12. Mr. DAOUDI said that, if he had understood Mr. Koskenniemi's statement correctly, he was not denying the existence of unilateral acts, but the existence under international law of the legal institution known as "unilateral acts", which was likely to lead to codification. During the previous session, the majority of the members of the Commission had decided that work on the topic should be continued and had recommended that the Special Rapporteur should examine unilateral acts one by one.

13. The current discussion should have taken place when the Sixth Committee had requested the Commission to study the topic of unilateral acts. It was in that context and in response to the question whether it should continue or abandon its study of the topic that the Commission had decided to establish a working group to study how the topic should be dealt with. For that reason, he did not consider it useful to continue discussing the matter before the Working Group's report became available.

14. Mr. NIEHAUS expressed surprise at Mr. Koskenniemi's remarks, which seemed to deny the existence of unilateral acts. Such a position, about which some members had raised doubts, was difficult to accept.

15. The topic was a complex one, as the Special Rapporteur had clearly shown, but it would be a serious error simply to deny the existence of unilateral acts, when they were unanimously recognized by doctrine. Likewise, to say that unilateral acts were informal, which implied that there was no intention to be bound, was not true. There were unilateral acts whereby States expressed their will to undertake obligations, although it was a different type of obligation from that arising under a treaty act. That was why the decision to set up a working group with the task of responding to questions raised by the Sixth Committee was justified. The Commission would find itself in an embarrassing situation if it concluded that it had been working for several years on a subject which did not exist. The Working Group must therefore be given the opportunity to continue its work with a view to reaching a satisfactory conclusion.

16. Mr. SEPÚLVEDA considered that one of the tasks of the Working Group would be to clarify, not the feasibility of the topic, but the possible validity of the study on unilateral acts. He did not share the Special Rapporteur's

view expressed in paragraph 1 of the report, according to which the Commission, as a consultative organ of the General Assembly, must consider all topics on its agenda. That was not sufficient justification. First the legal nature of unilateral acts as well as their legal effects would have to be clarified. The introduction should indicate why unilateral acts entailed legal consequences and established rights and obligations.

17. As far as recognition was concerned, he considered that the inductive method proposed for dealing with the matter was appropriate. However, the distinction drawn in chapter I between the different categories of recognition was inadequate, and that might lead to some confusion about the recognition of States, the recognition of Governments, the recognition of the belligerent State, the recognition of insurrection, recognition *de jure* or the recognition of territorial changes. All those acts produced different effects, which were not studied as they should have been in the report. The basis for a unilateral act by a State, on the one hand, and the institution of recognition in its various legal forms, on the other hand, had not been dealt with clearly enough in the report to explain why unilateral acts of States and the institution of recognition had to be considered.

18. With regard to methodology, he considered that a system should be used which would, in the view of the Sixth Committee, justify the feasibility of a study of the topic by the Commission.

19. The CHAIR, speaking as a member of the Commission, acknowledged that Mr. Koskenniemi's comments on the subjective element of will in unilateral acts were relevant. It was true that international law sometimes recognized the effects of some unilateral conduct, even in the absence of any intention to produce such effects. That had been clearly demonstrated in the *Nuclear Tests* cases, in which ICJ had attributed an intention to the declaration by the representative of France which he probably had not had. Intention was thus a very important element to be considered by the Working Group, particularly as far as defining the topic for study was concerned.

20. As Mr. Brownlie had said, moreover, State recognition was a separate topic. In that connection, the purpose of the study must be to analyse recognition in general as a category of unilateral acts, rather than to try to analyse the very specific aspects of recognition.

21. Mr. KOSKENNIEMI said he fully shared Mr. Melescanu's view that it would be indefensible and unwise to give up the study of unilateral acts after so many years. It had not been his intention to propose such a move or to claim that the Commission had any alternative, as some members seemed to believe. On the contrary, he considered that the establishment of a working group to deal with the subject was a good idea—a step in the right direction.

22. So why then had there been all those questions on the feasibility of the topic? Probably because adopting of general positions affected the way in which a given or specific opinion was formed on the question of recognition. He had merely wished to make some general comments and to draw attention to the ambiguous nature of the legal

concept of institution, which was not well defined, with a view to the forthcoming discussion.

23. In that respect, he agreed with the first sentence of the report ("It is true that it has not been clearly established that the institution of unilateral legal acts exists..."); that was admittedly surprising, but fully reflected his point of view. What was the point of questioning the existence of unilateral acts as an institution, when there was no doubt about the existence of treaty law or State succession as institutions? Drawing an analogy with internal law, he pointed out that a contract was undeniably an institution of internal law, regardless of the cultural context, like marriage. But could it be said that due diligence was a legal institution? What those three notions had in common was that they were legal terms and concepts, but there was a great difference between them: contract and marriage were governed by a set of rules and principles, but also by institutional practices and history; that was not the case of due diligence. It was not a legal institution in that there was no act of due diligence to which a set of rules, principles and criteria could be applied. So when it was stated that unilateral acts were not a legal institution in the sense of the law of treaties or State succession, the same distinction was being drawn, and it would have practical consequences with regard to codification. That was why the first sentence of the report made sense only if such a distinction was drawn; but the drawing of such a distinction had many consequences.

24. Mr. MOMTAZ, welcoming the fact that the Special Rapporteur was to be assisted by a team of university research scholars, said that such help would enable him to deal in greater depth with one very important aspect of the topic, State practice. That team could perhaps take up the question raised by Mr. Melescanu, namely, to what extent States which had entered into a commitment through a unilateral act were liable if they did not honour their commitments. That would entail codification based on State practice. Personally, he did not share the opinion expressed by the Special Rapporteur in paragraph 4 of his report that work should focus more on a progressive development approach than on codification. The question was not one of establishing general rules on the subject, but of identifying a minimum number of rules which had been drawn from State practice and could then be regarded as the lowest common denominator. Care therefore had to be taken not to make all of the rules on the law on treaties applicable to unilateral acts.

25. The institution of unilateral acts had undeniably proved useful to the international community, in that it enabled a State to enter into a legal commitment without having to sign an agreement, and thus to defuse a situation that placed peace and international security in jeopardy. That was why the binding nature of a unilateral act had to be emphasized in order to obviate the risk of completely destroying its stabilizing effect in international relations. The Special Rapporteur was right in that regard to refer to the principles of *acta sunt servanda* and good faith in relation to unilateral acts. Those principles certainly applied to all unilateral acts and to recognition in particular. As Ms. Xue had said earlier, when a State recognized a Government, it assumed an obligation to that Government. If, however, all the principles of the Vienna system of the law of treaties were transferred to the context of unilateral

acts as a whole, the latter would no longer have a *raison d'être*.

26. The main questions arising in respect of recognition were whether States, through such an act, were free to enter into a commitment towards an entity which had declared its independence, and whether that freedom to enter into a commitment was comparable to the freedom to enter into a commitment by signing or ratifying a treaty. It was hard to believe that a State was free to grant recognition to any entity that wanted such recognition. Those doubts were substantiated by the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community<sup>2</sup> which were mentioned in paragraph 37 of the report and whose purpose had been to reconcile the right to self-determination with the need for international stability. A unilateral act did indeed have a stabilizing effect. In an endeavour to reconcile the interests of the international community and the act of recognition, Mr. Boutros Boutros-Ghali, the former Secretary-General of the United Nations, had said in his concluding statement to the Congress on International Law, held in 1995, "To suggest that any social or ethnic entity which decides that—often for reasons which are ambiguous and sometimes reprehensible—it is different from its neighbours, should be recognized as a State would be a very perverse way of interpreting the right of peoples to self-determination."<sup>3</sup> In other words, States would appear to have a rather vaguely defined obligation of non-recognition. A difference therefore existed between a unilateral act of recognition, a commitment to another State into which a State was free to enter, and a treaty-based undertaking.

27. The same considerations held good with regard to the recognition of Governments, a topic to which the Special Rapporteur had unfortunately not referred. It was clear, for example, that most States had not recognized the Taliban government, despite the fact that it had controlled almost the entire territory of Afghanistan, primarily because that government had not respected human rights or fundamental freedoms. A unilateral act was not therefore discretionary. It was against that background that consideration should be given to the withdrawal of a *de facto* act of recognition of a State, to which Mr. Pellet had referred at the previous meeting.

28. All that showed the advantages and limitations of the category-by-category approach adopted in the sixth report. A unilateral act of recognition had specific characteristics which were difficult to transpose to all the other categories of unilateral acts. It would therefore be advisable to pursue the category-by-category approach initiated by the Special Rapporteur in order to define the specific characteristics of each category of unilateral act and to exclude from the draft articles those which were not shared by all unilateral acts. Hence it would seem that not many common rules would be drawn from State practice.

29. Mr. PAMBOU-TCHIVOUNDA said it was regrettable that there was not a single rule—not even the start

of one—in the sixth report, which also did not contain a single draft article.

30. As to the debate on the discretionary nature of recognition, to say that there were rules of international law which established an obligation of non-recognition or at least an obligation for States to ensure that the law endorsed an initiative in respect of recognition was one thing, but to declare that States could not freely determine whether a situation should be recognized, even if that meant that they might make a mistake, was another. In the example mentioned by Mr. Momtaz of the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community, the concern had been to safeguard the rights of minorities within existing borders. In Africa, the inviolability of borders was regarded as a peremptory norm. Conceivably, the rebellion in Côte d'Ivoire might cause the country to split into three separate States which the African Union was unlikely to recognize. But what of non-African States which might, on account of their own interests, well wish to recognize some of those States? The rules of international law might restrict freedom of recognition, but they did not prevent a State from taking the initiative of venturing into recognition. That was the crux of the problem of the discretionary nature of recognition.

31. Mr. MOMTAZ, replying to Mr. Pambou-Tchivounda on the question whether the report under consideration identified a rule which might apply to all categories of unilateral acts, said that the principle of *acta sunt servanda*—of good faith in the fulfilment of commitments entered into under a unilateral act—might be one rule that must apply to all unilateral acts. That was the conclusion reached by the Special Rapporteur.

32. As to the second point raised by Mr. Pambou-Tchivounda, he himself had not said that a State was not free to evaluate the criteria for the recognition of States and Governments. What he had meant was that those criteria were becoming increasingly strict in order to reconcile questions of security and the maintenance of peace with States' freedom of action in matters of recognition. States were still free to evaluate those criteria.

33. Mr. ECONOMIDES, referring to some of the points made in the interesting, stimulating report submitted by the Special Rapporteur, noted that it was stated in paragraph 26 that "silence is not always interpreted as acquiescence". That meant that, as a general rule, silence was interpreted as acquiescence, save in exceptional circumstances. That sentence was absolute. In his view, very great caution was required when treating silence as acquiescence, especially if such passive conduct had been adopted by a weak State in its dealings with a powerful State.

34. He disagreed with the opinion the Special Rapporteur expressed in paragraph 99 of his report that a State could "persistently oppose a general custom, which would mean that the latter is not opposable to it". It was true, as Mr. Melescanu had noted at the preceding meeting, that customary international law had not yet been codified, but the Special Rapporteur's view was at variance with Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, since, unlike a treaty, custom was bind-

<sup>2</sup> See *Bulletin of the European Communities*, vol. 24, no. 12 (1991).

<sup>3</sup> Press release SG/SM/5583/Rev.1 – L/2710/Rev.1 of 17 March 1995, p. 4.



ing on all States without distinction, even those which opposed it. Custom was not an optional legal rule.

35. An act of recognition was not declarative. Admittedly, an act of recognition did not create the new State which already existed at the time of its recognition as a State, but there was no denying that, on the basis of recognition, a whole nexus of relations was established between recognizing and recognized States, and that nexus of relations was more constitutive than declarative in nature.

36. It was also regrettable that, when referring to the obligation of non-recognition under United Nations decisions, the Special Rapporteur did not mention the relatively recent case, to which Mr. Dugard had referred at the preceding meeting, of the State of Northern Cyprus, which had been established unlawfully.

37. Like Mr. Pellet, he regretted that the Special Rapporteur had not made more of the classical distinction between *de jure* recognition, which was irrevocable, and *de facto* recognition, which was both temporary and of a trial nature and therefore revocable.

38. The procedure for admitting new Members to the United Nations could not be regarded as a collective act of recognition of those States. A recent example which gave the lie to any such tendency was the attitude of Greece, which had voted in favour of the admission of the former Yugoslav Republic of Macedonia to the United Nations while maintaining its decision not to recognize that State.

39. The purpose of the sixth report was to make the Commission think about how to handle the codification and progressive development of unilateral acts of States. He was convinced that the first thing to do was to define unilateral acts of the State restrictively and, on the basis of that fundamental definition, to begin preparing the provisions of the draft. The unilateral acts on which the Commission's work must focus were those that could be a source of international law on the same basis as treaties, custom or binding decisions of international organizations. In other words, as he had already said at the preceding meeting, a unilateral act must create an international obligation towards another State, several States or the international community as a whole, or even towards other subjects of international law. Any other unilateral act must be excluded from the scope of the study.

40. For essentially didactic reasons, the doctrine divided unilateral acts into various categories such as promise, recognition, waiver and protest. He did not consider that list to be exhaustive. In addition, a single unilateral act might be placed in more than one category. The famous Ihlen declaration<sup>4</sup> might be taken as an example: as the Special Rapporteur stated in paragraph 21 of his report, it recognized a situation, but it also contained a promise and even a waiver. Obviously, what mattered in that case was the legal effect of the unilateral act, not its actual categorization. He was therefore sceptical about the need for further specific methodological studies. On the basis of State practice, as many speakers had pointed out, basically what was needed was to identify unilateral acts which could create international obligations and to draft

a limited number of rules applicable to them—both customary rules and rules derived from progressive development. True, State practice was not rich as far as unilateral acts that created international obligations were concerned. States were highly averse to assuming such obligations unilaterally with nothing in return, since that was by definition contrary to their foreign policy. When they did assume such obligations, they usually did so unwittingly or as a result of open or unavowed constraint. The purpose of the study was accordingly to alert States to effects of their unilateral acts that could sometimes be harmful to them.

41. In conclusion, he said that he was still in favour of the codification of unilateral acts of States, but thought that the Commission should not be overly ambitious and should produce a relatively short text including the basic, fundamental principles that applied to such acts. He was also of the view that the title of the topic should be broadened to read: "Unilateral acts of States as a source of international law".

42. Mr. FOMBA congratulated the Special Rapporteur on the efforts he had made in preparing his report and noted that he had done what the Commission had asked of him. It might be asked, however, whether the results were perfect in spirit and letter, specifically with regard to the categorization and evaluation of State practice. At all events, the most important thing was to criticize constructively. He would not enter into the substantive discussion on recognition of States, which might, despite appearances, be considered to constitute a fairly unique category of unilateral acts and which was also probably the best known. He would therefore make just a few very brief comments on form and the methodological approach to the topic.

43. On form, following the introduction, the report was divided into four parts dealing with recognition, the validity of the unilateral act of recognition, the legal effects of recognition and the application of acts of recognition. The ordering and internal consistency of those components could probably be improved. In fact, the four parts were based on two main concepts, namely, the definition and scope of recognition, on the one hand, and the applicable legal regime, on the other. There was also, at least for the time being, no section entitled "Conclusions and recommendations".

44. As to the usefulness of the topic, even though unilateral acts of States were not placed by international law on the same footing as treaties, they were no less important and should be seen as such with a view to adding to the full array of sources of international law.

45. At present, it was too early to determine what form the final product might take. Among the various options, however, he would prefer the preparation of as comprehensive a set of draft articles as possible, accompanied by commentaries. On that point, however, a number of speakers, particularly Mr. Momtaz, had called for some caution, and their opinion should be taken into account. As to the methodological choice between a case-by-case study and a comprehensive study, he preferred the latter, but, since the Commission had already committed the Special Rapporteur to an empirical approach, it was now a question of capitalizing on the work already done. He therefore agreed

<sup>4</sup> See 2770th meeting, footnote 8.

to a series of monographs, but with a view to bringing together and systematizing the conclusions that could be drawn. That was why he found merit in Mr. Pellet's idea of a table containing a preliminary assessment of the various categories of unilateral acts for the purposes of comparison and systematization. The Working Group that had been set up could do useful work along those lines. What was needed was an evaluation questionnaire that was as rigorous, clear-cut, comprehensive and coherent as possible. There were many fundamental questions, including the generic definition of unilateral acts, its applicability to all the possible categories, the identification of specific features, the conceptual and methodological framework, the deciphering of the intellectual and operational process from the standpoint both of internal and of external logic, and the current situation and prospects for incorporation in international law.

46. As to the scope of the study, whereas the Commission's mandate had initially been limited to unilateral acts of States, the codification process would be incomplete if it was not followed up by a study of unilateral acts of international organizations.

47. The definition proposed of unilateral acts by the Special Rapporteur in paragraph 67 of his report was not without interest, but he would refrain from commenting on it until the text proposed by the Working Group had been made available.

48. While account must be taken of the *acta sunt servanda* principle, caution should be exercised in applying, *mutatis mutandis*, the Vienna regime particularly with regard to the question of the modification, suspension and revocation of unilateral acts.

*The meeting rose at 12.35 p.m.*

## 2773rd MEETING

*Thursday, 10 July 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIR extended a warm welcome to Mr. Matheson, the new member of the Commission, and invited the Commission to resume its discussion of the sixth report on unilateral acts of States (A/CN.4/534).

2. Ms. XUE said that the sixth report was very useful in that it studied the subject matter from one specific aspect and thus provided a more solid basis for the Commission's deliberations. The topic deserved serious study for the purposes of the codification and progressive development of international law. State practice showed that certain unilateral acts did give rise to international obligations, and it would therefore be desirable to lay down some rules for such acts in the interests of legal security and in order to lend certainty, predictability and stability to international relations.

3. The topic was complicated and difficult because it encompassed various kinds of unilateral acts performed by States, some of which, such as the recognition of States or Governments, could be directly assimilated to existing legal regimes, while others, such as promise or denunciation, could not. It also touched on the very nature of State conduct and on States' willingness to be bound by their own acts. In international relations, most unilateral acts of States were political in nature, yet they were often as solemn and important as legal commitments and were normally upheld by States as a matter of honour. In practice, States were reluctant to regulate the matter mainly for foreign policy reasons, but the scope of the topic needed to be defined in order to maintain a proper balance between States' individual interests and the need to strengthen the legal system. The establishment of a working group to produce such a definition was therefore welcome.

4. The report did not study State practice in sufficient depth and failed to focus on acts of recognition that had a direct bearing on the rules governing unilateral acts. In the classical doctrine of recognition, constitutive theory contained strict rules on the criteria for the recognition of a State or Government and turned on the issue of legality, but declaratory theory was gradually prevailing with the development of State practice. In recent years, some States had gone so far as to stop giving formal recognition to a new State and directly decide whether to establish diplomatic relations with it. Hence the contents of the criteria for the recognition of a State or Government should not be examined, but the Commission should consider at what point such recognition took effect. Since recognition was essentially a political act which produced legal effects, the State which had been recognized rightfully expected such an act to have certain legal consequences that would be governed by international law.

5. Care had to be taken not to interpret silence and acquiescence as being synonymous, especially when territorial matters were concerned. She took issue with the

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

assertion in paragraph 28 of the report that admission of a State to the United Nations might possibly constitute collective recognition. During the Cold War, the fact that a State might be party to an international convention or a member of an international organization had certainly not been regarded as formal recognition, as had been illustrated by the refusal of the People's Republic of China to recognize Israel or the Republic of Korea for many years, and it was her belief that States still tended to separate the issues of recognition and membership.

6. The examples of non-recognition given in paragraphs 42 to 45 were not truly unilateral acts, because the legal obligation not to grant recognition in such instances stemmed from the relevant resolutions and decisions of organizations. The issue of Taiwan offered a better example of the effects of non-recognition. China had diplomatic relations with about 160 States, most of which had made a clear unilateral statement in the agreement establishing those relations that they recognized Taiwan as an integral part of Chinese territory and the Government of the People's Republic of China as the sole legitimate Government of China. Often such non-recognition thereafter had legal implications for representation in international organizations.

7. Recognition was a discretionary, mainly political decision, while non-recognition tended to be obligatory by operation of the law, although both gave rise to legal effects which, irrespective of whether they were intended by the author State, were governed by international law.

8. In chapters II and III of the report, the Special Rapporteur specified the conditions for recognition but adhered too rigidly to the practice followed in treaty making. Although a unilateral act had to be attributable to a State and meet certain requirements for it to be legally binding, it did not have to satisfy the same or similar conditions as those for concluding a treaty. Unilateral acts were technically and practically much simpler. Again, the affirmation in paragraph 79 that an act of recognition was an expression of will which must be formulated without defects was not wrong, yet it was not clear what was meant by "without defects".

9. The Commission should examine State practice with regard to recognition in greater detail with a view to formulating general rules on unilateral acts. The Special Rapporteur deserved to be thanked for his praiseworthy efforts and his contribution to the Commission's consideration of the topic.

10. Mr. PAMBOU-TCHIVOUNDA said the Special Rapporteur should be congratulated more on the efforts he had put into the report than on the results they had produced because, owing to his sincere belief that the instructions he had received from the Commission at the previous session prevented him from pursuing the approach followed in the five earlier reports,<sup>2</sup> the sixth report was inconsistent with its predecessors, since it dealt with only

one subject and could have been subtitled "Recognition of States". It was not immediately clear how that subject fitted in with the overall topic of unilateral acts of States. Recognition was simply one type of unilateral act; the two were not necessarily identical. Legally speaking, the essence of a notion lay less in the diversity of its constituent parts than in its technical function.

11. The nature of recognition, which the Special Rapporteur had unfortunately tackled by investigating its legal effects, might help to clarify the notion of unilateral acts of States, but it was doubtful whether it was a deciding factor. Similarly, it was questionable whether the sum of the identifying characteristics of various kinds of unilateral acts of States made it possible to infer that such acts always fulfilled the same technical function. They comprised one of the means whereby a State, acting in full knowledge of the facts, entered into commitments *vis-à-vis* other subjects of law. Like all other means to that end, a manifestly unilateral act brought into play the prerogatives inherent in State sovereignty, as well as those stemming from treaty or customary law and, in all cases, such a testing of State sovereignty was aimed at protecting political, economic, financial, strategic or military interests.

12. That technical function called for an equally functional, and not an abstract, definition of unilateral acts of States. Such a definition would be useful if it made it possible to determine a set of parameters, such as form, procedure, competence, reasons, purpose or the aim of a unilateral act, which would in turn serve as a basis for working out general principles and standards.

13. For that reason, it was clear why, in the preceding reports, the Special Rapporteur had sought to discover in the Vienna Conventions of 1969 and 1986 some premises on which general rules governing unilateral acts of States might rest. It had, however, been obvious that the method had its limitations and had caused some difficulties. The issues had been poorly stated and no attempt had been made to devise even a tentative conceptual framework, which would have made it possible to distinguish between the specific features of the rules for treaty making and those of rules governing unilateral acts of States. Nevertheless, agreement on those topics would ultimately have been reached if it had not been for the sixth report, which had altered the whole line of attack. The initial approach to the subject, which had focused on general aspects common to all unilateral acts of State such as formulation, validity and interpretation, had been abandoned. Naturally, it would also have been wise to consider the reasons for an act, its effects, any links with treaty law or customary law, general legal principles, change of circumstance, responsibility and settlement of disputes.

14. The sixth report had not, however, completed that initial work, despite the fact that it had led to the drafting of several articles. The attempt to formulate common rules should be resumed and completed before embarking on the second stage of work, which would consist in drawing up different rules applying to specific subjects. The sixth report was premature and badly put together. The examination of the basis for the obligatory nature of recognition could not be dealt with under the heading of

<sup>2</sup> First report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486; second report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1; third report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505; fourth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519; fifth report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add.1 and 2.



the legal effects of recognition. Moreover, the report was repetitive.

15. The parallels drawn between treaties and unilateral acts in paragraphs 109 *et seq.* of the report were further proof that earlier work was incomplete. The tendency to treat such basic questions as temporal application as inconsequential was regrettable, since it was a central issue and its substance deserved to be considered at length, rather than merely forming the subject of a “comment”, the term employed in paragraph 111. The Special Rapporteur should therefore go back to the drawing board if he wanted to savour the fruits of his labours.

16. Mr. MELESCANU said that unilateral acts of States were fundamental to public international law and were recognized by legal theory, in State practice and in the case law of ICJ, as had been demonstrated in the *Nuclear Tests* cases. In textbooks, unilateral acts of States were regarded as a source of public international law in the same way as customary law, treaty law and the binding decisions of international courts.

17. The codification of such acts was vital. Some, like wrongful acts of States giving rise to an obligation to compensate for the damage they had caused, had already been codified, and it was therefore high time to do the same for lawful acts of State in order to see in what circumstances they could produce legal effects. If possible, the law on the subject should also be developed progressively. Any other working method at the current stage would be unacceptable and futile.

18. As for the Commission’s approach to the issue, the general strategy mapped out in the first report was still wise, namely that the typology of unilateral acts should be established first, before focusing on the legal effects of those acts, their application, their validity, the duration of their validity and their modification or termination. The basic criterion determining what unilateral acts should be covered by the report was their ability to give rise to legal effects.

19. Three draft articles, accompanied by a commentary, had been presented in the second report, and after a long debate it had been deemed advisable to look at each category of unilateral acts, like promise, recognition, waiver and protest, before any further general rules were formulated. That sagacious decision had formed the basis of the sixth report, which should, however, be supplemented with references to legal theory and State practice. The work done by the Special Rapporteur was commendable and he personally supported it.

20. His main objection to the sixth report, however, was that it was a short monograph on the legal institution of recognition of States that addressed intellectually stimulating issues but drew the Commission away from its final objective, which was to determine to what extent recognition produced legal effects. Chapter III was the most interesting part of the report, but, like Mr. Economides, he would have preferred to see more attention paid to the difference between *de jure* and *de facto* recognition, something that could have practical implications. He would also have liked to see references to recognition of States and recognition of Governments, since they were two in-

stitutions that were much used and on which there was much State practice.

21. He agreed that recognition had a declarative and not constitutive effect, as was clearly illustrated by article 13 of the Charter of the Organization of American States, cited in paragraph 86 of the report. Moreover, recognition implied that the State granting it accepted the personality of the new State, with all the rights and duties that international law prescribed for the two States. He would add that recognition was not an institution specific to a given historical period. It continued to function to the present day, as was illustrated by the practice of the Arbitration Commission of the European Community, under which the recognition of a State by other States was purely declarative.

22. It would have been better to have a more extensive analysis of the legal effects produced by *de jure* recognition, which in his opinion included recognition of the territorial boundaries of the State recognized and the obligation to establish diplomatic relations and to negotiate and sign international agreements. By way of illustration, one might look at the practice of the Federal Republic of Germany *vis-à-vis* the German Democratic Republic and of Romania’s approach to the creation of an independent Moldova.

23. The comment in paragraph 107 concerning the basis of the binding nature of unilateral acts was true, as was the fact that unilateral acts in general and acts of recognition in particular were opposable in respect of the author State. The principle of *acta sunt servanda* adduced by the Special Rapporteur, on the lines of the principle of *pacta sunt servanda* as applied to treaties, must be incorporated in the Commission’s conclusions. It should, however, be accompanied by a *rebus sic stantibus* clause, as in the law of treaties, meaning that, if a fundamental change of circumstance could affect the object of a unilateral act, then so could the unilateral act be affected.

24. The Commission had started out with a theoretical analysis and moved on to a case-by-case study, with the intention of postponing the development of general rules. Mr. Gaja’s very welcome proposal to establish a working group had made it possible to re-examine the Commission’s methods of work with a view to charting the broad outlines of its future course of action. He nonetheless believed that, once the working group decided on a given approach, the Commission should agree in principle to follow that approach.

25. Two practical problems arose. What was to happen now with the case-by-case approach? If the codification work on international treaties had proceeded on that basis, it would still be at a very early stage. Drafting small monographs on specific unilateral acts was unlikely to be very fruitful, though he fully agreed that the work could not remain entirely at the level of theoretical abstraction, with no reference to State practice. A happy medium must be found in which the Commission’s work would be neither too theoretical nor too focused on specific details. The primary objective should not be to describe every aspect of the institution of unilateral acts, but rather to determine what their legal effects were. That would reveal

State practice on the basis of which general rules could be codified and drafted.

26. The second practical matter was whether the Commission was going to codify unilateral acts alone or the behaviour and acts of States as well. He was in favour of a classic approach, namely, to deal solely with unilateral acts, to see to what extent a specific act of a State could, in certain circumstances, produce legal effects. However, he was also open to the idea of elaborating rules under which certain State conduct, in certain very clearly defined circumstances, could produce legal effects. Exploring that domain might be fruitful, and Mr. Gaja's informal proposal might hold some promise. Above all, however, the objective of the Commission's endeavours must be kept in mind: to draw the attention of States to the fact that, in certain circumstances, their statements or acts could produce legal effects, and that to engage in unilateral acts therefore entailed a certain degree of responsibility.

27. Mr. BROWNLIE said his position was so far from that of all other members of the Commission that he felt quite depressed. He was in the same state of mind as a Cypriot colleague who, having heard the other side's arguments before the European Court of Human Rights, had torn up his original speech and given another one. While he would not go quite that far, he did find it depressing that the Commission was still discussing methodology, and needed to do so, even though it had been working on the topic since 1996. Yet another depressing fact was that everyone was using the conventional rubric of unilateral acts, even though the true subject of discussion was the conduct of States.

28. He wished to express his sincere recognition of the extraordinary patience and fortitude shown by the Special Rapporteur. He had been criticized, but had not always been given much help. The effort was a collective enterprise, however, and if it turned out to be a can of worms, it would not be the Special Rapporteur's can but that of the Commission.

29. He was greatly troubled by one preliminary issue: the need for the Commission to be consistent in the conduct of its business. The topic had been placed on its agenda in 1997, and the first report by the Special Rapporteur had been considered in 1998. The topic had been given prominence in 2002 in the Commission's report to the General Assembly in the work of its fifty-fourth session,<sup>3</sup> in which the discussion of the Special Rapporteur's fifth report was summarized at length. At its 2727th meeting, on 30 May 2002, the Commission had established an open-ended informal consultation, to be chaired by the Special Rapporteur.<sup>4</sup> Thus, in 2002 there had been no indication of any serious problems in the work on the topic, no suggestion that the Commission was about to leave the charted path.

30. Those historical facts had to be recalled in the light of the statements made at the previous meeting. Mr. Koskenniemi had not formally proposed terminating the project, but all his reasoning had pointed in that direction. It was somewhat disturbing that some members had

found his exposition to be seductive. The superficial attractions of his position must be rejected, however, for two entirely independent reasons.

31. First, a change of position by the Commission after the topic had been on its agenda for six sessions would convey the impression that the Commission was unable to conduct its own affairs. Second, Mr. Koskenniemi's case for dismissing unilateral acts on grounds of absence of coherence and lack of legal quality was weak. Mr. Koskenniemi suggested that the informal transactions of States were of little significance and not worthy of the Commission's attention. That position was contradicted by a vast array of evidence and, quite simply, by the realities of international relations.

32. Nevertheless, whatever the intellectual and analytical problems, unilateral acts played a substantial role in State relations, as was demonstrated by a number of cases considered by ICJ. In the *Fisheries* case, the United Kingdom had long remained silent while the Norwegian system of straight baselines had evolved, and it had been held bound by that system, even though that might have been thought anomalous under general international law. The *Arbitral Award Made by the King of Spain on 23 December 1906* case had concerned the not unimportant question of the validity of an arbitral award. In the *Passage through the Great Belt* case, there had been no Finnish protest in relation to the building of a bridge—a pity. The *Nuclear Tests* cases had turned on the French attitude to nuclear testing in the atmosphere. In the *Corfu Channel* case, the Court had used as part of the evidence the “attitude” of Albania. In the *Military and Paramilitary Activities in and against Nicaragua* case, reference had been made to the annual report of the Court. In the *Certain Phosphate Lands in Nauru* case, it had been very important that, after independence, the Head of State had made a number of representations to Australia about compensation for the taking of phosphate. The *Temple of Preah Vihear* case had been won on the basis of a map in annex I to the memorial of Cambodia which had been in circulation in the negotiations between the two States from 1908 to 1958. In the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case, both sides had relied on forms of estoppel.

33. Those nine examples were by no means exhaustive, of course, and the argument that they reflected only the special world of ICJ was not acceptable. They all reflected significant and recurrent phenomena of State relations. The Court must not be treated as being in a special category: it dealt with real problems faced by States, and it was very much a part of the real world.

34. If the topic of unilateral acts was set aside on the basis suggested by Mr. Koskenniemi, the Commission would be ignoring doctrine, which was quite extensive. There was a respectable quantity of State practice as well. The Commission would appear to be acting both arbitrarily and arrogantly if those familiar and substantial materials were set aside.

35. The inevitable conclusion was that unilateral acts formed an area of legitimate legal concern, namely conduct of States that fell outside the concept of treaty making. There were some extremely difficult problems, of course, such as the relationship of the topic to the law of

<sup>3</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. VI.

<sup>4</sup> *Ibid.*, vol. I.

treaties, an analogy that was not at all helpful, as there was a major distinction between unilateral acts and treaties. For treaties, there was a clear distinction between the determining or precipitating conduct—the making of the treaty—and the legal analysis of the consequences. For unilateral acts or conduct, the precipitating act or conduct was difficult to separate from the legal process of constructing the results.

36. A second problem was that the subject matter of unilateral acts was unusually susceptible to overlapping classifications. The *Nuclear Tests* cases were frequently discussed as a form of unilateral act or estoppel but could also be characterized, with some justification, as an example of the operation of the principle of good faith. In paragraph 107 of the report, the Special Rapporteur characterized it as a promise. The Ihlen declaration<sup>5</sup> could be analysed in terms of an informal agreement, as Hambro had pointed out in a famous essay.<sup>6</sup> A third problem was the question of informality, something Mr. Koskenniemi had over-emphasized. The real question was not form but rather the conduct of States in the absence of a real treaty relationship. The fourth and perhaps most basic problem was that the concept of a unilateral act was too restrictive in several ways, since it was the context and the antecedents that were legally significant. The fifth problem was whether there was a legal institution that corresponded to the concept of the unilateral act. That seemed to be a non-question, or at most a very theoretical one.

37. As to the awful question of methodology, the United Kingdom had proposed an expository study, but, as Mr. Addo had asked, where would it lead? He was not sure, but neither was he attracted by the draft articles approach. To come out with general principles in the form of treaty-type articles did not seem to correspond to the nature of the subject matter. There should rather be an archipelago of topics, each to be studied on its own. He appreciated the efforts made by the Special Rapporteur and others to pin down some principles and definitions, a necessary enterprise. An organizational question also arose: the Working Group was functioning, yet significant questions of methodology had not been addressed. That course of action was bound to lead to difficulties.

38. Finally, it seemed clear that recognition of States was a separate topic, not the one envisaged by the General Assembly when it had mandated the study of unilateral acts.<sup>7</sup> It consisted of two issues: What constituted recognition, and what were the criteria of statehood? The Commission would be taking on appalling difficulties—indeed, acting beyond the agenda approved by the General Assembly at its fifty-second session<sup>8</sup>—if it pursued the topic, although examples of recognition of States could certainly be used as part of the general analysis.

39. The main analytical point was that recognition, as a form of State conduct, was not confined to recognition

of States. The Ihlen declaration was an example of recognition, as was the annex I map in the *Temple of Preah Vihear* case. Unfortunately, in the discussion so far, there had been a general failure to distinguish political and legal recognition or non-recognition. Political non-recognition could be illustrated by the refusal of the Arab States to recognize Israel, except when it was to be charged with breaches under Article 2 of the Charter of the United Nations. In the *Loizidou* case, the question had been whether the Turkish Republic of Northern Cyprus qualified for recognition, and the European Court of Human Rights had taken the view that it did not. That had been a form of legal non-recognition, although it could have political implications as well. The question of recognition of States was necessarily linked to the criteria of statehood, and that was not a legitimate part of the rubric of unilateral acts.

40. Mr. GALICKI congratulated the Special Rapporteur on his ambition to continue with a difficult topic despite all the difficulties and voices of criticism. In the light of the discussion in the Commission and the Sixth Committee in 2002, he had presented a completely different approach, analysing mainly the institution of recognition and taking up such issues as the principal forms and characteristics of acts of recognition and their validity, legal effects and application.

41. The sixth report revealed some rather surprising changes in the author's attitude to the methods applied. He had previously been attempting to produce draft articles on specific matters such as the definition of unilateral acts, the capacity of States, the persons authorized to formulate unilateral acts, and so on, while planning to prepare other, more general ones, in keeping with the framework of the Vienna regime on the law of treaties.

42. The report did not draw any conclusions about how to develop draft articles. On the contrary, the Special Rapporteur seemed ready to abandon that approach in favour of less rigid guidelines. The approach now proposed, which seemed to contradict that outlined in the fifth report, raised other issues and would entail a substantial amount of further study on unilateral acts. The Special Rapporteur should be more consistent in his decisions on methodology.

43. Notwithstanding some of the doubts raised, he was in favour of continuing work on the topic, in keeping with the decision of the Sixth Committee as endorsed by the General Assembly. The question was how to consolidate the results of the work done so far. In that connection, he welcomed the establishment of an *ad hoc* working group to assist the Special Rapporteur in defining the scope of the topic for study. It was evident from the fifth and sixth reports and discussions thereon that in particular the concept of recognition and its relevance to unilateral acts needed to be more clearly defined. Different forms of recognition—explicit, implicit, *de jure*, *de facto*—should be considered. Likewise, it should be remembered that not only States were “objects” of international recognition. What of governments, insurgents and belligerents? Given that the Commission had early on refused to accept the proposal to consider the international recognition of States, the institution of recognition in the context of uni-

<sup>5</sup> See 2770th meeting, footnote 8.

<sup>6</sup> See E. Hambro, “The Ihlen declaration revisited”, in D. S. Constantopoulos *et al.*, eds., *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Bonn, Schimmelbusch, 1957), pp. 227–236.

<sup>7</sup> See General Assembly resolution 51/160 of 16 December 1996.

<sup>8</sup> General Assembly resolution 52/156 of 15 December 1997, para. 8.



lateral acts must be examined very carefully, with a very precise definition of its scope.

44. It had also emerged from the discussion of the sixth report that there was an urgent need to define clearly the concept of unilateral acts. The Commission was now suffering the consequences of its failure to do so at an earlier stage. It was to be hoped that the *ad hoc* working group would remedy the situation, on the basis of formulas already agreed upon, where possible. Mr. Melescanu was right to say that the Commission should first of all identify common features in the unilateral acts, understood as sources of international legal obligations, as stressed by Mr. Economides. For practical reasons, the definition of unilateral acts should be rather restrictive, thereby providing a narrower but clearer scope for the study.

45. An additional factor, one which seemed to be thwarting attempts to create a unified concept of unilateral acts as sources of international obligations and must also be given due consideration, was the absence of a clear legal position on unilateral acts in domestic legislation. Such uncertainty was one of the main reasons why unilateral acts were not more widely used by Poland, and the same might well apply to other countries.

46. Finally, to make headway on the topic and bring it to a successful conclusion the Commission should undertake more active study of State practice regarding unilateral acts in general and cases of recognition as one form of those acts in particular. It might be the only means of establishing common principles that were not confined to *acta sunt servanda* or to a principle of good faith, thereby ensuring that the Commission's work would be effective and really useful for States.

47. Mr. CHEE said the Special Rapporteur had done hard work in the sixth report but might have approached the subject differently. In order to simplify his task and define the scope of the study, he should have drawn a distinction between the institution of recognition and the regime of recognition of States and Governments, with a view to providing separate definitions. According to Jennings and Watts in *Oppenheim's International Law*,<sup>9</sup> recognition involved acceptance by the State of any fact or situation occurring in its relations with other States. However, in the context of recognition of States and Governments, it must be distinguished from a looser use of the term conveying mere acknowledgement or cognizance of an existing situation. Those two issues were dealt with under separate headings in most textbooks on international law, including *Oppenheim's International Law*, which listed four categories of unilateral acts: declaration, notification, protest and renunciation.

48. The best definition of a unilateral act of declaration was to be found in the *Nuclear Tests* cases (*Australia v. France*) and (*New Zealand v. France*). According to ICJ, "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly,

and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made" [p. 267, para. 43, and p. 472, para. 46, respectively].

49. As to other cases mentioned in the report, attention should be drawn to the statement in paragraph 21 that the Ihlen declaration recognized a situation, but also contained a promise and even a renunciation. He pointed out that the Ihlen declaration had been made in response to the Danish Minister's intervention requesting Norway to refrain from making any difficulties in the settlement of the Greenland question in return for Denmark's readiness to concede in the Spitzbergen question. The declaration had thus been made as a reply, as a bilateral commitment between the two countries. It was neither a unilateral promise nor a one-sided renunciation. The interdependence of bilateral transactions had been noted by PCIJ, which considered it beyond dispute that a reply of that nature given by the Minister of Foreign Affairs in response to a request by the diplomatic representative of a foreign power on a question falling within his province was binding upon the country to which the Minister belonged.

50. Judging from the last sentence of paragraph 99 of the report, the Special Rapporteur seemed to accept the persistent objector rule in customary international law. Although the rule, which was based on lack of consent by the persistent objector, was accepted by many academics, in practice there had been only two cases decided by ICJ on the rule: the *Asylum* case (1950) and the *Fisheries* case (1951). In the former, the Court had denied the application of a special custom among Latin American countries, pointing out that even if the special custom had existed, it was not applicable to Peru, which had persistently opposed application of it. In the latter case, the Court had denied the United Kingdom's claim to the 10-mile rule applicable at the entrance to the Bay of Norway as part of customary international law, stating that, since Norway had persisted in its opposition to the 10-mile rule, it had been immunized from applying it. D'Amato noted that those two cases raised issues of special custom rather than general custom.<sup>10</sup>

51. Clearly, the persistent objector rule hindered the evolution of international law that was required to keep pace with the developments of a changing world. For instance, Grotian principles on the freedom of navigation and fishing on the high seas had recently undergone drastic changes, those areas now being subject to an array of new international regulations. One example of the futility of the persistent objector rule in the development of international relations was the expansion of the jurisdiction of the coastal State's seaward limit from 3 to 12 miles for the territorial sea and 12 to 200 miles for the exclusive economic zone—a change initially resisted but gradually accepted by Japan, the United Kingdom and the United

<sup>9</sup> See 2759th meeting, footnote 9.

<sup>10</sup> See A. D'Amato, "The concept of special custom in international law", *AJIL*, vol. 63 (1969), pp. 211–223, especially p. 212.

States as an inevitable evolution of the law of the sea. A further example of the evolution of international law was where States assumed new obligations to prevent harm to the environment. According to Jonathan Charney, the persistent objector rule was at best only of temporary or strategic value in the evolution of the rule of international law, unless one really believed that States had the independence to freely grant or withhold their consent to rules of customary international law.<sup>11</sup>

52. The Special Rapporteur should persevere with his work, which, with the assistance of members, would represent the work of the Commission as a whole.

53. Mr. KABATSI commended the Special Rapporteur on his efforts to tackle such a complex and unwieldy subject. Unquestionably, unilateral acts did exist and sometimes entailed legal obligations, and there was ample material on the subject in the form of academic articles and court decisions. The problem was how to identify common features with a view to establishing a set of rules allowing for subsequent codification. In that connection, the suggestions made included how and by whom such acts were formulated and conditions for their validity and revocation.

54. Despite the fact that little progress had been made since 1997, every year the Sixth Committee had encouraged the Commission to continue its work, and, as the Special Rapporteur underlined in paragraph 1 of the report, irrespective of the outcome, the study must be completed. Yet it could not be said that no progress had been made, as was borne out by Mr. Melescanu's comparison with the second report and the survey on relevant academic work and court decisions. To be sure, more information on State practice would be welcome and he looked forward to a greater response from States in that regard. Perhaps the report would have been better received if it had dealt with the issue of recognition more generally in the context of unilateral acts in international law, rather than focusing specifically on the concept of recognition itself. He hoped that with the assistance of the *ad hoc* working group the Special Rapporteur would find the best way forward. He shared the optimism of other members of the Commission like Mr. Mansfield, who believed in the viability of the topic.

*Mr. Melescanu (Vice-Chair) took the Chair.*

55. Mr. KOLODKIN said that, although he had previously regarded the topic of unilateral acts with a degree of scepticism, the content of the sixth report and the establishment of the *ad hoc* working group gave rise to some optimism.

56. Mr. Koskenniemi's assertion that there was no such institution as unilateral acts of States, and that hence it could not constitute a subject for the codification of international law, might seem radical. Yet it was surely more realistic than the view that it would be possible to produce a set of draft articles. Even were such a text to be submitted to States, there must be some doubt as to whether

it would advance any further. A law on unilateral acts of States could hardly be regarded as being on the same level as the law of international treaties. Unilateral acts, in most cases at least, were far more political expressions of will than were international agreements: they were not a result of negotiations, every stage of which was regulated by international law. They were therefore significantly more flexible than international agreements and, by the same token, could not be as stable.

57. Some general principles could nonetheless be discerned. While noting that the nature of unilateral acts could only be fully grasped on the basis of the peculiarities displayed by their various types, Wilfried Fiedler had acknowledged that some general criteria could be perceived.<sup>12</sup> To identify such criteria, a comparative analysis would be required: various types of unilateral acts would need to be examined. He therefore welcomed the Special Rapporteur's avoidance of any attempt to formulate general provisions and to take as his focus in the sixth report one type of act, that of recognition.

58. The report must clearly be regarded as merely the first approach to the topic of recognition. It was his impression that the Special Rapporteur had not attempted to bring forward any specific features of recognition as a unilateral act for the purpose of comparing them with the features of other unilateral acts, but had sought rather to fit recognition into the general framework already established in his previous reports. Recognition should, however, be considered only to the extent that it was expressed as a unilateral act. Recognition through or as a result of the establishment of diplomatic relations or other agreements should not find a place in the report. That also applied to recognition as the result of a decision by an international organization, if indeed such a decision amounted to recognition. The Special Rapporteur had himself imposed that restriction. It was therefore unclear why he had included paragraphs 28–31 and 36, which dealt with acts of recognition that were not unilateral. It was possible that recognition merited a study of its own, but only as a separate topic.

59. The Special Rapporteur rightly pointed out, in paragraph 46 of his report, that there was no norm of general international law that required States to formulate an act of recognition, which reflected the discretionary nature of recognition. He doubted that, when a State voted for the admission of another State to the United Nations, it was bound by that vote and could not withdraw its recognition at a later date. Mr. Economides and Ms. Xue had spoken about the situation in which States, although voting for the admission of a new member, continued not to recognize the State concerned. Such votes were, however, the result of political considerations, above all; they had nothing to do with international law. All States were aware of the political nature of voting in the General Assembly, so there were no grounds for claiming legal precedence or for evoking estoppel. On the other hand, the unilateral act of recognition was also used above all as a political instrument.

<sup>11</sup> See J. I. Charney, "The persistent objector rule and the development of customary international law", *BYBIL*, 1985, vol. 56, pp. 1–24, at p. 24.

<sup>12</sup> See W. Fiedler, "Unilateral acts in international law", in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. IV (Amsterdam, Elsevier, 2000), pp. 1018–1022.

60. It was becoming ever clearer that recognition of a State involved not only the traditional considerations—possession of territory, settlement, effective government and independence in international relations—but also a host of others. Thus, the new independent States of Europe had been recognized, but the Taliban had not. Moreover, recognition was increasingly accompanied by purely political criteria or conditions.

61. If recognition was regarded as a political act, doubt must hang over the Special Rapporteur's assertion that the modification, suspension or revocation of an act of recognition was possible only if it was provided for by the act itself, with the agreement of the addressee or under the conditions outlined in paragraphs 121–123. Mr. Dugard had asked whether recognition could be withdrawn in the case of failed States. It was worth looking at some other hypothetical examples. The report stated that admission to the United Nations was an act of recognition, or its equivalent. However, what was the situation where a State was excluded from the United Nations or had its membership rights suspended? If the unilateral recognition was hedged round with various political conditions and if, following the recognition, the State stopped observing them, could the recognition be withdrawn? Moreover, the State that had formulated conditions for recognition as a unilateral act could change those conditions, cancelling some or adding others. It would be remembered in that context that, in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ had said that the right to change or withdraw was inherent in any unilateral act of a State.

62. Although basically a political act, recognition nonetheless gave rise to legal effects. The assertion—even within the Commission itself—that recognition was of a purely declaratory nature was therefore open to question. Various forms of recognition should be examined from various points of view. For example, in the 1990s, there had twice arisen the question of the recognition of two States that were claiming to be continuing the personality of the preceding States. He had in mind the recognition of the Russian Federation as the continuing State of the Soviet Union and the Federal Republic of Yugoslavia as that of the Socialist Federative Republic of Yugoslavia. Although the circumstances were similar, Russia's status had been recognized, while that of the Federal Republic of Yugoslavia had not. The legal effects of continuity had therefore arisen only for the Russian Federation. In that case, recognition—in what had been a basically political act, as had been the non-recognition of the Federal Republic of Yugoslavia as the continuing State of the Socialist Federative Republic of Yugoslavia—had had a clearly constitutive effect. Much remained to be said on the question of whether recognition was declaratory or constitutive, and it was regrettable that the report only contained arguments in favour of the former approach.

63. Finally, the Special Rapporteur was right in saying, in paragraph 8, that a decision on the final form to be taken by the outcome of the Commission's work would facilitate progress. In his view, the Commission's conclusions could not be fitted into the rigid framework of draft articles.

*Mr. Candioti resumed the Chair.*

64. Mr. SEPÚLVEDA said that the report represented a praiseworthy effort to systematize a topic that had been extraordinarily elusive, owing to its complexity: indeed, within the Commission itself there was considerable disagreement as to the nature and scope of unilateral acts. It was difficult even to achieve any shared understanding of the definition of such acts or their essential elements. The problem had been compounded by the paucity and limited nature of government contributions. It was therefore essential for the Commission to look into State practice, on which much had been written, and at the same time take into consideration the judgements of international courts. It was clear from the report that some progress had been made, but it would have been advisable to make more use of such judgements, both those mentioned in the report and others, as could be relevant to the topic. An examination of decisions by national courts could also be helpful, such as those delivered in courts in the United Kingdom and the United States concerning recognition in relation to the civil war in Spain or the Soviet Union. He also drew attention to the *Sabbatino* case in the United States, which had related to the recognition of the Government of Fidel Castro.

65. He welcomed the establishment of the *ad hoc* working group, which could bring together all the elements for a definition of unilateral acts and streamline the organization of the Commission's work. The first few meetings of the group had already shown the success of such a procedure. The main question to be considered was the legal effects of unilateral acts, which had three central elements: the manifestation of consent by a State; the creation of international rights and duties; and the repercussions of the first two elements.

66. As ICJ had said in the *Nuclear Tests* cases, such consent must be of an autonomous nature: no counterpart was required to produce a legal effect, although an objecting State might, of course, formulate a protest addressed to one or more States, indicating its intention to repudiate or not to accept the legal consequences of a unilateral act. Hence there was a paradox between the autonomy of the act and the potential questioning of it.

67. As to the question of establishing rules for general application, he believed that, although few, unilateral acts had enough common denominators for the Commission's purposes. It would, however, be essential to establish specific rules for each category of act, including recognition, promise, protest and waiver. A harder task would be to classify the effects of unilateral acts, for they often could not be pigeonholed. The recognition of belligerency and insurgency—if that strange and anachronistic institution still existed, given that it had been invented as a means of establishing some South American States in the early 1900s—fell into a different category again. Of particular interest would be State practice with regard to territorial changes.

68. Certain aspects of the report should be thoroughly reviewed, especially paragraphs 17–67. The different categories of recognition were jumbled up and it was hard to sort them out. The same went for the section on legal effects (paras. 82–108): the extended discussion on whether recognition was declaratory or constitutive over-



shadowed the more important question of the legal effects themselves.

69. Clarification was required on a number of specific points. First, the link between unilateral acts and admission to membership of the United Nations and other international organizations should be established. Following debates in the General Assembly in the 1950s, in an advisory opinion ICJ had reaffirmed the criteria set out in the Charter of the United Nations. The question remained, however, whether States that voted for a given admission were thereby bound or whether an additional, independent act of political will was needed to give legal effect to the vote.

70. Second, State practice concerning recognition of Governments and the establishment or withdrawal of diplomatic or consular relations needed to be determined. Some States maintained diplomatic relations without formally recognizing a government. The question was whether that practice had replaced recognition or whether examples of such non-recognition were isolated.

71. Third, the question of the recognition of belligerency, insurgency and neutrality should be cleared up. The three categories of recognition had been modified and expanded since 1945 through the codification of international humanitarian law, but the nature of unilateral acts in that context needed to be determined.

72. Fourth, in the nineteenth and twentieth centuries a distinction had been introduced between *de jure* and *de facto* governments. He wondered whether that distinction held good and whether the effects of unilateral acts were the same as in the past.

73. More research was required on State practice concerning the recognition or non-recognition of territorial changes. The topic was of particular importance given the radical transformation in the world's borders since 1945. The principles on which States based their practice should be determined, and the inherent contradiction between the permissibility of force and the institution of non-recognition of territorial changes should be examined.

74. Further consideration should be given to the legal basis for unilateral acts: the reasoning that gave States legitimacy to undertake such acts. Again, a survey of the nature and scope of the concept of "good faith" would be welcome. Finally, thought should be given to whether unilateral acts only imposed obligations or whether they also gave rights.

75. Mr. BROWNLIE said that the Commission should not be wasting its time discussing a subject that was not on its agenda. Indeed, recognition of States and Governments, or belligerency, neutrality and other such topics, could not be discussed without a consideration of the substance of the matter to which that recognition related. The General Assembly had not put those topics on the agenda, and their discussion raised a serious question about the conduct of persons who might decide to stay away from plenary meetings when such topics were discussed. Meanwhile, the Commission was moving ever further away from the subject on the agenda.

76. The CHAIR recalled that, at the previous session, the Commission had agreed that the Special Rapporteur would consider the topic of recognition. It was important for all views on the matter to be heard.

*The meeting rose at 1.05 p.m.*

## 2774th MEETING

*Friday, 11 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIR invited the members of the Commission to continue their consideration of the Special Rapporteur's sixth report on unilateral acts of States (A/CN.4/534).

2. Mr. KEMICHA said that, with hindsight, the scepticism with which the Commission had welcomed the sixth report on unilateral acts of States seemed exaggerated, to say the least. It could be explained by the newness and complexity of the subject matter, but also possibly by the Special Rapporteur himself, who had initially given the impression in his report that he had some doubts about the feasibility of the topic. He had referred to statements by representatives of States in the Sixth Committee and also by members of the Commission as justification for the approach he had adopted of focusing in the report on a particular type of unilateral act—the recognition of States.

3. By means of that example, the Special Rapporteur had attempted to illustrate, sometimes easily but more often with great difficulty, that the act of recognition lent itself to codification through the simple technique of transposing the Vienna regime on the law of treaties, details of which he had given throughout the sixth report. One could

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

not but be impressed by the number of references in the report to the law of treaties and the Vienna regime. Admittedly, the transposition offered opportunities for codification, but it did have its limits: there was no guarantee that the exercise was applicable to other unilateral acts. Whatever the answer to that question might be, there remained a more basic concern, namely, the risk of losing sight of the specific nature of unilateral acts, whereby the State could assume obligations outside the treaty framework. As various members of the Commission had said, one must be wary of extending the Vienna regime to unilateral acts. Those acts represented an expression of will by States in the same way as treaties, and to question whether or not they were a legal institution was of little importance at present. As Mr. Economides had pointed out, the facts were more important than their classification.

4. Those acts were carried out to produce legal effects and engage the author State, and it should therefore be possible to categorize and even codify them, not only because that was what the Sixth Committee wanted, but also because that would ultimately help bring about legal stability at the State level. It was therefore in the Commission's interest to examine State practice, above all through doctrine and jurisprudence, and to identify characteristic features with a view to the establishment of a set of formal rules, a kind of common language, a code by which each State could measure the legal scope of its acts.

5. Mr. Sreenivasa RAO said that the Special Rapporteur's sixth report was as rich as the previous ones and that the ideas and observations it contained inevitably attracted attention, whether or not they fell within the Commission's immediate purview. Many members had already expressed their views in that regard, and it was now important for the Commission to give the Special Rapporteur guidance on the direction he should take. It was to be hoped that his energetic efforts would be channelled through a collective contribution by the Commission in a more productive framework.

6. While it was wise to focus the report on recognition, as one aspect of unilateral acts as a whole, studying the recognition of States *per se* would be counterproductive. Nowadays, moreover, the recognition of Governments attracted greater attention among the international community than the recognition of States. The recognition of States or Governments was in any case discretionary and not governed by legal criteria.

7. As a reasonable starting point for the drafting of the draft articles, perhaps the Commission might give an initial exposé on positive law—a restatement. In order to do so, it would have to be asked what the legal status of some of those unilateral acts was, how they were undertaken, what expectations they raised and by what combination of factors they could give rise to legal obligations. While there were of course unilateral acts which created obligations by and in themselves, more often than not those obligations were the result of a series of declarations and events, and it was that process, that genesis which the Commission must study.

8. Mr. ECONOMIDES, referring to the comment by Mr. Melescanu at the preceding meeting that the study of the topic should cover not only unilateral acts but also the uni-

lateral conduct of States, including silence, said that, with unilateral acts alone, the Commission's task was already extremely difficult, and he feared that if conduct was also considered, it would become virtually impossible. The members of the Commission must show wisdom, as their predecessors had done when drafting the text which was to become the 1969 Vienna Convention by totally ruling out oral agreements. As a compromise, the Commission might provide for a "without prejudice" clause, according to which the draft articles would not apply to unilateral conduct, which would continue to be governed by customary international law.

9. Mr. MOMTAZ, referring to the statement by Mr. Melescanu implying that the Commission had already partly codified the law applicable to unilateral acts by preparing its draft articles on State responsibility, said that, if that statement was true, it would be a strong argument to put to those who were still sceptical about the existence of unilateral acts as legal institutions. He asked Mr. Melescanu whether he thought that those who had prepared the draft articles on State responsibility had also had unilateral acts in mind when they referred to internationally wrongful acts.

10. Mr. MELESCANU, replying to Mr. Economides, said it was on account of the interest shown by some members of the Commission in studying the conduct of States likely to create legal effects similar to unilateral acts that he had said it would be advisable not to disregard that aspect of the subject.

11. Replying to Mr. Momtaz, he said that his comment had been an immediate reaction to Mr. Koskenniemi's statement that the codification of unilateral acts was difficult, not because the question was complex but because such acts did not exist as a legal institution.

12. Mr. FOMBA recalled that at the preceding meeting, Ms. Xue had said that, unlike other unilateral acts, recognition was subject to a well-established regime. He did not think it could be said that, under current international law, recognition was subject to a clear, strict and universally accepted legal corpus. Attempts to classify unilateral acts according to doctrine seemed to show that recognition was regarded as a discretionary act within the realm of State sovereignty and, thus, as being beyond the scope of international law, subject to compliance with its peremptory norms.

13. Mr. RODRIGUEZ CEDEÑO (Special Rapporteur), summing up the debate on the report under consideration, thanked the members for their constructive, positive and stimulating comments, which had sometimes been justifiably critical, particularly on drafting matters and the fact that some aspects had not been elaborated on in enough detail. The debate had once again highlighted the problems to which the topic gave rise, with regard both to substance and to method.

14. Referring to the existence of unilateral acts as an institution and the advisability and feasibility of codification and progressive development, he, like the vast majority of members, believed that, even though it was impossible to refer to an institution *stricto sensu*, unilateral acts existed nonetheless. International practice showed that

States took action by means of those acts and by means of certain forms of conduct which had specific characteristics and which could sometimes give rise to legal effects. Some members were of the opinion that a study of the topic would not go far enough if it were confined to unilateral acts in the strict sense of the term, as defined by one school of thought.

15. In reply to some members' comments on recognition and the recognition of States, in particular, he explained that he had analysed that unilateral act because, in 2002, the Commission had asked him to do so and that decision reflected the Commission's wish to pause while considering how to proceed with its work. That particular unilateral act had been singled out in order to show what the general features of a unilateral act were, but the intention had not been to carry out a study on the recognition of States. That was why the report under consideration was essentially a reference document.

16. Many excellent works existed on the subject of recognition. There was no doubt that the nature, characteristics and legal effects of recognition varied according to its purpose. The criteria for and rules applying to the recognition of States or Governments were, or might be, different from those applicable to the recognition of belligerency, neutrality or insurrection or to declarations relating to territorial matters. Perhaps the report, which was confined to one form of recognition, had caused some confusion, but he had tried to avoid that by not including the complete legal theory on recognition and not referring to the many and, in other respects, most useful categories of *de jure* or *de facto* recognition, something that a few members of the Commission had regretted. Legal theory and international instruments, such as the resolution adopted by the Institute of International Law at its fortieth session,<sup>2</sup> did, however, refer to full or definitive recognition and to limited or temporary recognition.

17. The main purpose of the sixth report had been to follow the suggestions made by some members in 2002 and to show that the definition of unilateral acts of recognition *stricto sensu* might be similar to the draft definition studied by the Commission in previous sessions.

18. He was not sure that the investigation of unilateral acts one by one, the method proposed by some members, was the best way to proceed. Of course the topic must be considered in depth, and State practice had to be taken into account. A comparative study of the characteristics, nature and legal effects of unilateral acts was crucial and would be considered in future reports. The table recommended by some members might be useful in some respects, if elements taken from previous reports were used, if State practice in respect of unilateral acts was analysed and if an attempt was made to draw general conclusions.

19. The debate had shown that there were still considerable differences of opinion about the scope and even the purpose of the study. Since reference to unilateral legal acts *stricto sensu* might be restrictive and some Governments might demur, it had been suggested that the study should also cover other acts and conduct of States which

might produce legal effects. If that were done, the scope of the topic would have to be widened to encompass conduct whereby a State accepted, or could accept, international legal obligations *vis-à-vis* one or more other States or even the international community as a whole. That would certainly have implications for his earlier work, which had disregarded various forms of conduct by States which were outside the framework of the planned codification work. State conduct, including omissions, could have major legal effects, and, as some members had suggested, those questions could probably be discussed at a later stage, hence the need to provide for a saving clause. The Working Group should consider the matter.

20. Other very important, substantive issues had been raised during the discussions, including the criteria for formulating acts of recognition, the discretionary nature of the act, the possibility of attaching conditions to it, the need to give further consideration to recognition, treating admission to the United Nations as an act of recognition and unilateral revocation or suspension of acts, especially acts of recognition.

21. It was generally held that recognition was a discretionary act. In addition, a unilateral act should not usually, in theory, be subject to conditions, for that would be tantamount to creating a treaty-based relationship, if the addressee agreed to the conditions in question, whereas the act of recognizing a State was a very special case and its characteristics were not always similar to those of other acts of recognition.

22. State practice seemed to indicate that States formulated acts of recognition in given circumstances, some of which were provided for by international law relating to the establishment of States, while others were more political in nature. Although it was true that an act subject to conditions implied the reaction of another party, a feature which deprived it of its unilateral character, it was equally true that that situation often occurred in practice. The question therefore deserved careful attention.

23. Collective recognition through a United Nations resolution had given rise to doubts. It had been accepted by some States, such as Spain and Sweden, for example, but not by others. Sometimes the admission of new members to the United Nations was not free from political considerations and the legal consequences could differ according to the way in which the practice was interpreted. In that connection, the admission of new States to the Organization in the 1990s had sometimes been highly controversial, a case in point being that of the Federal Republic of Yugoslavia.

24. Reference had also been made to difficulties arising out of the termination of unilateral acts in general and, in particular, whether a State could unilaterally revoke such an act. The conclusion had been reached that a State did not possess such arbitrary power. Revocation could be subject to limitations, and a restrictive approach taking account of circumstances and possible harm to third parties had to be adopted. If a State could revoke a unilateral act at any time, without giving any reasons, the *acta sunt servanda* rule and the good faith rule would be called into question.

<sup>2</sup> See *Annuaire de l'Institut de Droit International*, Brussels session, April 1936 (Paris, Pedone, 1936), pp. 300 *et seq.*



25. As far as the criteria which might be applicable to the recognition of a State were concerned, recognition was in theory not only a discretionary act of a State, but also an act which was not usually subject to restrictions, save in extreme circumstances (for example, when a Security Council resolution prohibited the recognition of a State, a Government or a particular situation).

26. Legal opinion on the Ihlen declaration<sup>3</sup> was divided; for some writers, it was a unilateral act, mainly of waiver, while others contended that it was a conventional act because it was a reply to a request from the Danish Government. He personally believed that the reasons for the declaration did not necessarily make it conventional. In the *Nuclear Tests* cases, the French declarations, which were usually regarded as a promise, had been made in response to proceedings instituted by certain countries which had believed that they were affected by French nuclear explosions in the South Pacific. ICJ had itself found that there was no denying the unilateral nature of those declarations or of the declaration as a whole, which must be regarded as a single legal act composed of several declarations.

27. As things stood, it was too early to decide on the form of the final product, given the divergence of opinions on the subject, although his work to date had been aimed at the drafting of a set of articles. It was necessary to meet the concerns of the members of the Commission and to find acceptable compromise solutions without a radical change of method. In that connection, he was looking forward to receiving the Commission's instructions.

28. State practice should unquestionably be investigated in greater depth, and he would be at pains to do so in his next report. In his future reports, he would also pay more attention to international precedents and legal theory. He intended to send all members of the Commission the outline of his seventh report so that they could express their opinions and give him a clearer idea of the direction his study should take.

29. Mr. Sreenivasa RAO said that, instead of sending the outline of his study to all members of the Commission, the Special Rapporteur should submit his observations to three or four colleagues or ask the Working Group chaired by Mr. Pellet to work with him.

#### **Diplomatic protection<sup>4</sup> (continued)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>5</sup> A/CN.4/L.631)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)\*\***

30. Mr. DUGARD (Special Rapporteur), introducing the addendum to his fourth report on diplomatic protec-

tion (A/CN.4/530 and Add.1), said that the Commission had completed the most important part of the work on diplomatic protection. It had sent draft articles on the diplomatic protection of corporations and shareholders (2764th meeting, para. 19) to the Drafting Committee and adopted the draft articles on the institution of diplomatic protection, the diplomatic protection of natural persons and the exhaustion of local remedies (2768th meeting, para. 38). One substantive issue still had to be considered: the diplomatic protection of crews of ships by the flag State. There was a division of opinion on the subject, both in the Commission and in the Sixth Committee, but in 2004 he would produce a draft article on it.

31. Three questions remained to be considered: the diplomatic protection of legal persons other than corporations, *lex specialis* to cater for bilateral investment treaties, and dual protection of an individual by an international organization and by a State. It was essential to the Commission's reputation that the second reading of the draft should be completed before the end of the current quinquennium.

32. As to *lex specialis*, which was covered in his draft article 21, there was no conflict between the document that Mr. Koskenniemi had prepared on the same subject for the Study Group on the Fragmentation of International Law and his own work. Many of the ideas advanced by Mr. Koskenniemi could even have been included in the addendum, and he thanked him for drawing his attention to the dictum of ITLOS in the *Southern Bluefin Tuna* case, in which the Tribunal had said that the principle of *lex specialis* was a general principle of law recognized in all legal systems and that, if the *lex specialis* contained dispute settlement provisions applicable to its content, the *lex specialis* prevailed over any similar provision in the *lex generalis*.

33. As was indicated in paragraph 106 of the report, foreign investment was largely protected by bilateral investment treaties, which provided two routes for the settlement of investment disputes. They could provide for the direct settlement of an investment dispute either between the investor and the host State before an *ad hoc* tribunal or a tribunal established by ICSID or by means of arbitration between the State of nationality of the investor (a corporation or an individual) and the host State. Where the dispute resolution procedures provided for in a bilateral investment treaty or by ICSID were invoked, customary law rules relating to diplomatic protection were excluded. Those procedures offered advantages to the foreign investor, as they avoided the political uncertainty inherent in the discretionary nature of diplomatic protection. ICJ had acknowledged the existence of such a special regime in the *Barcelona Traction* case.

34. Article 21 aimed to make it clear that the draft articles on the diplomatic protection of corporations and shareholders did not apply to the special regime provided for in bilateral and multilateral investment treaties. They served essentially the same function as article 55 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>6</sup> and reflected the maxim *lex specialis derogat*

\* Resumed from the 2768th meeting.

\*\* Resumed from the 2764th meeting.

<sup>3</sup> See 2770th meeting, footnote 8.

<sup>4</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>5</sup> See footnote 1 above.

<sup>6</sup> See 2751st meeting, footnote 3.

*legi generali*. The application of *lex specialis* was justified by the fact that there was a clear inconsistency between the rules of customary international law on the diplomatic protection of corporate investment, which envisaged protection only at the discretion of the national State and only, subject to limited exceptions, in respect of the corporation itself, and the special regime for foreign investment established by special treaties, which conferred rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal. That was why a provision along the lines of article 21 was indispensable in order to make it clear that there was a special regime for bilateral or multilateral agreements.

35. Recalling that the fourth report on diplomatic protection was devoted entirely to a particular species of legal person, the corporation, he introduced article 22, which applied the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made in the cases of other legal persons, depending upon their nature, aims and structure. It must be emphasized that the focus of attention in the draft articles should be on the corporation and that it was not possible to draft articles dealing with the diplomatic protection of each kind of legal person other than the corporation. The members of the Commission were well aware that legal persons could be created by municipal law and that there was no consistency or uniformity among legal systems in the conferment of legal personality. There was today a wide range of legal persons, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all those legal persons provided one explanation for the fact that writers on both public and private international law tended to focus their attention on the corporation. There was, however, another reason, which was that corporations engaged in foreign trade and investment. Thus, it was most often legal persons that were involved in investment disputes and that were most likely to request diplomatic protection. Other legal persons, of course, could require such protection. Several decisions of PCIJ stressed the fact that a commune or a university, for example, could have legal personality. There was no reason why a State should not protect a university if it was injured abroad, provided that it was entirely a private entity, since, in the case of a state-controlled university, it would be the State itself that was directly injured. Foundations, which were also private institutions, did good works abroad and should benefit from diplomatic protection.

36. The same applied to non-governmental organizations. Some authors did not agree, however, and considered that a non-governmental organization had an insufficient link with the State in which it was registered to allow the State to protect it. Thus, Doehring argued that the worldwide membership and activities of a non-governmental organization resulted in a situation in which an injury to it could not be seen as an injury to the State of registration.<sup>7</sup> That was an interesting line of argument which in his opinion paid too much attention to

the *Nottebohm* judgment and too little to the *Barcelona Traction* judgment. It certainly illustrated the complexity of the topic of diplomatic protection in respect of legal persons other than corporations.

37. Partnership illustrated that complexity particularly well. In most legal systems, particularly common-law ones, partnerships were not legal persons. In some legal systems, however, they were endowed with legal personality. A partnership might thus be considered a legal person in one system but not in another, something which underlined the total lack of uniformity among States in their approach to conferring legal personality on entities.

38. He had given those examples in order to show that it would be impossible to draft distinct provisions to cover the diplomatic protection of the various kinds of legal persons. The only course was the one already adopted, namely, to focus attention on the corporation, the kind of institution that had been the subject of the decision by ICJ in *Barcelona Traction*, and then to draft a general clause extending to other legal persons *mutatis mutandis* the principles expounded in respect of corporations. That was what the provision in article 22 sought to achieve.

39. Most cases involving the diplomatic protection of legal persons other than corporations would be covered by draft article 17, which was currently before the Drafting Committee in the revised form set out in paragraph 122. The draft article had been extensively debated, but the Drafting Committee had adopted it provisionally. Under article 22, a State would have to prove some connection of the kind described in article 17 between itself and the injured legal person as a precondition for the exercise of diplomatic protection. The language of article 17 was wide enough to cover all types of legal persons, however different they might be in their activities, structure or purpose. Articles 18 and 19, which had been referred to the Drafting Committee and dealt with cases in which shareholders could be protected, would not apply to legal persons other than corporations, while article 20, dealing with the principle of continuous nationality, would apply. In other words, the provisions on diplomatic protection of corporations were being taken as the starting point and applied *mutatis mutandis* to other legal persons. The Commission had often expressed misgivings about the use of Latin maxims. In paragraph 123, he suggested an alternative article 22 in which the words *mutatis mutandis* were replaced by an equivalent but wordier formulation. He himself preferred the Latin phrase, which had the advantage of being more economical and more elegant, and he hoped that the Commission would agree with him.

40. Mr. KOSKENNIEMI said that, as currently drafted, the provision in article 21 dealt only with the protection of corporations and their shareholders. Special arrangements—local, bilateral or multilateral regimes—could well be concluded between States on diplomatic protection in general, however. He therefore wondered where in the draft convention such special regimes should be placed. On the face of it, they should appear at the end of the draft articles in a *lex specialis* clause covering all the kinds of arrangements that might be concluded between

<sup>7</sup> See K. Doehring, "Diplomatic protection of non-governmental organizations", M. Rama-Montaldo, ed., *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al profesor*

Eduardo Jiménez de Aréchaga (Montevideo, Fundación Cultura Universitaria, 1994), pp. 571–580.

States, and he asked whether the Special Rapporteur had any intention of coming up with a more general provision or whether the exception contained in article 21 was the only one that would appear in the draft convention.

41. Mr. DUGARD (Special Rapporteur) said that he had not considered the matter from the perspective of other forms of *lex specialis*, since in practice the main focus was on bilateral investment treaties. Mr. Koskenniemi was, however, correct in saying that there were other arrangements in which diplomatic protection was included and that it might be wiser to provide for a general *lex specialis* clause outside the chapter dealing exclusively with corporations. The emphasis must be on bilateral investment treaties, but the Commission could well broaden the scope. He hoped that the proposal might be revisited during the general debate, but there was no reason why it should not be approved and referred to the Drafting Committee for the amendment of article 21.

42. Mr. BROWNLIE, endorsing Mr. Koskenniemi's comment, said that he had some reservations about article 21 relating more to the commentary than to the provision itself. He felt uneasy when members of the Commission insisted on putting *lex specialis* provisions in all its texts, since the applicability of such provisions surely went without saying. *Lex specialis* was a general principle. Even if a *lex specialis* provision was included, there was no need to spend a lot of time cataloguing what were regarded as the situations producing *lex specialis*, and especially giving particular prominence to bilateral investment treaties. It was not the usual practice to spell out the cases of *lex specialis*. It would be much safer—as well as being the normal approach—simply to state the principle. Those members of the Commission who worked in the field of arbitration were aware that restrictions on diplomatic protection applied, *inter alia*, to the standards of conduct set out in bilateral investment treaties. It was extremely common for the parties to present arguments on the interpretation of various parts of a treaty, in cases of doubt, by referring to the principles of general international law that were applicable at the time of the conclusion of the treaty; that was an altogether standard way of interpreting treaties.

43. He was concerned that the emphatic language of the commentary might give rise to misunderstandings. That applied in particular to the penultimate sentence of paragraph 112 of the report, which contained the phrase “special regime for foreign investment”. While it was generally true to say that the *lex specialis* envisaged by the Special Rapporteur clearly related to what might be termed the procedural regime, the phrase in question encompassed substantive provisions dealing with the standards of conduct of the State playing host to foreign investment. That suggested that there was a total divorce between customary international law and general international law as far as bilateral investment treaties were concerned. And that was not the case, either in principle or in the practice of arbitration. It was perfectly normal for teams of lawyers, whether representing the respondent State or the claimant, to bring in matters of general international law, and, if one team did so, the other automatically did the same. It might therefore be preferable to adopt more cautious language in the text of the commentary. It was unneces-

sary, since it was not common practice, to specify cases of *lex specialis*.

44. Mr. CHEE noted that the Special Rapporteur spoke of corporations in general. In order to clarify the thinking of the Commission, it might be advisable to define the nature of corporations, whether commercial or not.

45. Mr. NIEHAUS said that, in draft article 17, as revised, the criterion of the “analogous link” was too vague and would only complicate the granting of diplomatic protection. A distinction could be made between a corporation's *siège social* and administrative headquarters, but to speak of an “analogous link” with the State exercising the diplomatic protection gave the impression that reference was being made to the nationality of the shareholders, something that would complicate the concept of the nationality of the corporation. He asked the Special Rapporteur what his intention had been in proposing such wording, which might create additional difficulties.

46. Mr. DUGARD (Special Rapporteur), replying to Mr. Niehaus, said that the question had been debated at length during the consideration of the fourth report and that it would be inappropriate to reopen the debate in the context of the report currently being considered by the Commission. He therefore referred Mr. Niehaus to the summary records of the debate on the matter.

47. He reserved his position on the extremely pertinent comment by Mr. Chee, which related to a question that had already been dealt with, together with the other provisions relating to the nature of corporations. He believed that the question should be dealt with in the commentary rather than in the body of the draft article, but he would return to the matter in greater detail at a later stage.

48. Mr. Brownlie's comments were so substantial that they merited further reflection, and he reserved the right to provide a more detailed response at a later stage. He agreed with Mr. Brownlie that it might be unnecessary to include a *lex specialis* clause in the draft articles, since it was a general principle. That was for the Commission to determine, however. As for the commentary, he had dealt with the question of bilateral investment treaties in detail in order to emphasize the need for a provision of that kind. He had probably overstated the issue in suggesting, in paragraph 112, that customary international law was completely excluded, but there obviously existed circumstances in which it was not included. Mr. Brownlie's comments concerned the wording of the commentary to article 21, should it be adopted, but they should also be considered in the light of the fact that the Study Group on the Fragmentation of International Law was considering the question of *lex specialis*, thus enabling the Commission to debate a most important general principle, which applied to any draft articles it might prepare.

*The meeting rose at 11.35 a.m.*



## 2775th MEETING

Tuesday, 15 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### Cooperation with other bodies (*continued*)\*

[Agenda item 11]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed the President of the International Court of Justice and invited him to address the Commission. Judge Shi Jiuyong had himself served on the Commission from 1987 to 1993 and was thus familiar with the Commission's work.

2. Mr. SHI (President of the International Court of Justice) said the Court was most appreciative of the fact that exchanges of views with the Commission had become customary, and it was a particular pleasure for him to return to the very room where he had sat as a member of the Commission between 1987 and 1993, and as Chair in 1990.

3. The Court was the principal judicial organ of the United Nations, with the function of deciding disputes between States in accordance with international law, whereas the Commission was charged with the codification and progressive development of international law. The link between the two spoke for itself. Both contributed to the strengthening of international law. There was, moreover, interaction between the two bodies at every level. Some Commission members appeared regularly before the Court as counsel or agents of parties, bringing to bear not only their advocacy skills but also their valuable knowledge of the Commission's work, which in turn nourished the Court's deliberations. More important still was the fact that, since the election to the Court of Sir Benegal Rau in 1952, members of the Commission had regularly been elected to sit as judges of the Court. Two had been elected in October 2002, with the result that, of the current 15 Judges, 7 were former members of the Commission. Furthermore, several members of the Commission had served as judges *ad hoc* in cases before the Court.

4. The close relationship between the two was completed by the profound respect and consideration shown by each for the other's work. While the Commission systematically referred to the judgements of the Court in its codification enterprise, the Court had similar recourse to the Commission's work to determine the content of the law or interpret various rules of international law. If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means.

5. The first occasion on which the Court had referred to the Commission's work was in its judgments on the *North Sea Continental Shelf* case in 1969, when it had had recourse to the Commission's discussions on the question of delimitation between adjacent States to determine the status of the principle of equidistance embodied in article 6 of the 1958 Convention on the continental shelf. The Commission's work on the law of the sea had subsequently been used by the Court on several occasions, in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case and the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case.

6. The Commission's work had also been useful to the Court in many other areas. In the *Kasikili/Sedudu Island* case, and more recently in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had used the Commission's work to interpret various provisions of the 1969 Vienna Convention. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court had used the Commission's work to confirm the customary status of the principle of the prohibition of the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations. Article 12 of the 1978 Vienna Convention had similarly been found by the Court to be customary, notably on the basis of the commentary on article 12 of the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-sixth session,<sup>1</sup> in the *Gabčíkovo-Nagymaros Project* case. And, in the *Marine Delimitation and Territorial Questions between Qatar and Bahrain* case, the Commission's work had been used to confirm the definition of arbitration.

7. It was in the domain of State responsibility, more than any other, that the potential complementarity between the work of the Court and of the Commission had best been illustrated. The Commission's codification of the rules of State responsibility had been an invaluable guide to the Court when it had dealt with complex issues such as that in the *Gabčíkovo-Nagymaros Project* case. The Court had referred extensively to the draft articles on State responsibility adopted by the Commission on first reading<sup>2</sup> and to the accompanying commentary to interpret the notion of the state of necessity, to distinguish between a wrongful act itself and acts of a preparatory character, and to determine the conditions for lawful resort to countermeasures.

<sup>1</sup> *Yearbook ... 1974*, vol. II (Part One), p. 197, para. 2 of the commentary.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D, pp. 58–65.

\* Resumed from the 2764th meeting.

In doing so, it had not simply taken note of the Commission's work but had, in its turn, reinforced the value of the draft articles by declaring some of the principles contained therein as being of a customary nature; and it had done so some four years before the adoption of the draft on second reading<sup>3</sup> or before the General Assembly took note of the draft articles.<sup>4</sup> The recognition of the status of the draft articles had been further confirmed two years later in the advisory opinion in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when the Court had declared that the principle of attribution to the State of the conduct of its organs, reflected in the then article 6 (subsequently article 4) of the draft articles, possessed a customary character.

8. There had been important changes at the Court over the past year. Three new members had been elected—Judge Tomka from Slovakia, Judge Simma from Germany and Judge Owada from Japan—and the first two had been members of the Commission. Judge Koroma and he himself had been re-elected.

9. Since Judge Guillaume had addressed the Commission at the previous session, the Court had rendered a final judgment in three cases and ordered provisional measures in two others. The total number of 24 cases on the Court's docket remained the same, however, since three new cases had been filed with the Court over the past 10 months, a sure sign of its vitality and the trust placed in it by States.

10. The Court had handed down judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. In 1994, Cameroon had seized the Court of a legal dispute with Nigeria in respect of sovereignty over the Bakassi peninsula. It had subsequently widened the scope of its application, requesting the Court to determine the land boundary between the two States from Lake Chad to the sea and to delimit their respective maritime areas. It had also claimed reparation from Nigeria on account of damage suffered as a result of the occupation of Bakassi and Lake Chad and of various border incidents. Nigeria had responded by raising eight preliminary objections on the grounds of lack of jurisdiction and inadmissibility, which the Court had addressed in a judgment of 11 June 1998. Nigeria had gone on to submit a request for interpretation of that judgment (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*), on which the Court had ruled on 25 March 1999. Nigeria had then submitted counterclaims and Equatorial Guinea an application for permission to intervene, whose admissibility the Court had had to address.

11. The Court had held that treaties concluded during the colonial period, whose validity it confirmed, had fixed the boundary between Cameroon and Nigeria. In consequence, it had decided that, pursuant to the Agreement between Great Britain and Germany respecting (1) the Settlement of the Frontier between Nigeria and the Cameroons, from Yola to the Sea, and (2) the Regulation of

Navigation on the Cross River,<sup>5</sup> sovereignty over Bakassi lay with Cameroon. It had also determined the boundary in the Lake Chad area in accordance with the exchange of notes between the United Kingdom and France respecting the boundary between the British and French spheres of the Cameroons Mandated Territory<sup>6</sup> and rejected Nigeria's claims in that area. The Court had also defined the precise line of the approximately 1,500-kilometre land boundary between the two States in 17 other disputed sectors. It had gone on to determine the maritime boundary between the two States, taking into account the interests of third parties, including those of Equatorial Guinea, which had intervened in the oral proceedings. The Court had begun by affirming the validity of the Second Declaration of Yaoundé<sup>7</sup> and the Maroua Declaration,<sup>8</sup> whereby, in 1971 and 1975, the Heads of State of Cameroon and Nigeria had agreed on the maritime boundary separating the territorial seas of the two States. With regard to the maritime boundaries farther out to sea, the Court had adopted as the delimitation the equidistance line between Cameroon and Nigeria, which appeared to produce equitable results as between the two States. Finally, it had held that each State was under an obligation expeditiously and unconditionally to withdraw its administration and military and police forces from areas falling within the sovereignty of the other.

12. In December 2002, the Court had concluded the proceedings between Indonesia and Malaysia in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*. In its judgment, the Court had found that article IV of the 1891 Convention between Great Britain and the Netherlands Defining Boundaries in Borneo<sup>9</sup> for the purpose of defining the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which were under British protection did not establish any allocation line between the parties in the area of the islands, and that none of the parties had obtained title over the islands by succession. The Court had therefore relied on effectivities claimed by the parties and found that sovereignty over Pulau Ligitan and Pulau Sipadan lay with Malaysia.

13. The Court's most recent judgment had been in the case of the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*). The Court had recalled, first, that under Article 61 of its Statute, a revision could be requested by a party only upon discovery of a new fact, namely a fact that had existed at the time the judgment had been given but had been unknown to the Court and to the party claiming revision. The Court had determined that a fact that

<sup>5</sup> London, 11 March 1913 (Treaty Series No. 13 (1913) (London, H. M. Stationery Office), p. 231).

<sup>6</sup> London, 9 January 1931 (*ibid.*, No. 34 (1931) (London, H. M. Stationery Office), p. 1).

<sup>7</sup> ICJ, *Application Instituting Proceedings* of 29 March 1994, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case, annex 7.

<sup>8</sup> United Nations, *Treaty Series*, vol. 1237, no. 19976, p. 319.

<sup>9</sup> London, 20 June 1891 (*British and Foreign State Papers, 1890–1891*, vol. 83 (London, H. M. Stationery Office, 1897), p. 42).

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> General Assembly resolution 56/83 of 12 December 2001, para. 3.

occurred several years after a judgment had been given was not “new” within the meaning of Article 61. The admission of the Federal Republic of Yugoslavia to the United Nations<sup>10</sup> had occurred in November 2000, well after the 1996 judgment. The Court had accordingly found the application of the Federal Republic of Yugoslavia inadmissible.

14. The Court had also handed down orders for the indication of provisional measures in two cases filed over the past year. In the case concerning *Avena and Other Mexican Nationals*, Mexico had initiated proceedings against the United States regarding alleged violations of articles 5 and 36 of the Vienna Convention on Consular Relations, with respect to 54 Mexican nationals who had been sentenced to death in certain states of the United States. On 5 February 2003, the Court had indicated to the United States that it must “take all measures necessary” [pp. 91–92] to ensure that three Mexican nationals, for whom it found that the condition of urgency had been met, were not executed, pending a final judgment of the Court. It had also stated that the United States Government should inform it of all measures taken in implementation of that order and decided to remain seized of the matters forming the subject of the order until it had rendered its final judgment.

15. In the case concerning *Certain Criminal Proceedings in France*, Republic of the Congo had filed an application instituting proceedings against France seeking an annulment of the investigation and prosecution measures taken by the French judicial authorities further to a complaint concerning crimes against humanity and torture allegedly committed in Congo against individuals having Congolese nationality, filed by various human rights associations against the President, the Minister of the Interior and other individuals, including the Inspector-General of the Congolese armed forces and the Commander of the Presidential Guard. On 17 June 2003, the Court had found that the circumstances were not such as to require the exercise of its power under Article 41 of its Statute to indicate a provisional measure and rejected Congo’s request. In its application, Congo had indicated that it proposed to found the jurisdiction of the Court, pursuant to article 38, paragraph 5, of the Rules of the Court, “on the consent of the French Republic, which will certainly be given” [p. 103]. It had therefore been only France’s consent, on 8 April 2003, to the Court’s jurisdiction to entertain the application that had made it possible to open the proceedings. The case was exceptional in that it was the first time since the adoption of article 38, paragraph 5, in 1978 that a State had accepted, without prior special agreement, the invitation of another State to recognize the Court’s jurisdiction to entertain a case directed against it.

16. The Court had also taken a number of other decisions with which he would not burden the Commission. He would mention only that the Court had acceded to the request of the parties to form special chambers of five judges to deal with the case concerning the *Frontier Dispute (Benin/Niger)* case and the case concerning *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Fron-*

*tier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*.

17. The Court’s docket remained heavily burdened, and a number of cases were, or would shortly be, ready for hearing. The Court would therefore have to maintain its high level of activity. The *Oil Platforms* case was currently at the deliberations stage. Hearings would also be organized in several other cases before the end of the calendar year. The Court was considering ways and means of improving its working methods so as to ensure timely and efficient exercise of its judicial functions.

18. The Court and the Commission, in performing their respective tasks, each had to be constantly aware of the work accomplished by the other. The Commission’s programme of work for the current session was heavy, and many of the items on the agenda were of the highest relevance for several cases on the Court’s docket, including diplomatic protection, reservations to treaties, unilateral acts of States, the responsibility of international organizations, and others. The fragmentation of international law was also of interest. He assured the Commission that the Court would remain as attentive to its work as it had always been.

19. Finally, he congratulated the Commission on the fact that its proceedings were conducted in all the six official languages of the United Nations, whereas he had been obliged to make his statement in English because the official languages of the Court were, for historical reasons, restricted to English and French.

20. The CHAIR thanked the President of the Court for his very interesting statement and the useful information on the appointment of new judges, interaction between the Commission and the Court, the latter’s judgments, its docket and its official languages.

21. Mr. BROWNLIE asked whether the oral arguments presented to the Court were of value.

22. Mr. SHI (President of the International Court of Justice) said that the oral statements of the parties’ counsel helped members of the Court greatly in their deliberations, especially in cases like that concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, where counsel for Nigeria had raised eight points regarding jurisdiction and admissibility that had been argued so well and so forcefully that the members had spent long hours in closed session analysing those thought-provoking contentions.

23. The oral sittings proved tiring for elderly judges, but they afforded an opportunity to cover ground not dealt with in the written pleadings. For that reason, the members of the Court always read the minutes of the oral submissions with great care. The oral arguments of counsel were therefore heeded and were most valuable.

24. Ms. ESCARAMEIA said that the presentation of the substantive connection between the Commission and the Court had been very informative. Since the fragmentation of international law was a very real problem, she wished to know whether there were any contacts between ICJ, ITLOS, the *ad hoc* criminal tribunals and the International Criminal Court. Had such exchanges been dis-

<sup>10</sup> General Assembly resolution 55/12 of 1 November 2000.



cussed in ICJ? Had the latter invited the presidents of the other courts to describe their work, or would such a move detract from a court's independence and autonomy? Would such links foster an awareness of the difficulties encountered by each judicial body?

25. Mr. SHI (President of the International Court of Justice) said that the members of ICJ were concerned about the fragmentation of international law. To date, there had been no contacts between the various specialized judicial bodies, although it was indeed vital to arrive at a uniform interpretation of certain points of international law. The members of the Court had not discussed the matter formally, although they had exchanged views on the subject behind the scenes.

26. Some of the courts in question were not part of the United Nations system, while others were subsidiary organs of the Security Council. Nevertheless, it would be helpful if the General Assembly were to adopt a resolution indicating how to deal with the fragmentation of international law in international judicial bodies, some of which held differing views on specific legal issues.

27. Judge Guillaume, former President of the Court, had written a number of essays on the topic in which he had suggested that the Court, as the principal judicial organ of the United Nations, which considered all kinds of questions in the sphere of private and public international law, might give advisory opinions to other judicial bodies in the event of differences of interpretation. In the General Assembly, however, some States had rejected that idea on the grounds that it would turn the Court into an appeal body and the international community, as a whole, was not yet ready to accept such a step.

28. Mr. Sreenivasa RAO said it was gratifying that the President of the Court had mentioned the productive interactive relationship between the Court and the Commission. The workload and the complexity of the cases brought before the Court called for continuous adjustment and methodological reforms on its part. In that connection, the value of oral pleadings must be enhanced by introducing greater informality into them so they were no longer merely a repetition of the contents of written submissions, but became lively exchanges which would allow the Court to reach the crux of an argument.

29. The Court, other international judicial bodies and the Commission should contribute to the harmonious interpretation of legal issues in order to overcome the fragmentation of international law. In the beginning, several opinions might exist, but, as time went by, dissenting opinions often became the view of the majority. It was quite a normal process, and a creative means of fostering it must be found.

30. Mr. SEPÚLVEDA said that Judge Shi's description of the links between the Court and the Commission had been of particular interest to him, especially in the light of the Planning Group's recent discussion of relations between the Sixth Committee and the Commission. At times, those two bodies, both of which had important legal functions, seemed to be disconnected, although, admittedly, the Sixth Committee focused more on the politi-

cal aspects of issues, whereas the Commission's concerns were predominantly of a legal nature.

31. Judge Shi had drawn attention to the fact that the participation of members of the Commission as counsel in cases being heard by the Court raised the Commission's profile and that the opinions of the Commission, because of their soundness, served as a basis for the Court's decisions and judgments. In addition, some members of the Commission went on to become judges at the Court. The discussion which had just taken place had served to emphasize the intrinsic importance of the Commission.

32. The President of the Court, as a former representative in the Sixth Committee, no doubt knew what sort of links should exist between the Sixth Committee and the Commission. His presence at the Commission meeting had underlined the high esteem in which the Commission's members were held as they strove to achieve a better legal order.

33. Mr. MOMTAZ asked what difficulties the Court encountered in the exercise of its judicial functions and whether it was contemplating any revision of its Rules.

34. Mr. SHI (President of the International Court of Justice) said that, since the Court dealt with disputes between States, it had to respect the sovereign equality of those States and, as a result, had to allow them enough time to prepare their cases. It meant that well over two years could elapse between the submission of the original application, or the notification of a special agreement, and the presentation of replies and rejoinders in response to the parties' memorials and counter-memorials. That written stage was then followed by oral hearings for which some parties' agents required an additional five to six weeks of preparation.

35. Once the written pleadings were submitted and the oral hearings finished, the internal judicial procedure began. Before the formal deliberations in chamber, and in order to ensure the quality of the Court's judgments, each member had to write what were called Notes and were in fact preliminary judgments, addressing all the legal issues. Usually the drafting of the Notes took about a month and their translation another several weeks. They were then distributed to all members, and another week or so was allotted for them to be studied, after which the formal deliberations began.

36. Those lasted a week on average, two weeks in particularly difficult cases, and then began the process of drafting the Court's judgment. By the time the judgment was considered by the Court on second reading, several more weeks would have passed and various revisions made. A formal vote was then taken, following which individual opinions could be written. Unlike officials of domestic courts, members of the Court received very little assistance from law clerks, of which there were only five for the whole institution, and their recruitment had been authorized only a year ago.

37. It was thus very clear that the Court's proceedings were extremely time- and labour-intensive. Efforts could certainly be made to simplify the proceedings, but nothing must be done that might diminish the quality of the

judgments, and the reasoning behind them must be very clearly explicated.

38. A number of changes aimed at improving internal judicial methods had been made: members were no longer required to write Notes on preliminary objections in the jurisdiction/admissibility phase or on requests for provisional measures, as long as the legal issues were not too complicated, and the Court had taken steps to limit the duration of oral proceedings.

39. In short, any measures to streamline proceedings must be carried out in keeping with the principles of respect for the sovereignty of States and preservation of the quality of the Court's judgments.

40. The CHAIR warmly thanked the President of the International Court of Justice on behalf of the Commission for the very interesting information he had provided about the Court's functioning, which was valuable not only for the Commission's members but also for the members of the International Law Seminar who were attending the meeting. He asked the President to convey to the members of the Court the Commission's cordial greetings and its desire for further productive exchanges between the two bodies.

*Mr. Melescanu (Vice-Chair) took the Chair.*

**Diplomatic protection<sup>11</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>12</sup> A/CN.4/L.631)**

[Agenda item 3]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

41. Mr. GALICKI, referring to the recently issued addendum to the fourth report (A/CN.4/530 and Add.1), said it had been prepared by the Special Rapporteur with his usual competence, deep knowledge and openness. The title, "Proposed articles on diplomatic protection of corporations and shareholders", was somewhat misleading, since that was not the subject of the two draft articles contained in the addendum. Draft article 21, on *lex specialis*, excluded the application of some of the articles formulated earlier but did not specify which ones. Draft article 22 dealt with diplomatic protection of legal persons other than corporations and their shareholders. It was to be included in the third part, entitled "Legal persons", and the technical question to be solved was proper correlation of the titles of the articles throughout that part.

42. The two new draft articles covered exceptions to the main rules formulated earlier in the draft, but each did so in its own way. Article 21, based on the maxim *lex specialis derogat legi generali*, provided for the priority of special rules of international law where the protection of corporations or shareholders was governed by such rules. In paragraph 112, the Special Rapporteur cited the opinion expressed by the Commission in the commentary

to article 55 of the draft articles on State responsibility for internationally wrongful acts<sup>13</sup> that, for the principle *lex specialis derogat legi generali* to apply, there must be some actual inconsistency between two provisions or a discernible intention that one provision was to exclude the other. A requirement of actual inconsistency or discernible intention should perhaps be added to the text of article 21, thereby more precisely defining the scope of operation of *lex specialis* rules vis-à-vis general norms. A second aspect of article 55 on State responsibility was missing in article 21, namely that general articles should not apply solely "where" but also "to the extent that" the subject matter was governed by special rules of international law. That more extensively developed approach should be incorporated in the draft on diplomatic protection.

43. Mr. Koskenniemi had rightly pointed out that the operation of the *lex specialis* principle should not be limited to protection of corporations and shareholders but should be extended to other situations regulated by the draft articles. The matter seemed to be of crucial importance, especially in the light of the Commission's parallel work on the fragmentation of international law, where *lex specialis* was one of the main problems analysed.

44. Paradoxically, while Mr. Koskenniemi proposed a more extended formulation of the *lex specialis* principle, Mr. Brownlie suggested that a separate provision on *lex specialis* might not be necessary. True, its application to questions of diplomatic protection might derive from general principles of law. Yet even if one recognized the general nature of the *lex specialis* principle, in some situations like that of diplomatic protection, its practical application might require that additional particular rules be followed. Article 55 of the draft on State responsibility likewise confirmed the usefulness of having specific regulations on *lex specialis*.

45. In view of the widely diverging proposals made, a cautious approach should be taken: the idea of having an individual provision on *lex specialis* should not be rejected *in toto*, yet the suggestion of not confining the application of article 21 to diplomatic protection of corporations and shareholders seemed reasonable. Examples could be found of the application of that principle to other legal persons and perhaps even to natural persons—for instance, the self-contained regime of liability for damage caused by space objects. He was therefore in favour of modifying article 21 and possibly placing it somewhere other than in the third part, to make it applicable in a more general way.

46. As to article 22, he supported the view expressed by the Special Rapporteur in paragraph 113 that it was not possible to draft further articles dealing with the diplomatic protection of each kind of legal person. The main difficulty with the practical application of the article, as noted in paragraph 121, was the infinite variety of forms that legal persons could take. In general, the possibility of being registered as a legal person flowed from the internal legislation of the State, and the procedures and requirements established by individual States varied widely. Paragraph 121 gave an excellent example of such differentiation in the legal position of the European Economic

<sup>11</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>12</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>13</sup> See 2751st meeting, footnote 3.

Interest Grouping whereby, as the Special Rapporteur rightly pointed out, the same types of entities, endowed with equal legal capacities by a uniform statute, could be granted legal personality in one European Union member State and left without it in another.

47. One must also be conscious of the growing number of creatures of municipal law, as paragraph 117 put it, that might be interested in benefiting from their status of legal persons. The unlimited, unilateral extension by individual States of legal personality to various entities might create serious problems with the practical exercise of diplomatic protection of such entities *vis-à-vis* other States which might not necessarily be eager to recognize such legal personality. Even the very broad formula of *mutatis mutandis* application set out in article 22 did not seem to solve the problem. It might therefore be useful to include some sort of requirement of mutual recognition of legal personality of a given entity by the States concerned.

48. Despite those remarks, he thought both draft articles were necessary, were based on thorough research and were a useful addition to the set of articles previously accepted by the Commission. The draft articles, together with the comments made on them during the discussion, should therefore be referred to the Drafting Committee.

*Mr. Candioti (Chair) resumed the Chair.*

49. Mr. ADDO said he agreed with much of the Special Rapporteur's report. Draft article 21, which stipulated that when a bilateral or multilateral investment treaty was invoked the rules of customary international law did not apply, was not only acceptable: it stated the obvious. He concurred with Mr. Brownlie that there was no real need for including it, but it caused no harm and could be retained *ex abundanti cautela*. It should therefore be referred to the Drafting Committee.

50. As for draft article 22, it would be nearly impossible to draft articles for each and every specific legal person. Accordingly, use of the words *mutatis mutandis* was very apt. The phrase had become part of the vernacular, and there was no more succinct way of expressing the underlying idea. That article too should be referred to the Drafting Committee.

51. Mr. GAJA thanked the Special Rapporteur for a thoughtful and useful addendum to his report that highlighted two questions. As to the first of those questions, he agreed with the Special Rapporteur about the existence of many special rules on diplomatic protection. Some excluded or deferred protection, providing a method for dispute settlement that gave the investor a direct role. Others modified the requirement of nationality of claims or derogated from the local remedies rule. While most mainly affected diplomatic protection of corporations or their shareholders, a provision on *lex specialis* should not, in his view, be limited to them. He concurred with Mr. Galicki on that point: such a provision should have a wider scope and be placed among the draft's final provisions. If *lex specialis* was based solely on treaty provisions, however, a reference to it might not be necessary.

52. The Latin expression *mutatis mutandis* in draft article 22 was not, as was suggested in paragraph 123, a

maxim. In a legal text, it would be better not to use expressions in an unfamiliar language like Latin, and its equivalent could be found in most languages. His main problem with the expression, however, was that it conveyed very little about the circumstances that would entail the application of a different rule and about the contents of that rule. It therefore seemed preferable for a positive rule to be expressed with regard to legal persons other than corporations. To that end, an analysis of State practice would be needed, and that, unfortunately, was missing from the addendum to the report.

53. He would tentatively suggest wording along the lines that the State entitled to exercise diplomatic protection of a legal person other than a corporation was the State under whose law the legal personality had been granted, provided that the place of management was located or registration took place on the territory of the same State. An appropriate formulation could be found by the Drafting Committee so as to establish some formal link between the basic attribution of legal personality and the State deemed entitled to exercise diplomatic protection.

54. Mr. CHEE commended the Special Rapporteur on the addendum to the fourth report. The description in paragraph 109 of the advantages of bilateral investment treaties and ICSID for the current system of diplomatic protection under customary international law reflected the statement by ICJ in the *Barcelona Traction* case. Furthermore, in view of the extensive State practice regarding bilateral investment treaties and ICSID, it might be appropriate to conclude that article 21 was fit for codification. According to Verzijl, the frequency of a particular class of bilateral treaties or the constant repetition therein of a particular clause might in itself create a practice corroborated by general *opinio juris*.<sup>14</sup> Doehring also concluded that consistent treaty practice under certain conditions could effectively contribute to the formation of new law with regard to arbitration clauses.<sup>15</sup> Moreover, article 15 of the Commission's statute stated that the expression "codification" was used as meaning "the more precise formulation and systematization of rules of international law in fields where there already ha[d] been extensive State practice, precedent and doctrine". It was well known that the codification effort was made on the grounds that written law was superior to customary law.

55. In connection with article 21 he would also draw attention to State practice regarding the "stabilization clause" in contracts between the foreign investor and the host State. It was an additional and effective device for protecting the foreign investor's investment, had been upheld by several arbitral tribunals and commanded the support of distinguished jurists. That remark applied to bilateral investment treaties between foreign investors from developed States and developing host States. However, it seemed that problems arose in connection with bilateral investment treaties between foreign investors and developed host States. It might be appropriate for the Commission to look into such problems in the light of the globalized economy and the interdependence among States with respect to equitable economic relations.

<sup>14</sup> J. H. W. Verzijl, *International Law in Historical Perspective*, vol. I (Leiden, Sijthoff, 1968), p. 40.

<sup>15</sup> Doehring, *loc. cit.* (2774th meeting, footnote 7).



56. He wished to withdraw his earlier suggestion to add the word “business” before “corporation” in draft article 22, in view of the Special Rapporteur’s explanation in paragraph 117. Articles 21 and 22 were acceptable and should be referred to the Drafting Committee.

57. Mr. KATEKA commended the Special Rapporteur on his report and echoed his remark about completing the topic within the five-year period. Article 21 should apply generally to the whole set of articles on diplomatic protection and should not be confined to corporations alone. As Mr. Brownlie had suggested, it might not be necessary to have a provision on *lex specialis*. However, since a precedent had been set in the draft articles on State responsibility, there seemed to be no harm in incorporating such a provision in the present draft. Perhaps the General Assembly or a diplomatic conference would subsequently delete those provisions.

58. The title of article 22 should read “Other legal persons”, since that was what the article in fact dealt with. Furthermore, with reference to the last sentence of paragraph 122, he failed to understand why it spoke of articles 18 and 19, when most of the other legal persons concerned had no shareholders in the classical sense of company law. Finally, he was in favour of retaining the Latin expression *mutatis mutandis*.

59. Mr. MATHESON expressed gratitude for the warm welcome extended to him as a new member by the Commission and said he endorsed the remarks on the excellent quality of the report. As to article 21, he was in favour of specifying the application of *lex specialis*, although the Commission could be flexible as to what form that should take. It was appropriate not only to make clear how the principle related to the draft article but also to recognize the very important regimes which applied in the area of protection of investment. He also had some sympathy with the alternative idea that the article could be broader in scope. The matter could be dealt with in the commentary, but the Commission would no doubt prefer it to be incorporated in the draft articles proper.

60. As Mr. Brownlie had pointed out, certain parts of the report seemed too categorical in their description of the application of *lex specialis*. That was also true of the phrase in paragraph 108 that “customary law rules relating to diplomatic protection are excluded”. He suggested it would be more accurate to say that other regimes specifically derogated from customary law rules and would apply, but in other respects such rules would and did apply in arbitrations conducted in the area of diplomatic protection.

61. Mr. ECONOMIDES said that the *lex specialis* provision in article 21 should not be limited to corporations and their shareholders, but should also apply to natural persons who, for instance, acted under the terms of human rights treaties. The general provision should be placed at the end of the draft to cover all of the articles. He saw no reason why investment and human rights treaties should be excluded. In fact, the Commission should accord priority to them instead of setting in motion the unwieldy, political procedure of diplomatic protection.

62. He pointed out that the *lex specialis* exclusion was not absolute, but conditional. Although it would apply to

investment or human rights treaties, in certain circumstances, such as where a contracting State failed to comply with the judgment rendered, diplomatic protection could be reconsidered, as was indicated in the footnotes corresponding to the last sentence of the paragraph. The general provision should be drafted to reflect that situation. Also, he agreed that the phrase “These articles do not apply” at the beginning of article 21 should be replaced by a more specific reference to the articles in question.

63. As far as draft article 22 was concerned, he endorsed the use of the Latin expression *mutatis mutandis* but questioned the use of the term “principles”, suggesting that “provisions” might be preferable. Again, were all of articles 17 to 21 involved or only some of them? In his opinion, articles 21 and 22 could be referred to the Drafting Committee.

64. Mr. DUGARD (Special Rapporteur) said that initially he had tended towards a narrow provision in article 21 on the grounds that the most obvious *lex specialis* related to multilateral or bilateral investment treaties. However, there seemed to be support for a broader provision dealing not only with corporations but also with natural persons. He suggested, in order to expedite the proceedings, that rather than continuing discussion on the subject in plenary, the Drafting Committee should be assigned the task of redrafting the provision.

65. The CHAIR recalled Mr. Gaja’s comments on the expression *mutatis mutandis* as well as the need to recognize other legal persons or establish some formal link between them and the State concerned by diplomatic protection.

66. Mr. GAJA said that to use the expression *mutatis mutandis* was an easy solution, but it was important to be clear as to its exact implications. With regard to article 21, the Commission had a precedent in the topic of State responsibility, where the theme of *lex specialis* had been developed. However, he was not certain that, according to article 55 of the draft articles on State responsibility, *lex specialis* necessarily referred to treaties. This provision could also refer to some areas of general international law that were not covered by general rules. Perhaps a phrase to the effect that general rules might not cover all aspects of general international law would have been more appropriate. From the Special Rapporteur’s explanation he had understood that in his view in the case of diplomatic protection exceptions were based only on treaties. Perhaps that also needed to be specified.

67. Mr. DUGARD (Special Rapporteur) pointed out that there was very little State practice aside from that relating to the protection of corporations. There had been cases where States had afforded protection to non-governmental organizations, such as to Greenpeace in the dispute with France over the destruction of a ship in Auckland Harbour, but there was not enough State practice to be able to formulate general principles on the subject. For that reason, emphasis should be placed on the protection of corporations. The general provision to be drafted should lay down general principles to guide States in the diplomatic protection of legal persons other than corporations. The Commission could not hope to cater for each and every situation.

68. Mr. MELESCANU said that, in principle, he endorsed the idea of a broader provision on *lex specialis* to be worked out by the Drafting Committee, as suggested by the Special Rapporteur. However, he was concerned that if the exercise was not carried out properly, some difficulties would be encountered in the interpretation of the provision at a later stage. The discussion on general and special provisions had only just begun in the Study Group on the Fragmentation of International Law. The Drafting Committee would therefore have to clearly define the contents, scope and application of the *lex specialis* provision.

69. Mr. BROWNLIE, referring to concerns expressed about the relative absence of State practice, said it could be held that the positions of delegations of States before international tribunals were a form of State practice. Paragraph 119 of the report referred to the few pertinent decisions of PCIJ, and further research into the pleadings there might provide some State views. As for Mr. Melascanu's remarks on the approach to follow, he pointed out that, for the purpose of progressive development, one needed something to work on before it could be developed. Perhaps the Commission need say no more with respect to article 2 than that there was some unfinished business to be done.

*The meeting rose at 1 p.m.*

## 2776th MEETING

*Wednesday, 16 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### **The responsibility of international organizations (concluded)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)**

[Agenda item 7]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the Drafting Committee's report on the respon-

sibility of international organizations (A/CN.4/L.632), said that in his first report (A/CN.4/532) the Special Rapporteur had proposed three articles, all of which had been referred to the Drafting Committee. The latter had examined them and adopted three texts, an encouraging development which held out hope for the progress of the Commission's work on the topic. Following is the text of the draft articles adopted by the Committee:

#### **Article 1. Scope of the present draft articles**

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

#### **Article 2. Use of terms**

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

#### **Article 3. General principles**

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

2. The topic was in fact a sequel to the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>2</sup> That did not mean that the Commission would simply copy the articles on State responsibility, but rather that it would follow the basic trend that had taken shape in respect of that topic. However, when an article on the current topic embodied the same legal principle as an article on State responsibility, the language should remain the same in order to avoid any confusion or ambiguity.

3. Draft article 1, on the scope of the draft articles, was composed of two sentences which the Drafting Committee had preferred to separate and place in two different paragraphs.

4. Paragraph 1 corresponded to the first sentence of article 1 proposed by the Special Rapporteur and had its origin in article 57 of the draft articles on State responsibility for internationally wrongful acts. It indicated that

\* Resumed from the 2763rd meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st session, footnote 3.

the subject matter was the international responsibility of an international organization for an act that was wrongful under international law. The Drafting Committee had retained the text proposed by the Special Rapporteur with two drafting changes. It had deleted the word “question”, which it deemed superfluous. The new text therefore referred to “the international responsibility”, not to the “question of the international responsibility”. The last part of the paragraph had been drafted in the singular instead of the plural. That was a purely stylistic change and consistent with the Commission’s previous codification exercises. The last part therefore read “for an act that is wrongful” and not “for acts that are wrongful”. It had been suggested that reference should be made to “its internationally wrongful act”, but the Drafting Committee had rejected that suggestion, since it could have been argued that that formulation did not cover cases in which an international organization was responsible for the wrongful acts of its members under circumstances similar to those considered in Chapter IV of the first part of the draft articles on State responsibility. For the sake of clarity and in order to preclude any ambiguity, the Drafting Committee had therefore decided to retain the drafting style proposed by the Special Rapporteur.

5. It had further been suggested in the plenary that article 1 should deal with attribution. After considering the question, the Drafting Committee had decided that it was unwise to address that issue at the current stage for fear of limiting the scope. For example, it was not yet certain whether the draft articles should exclude situations in which an organization had accepted certain obligations that had to be fulfilled by one of its members and that member had then failed to do so. In that situation, the wrongful act might, in principle, be attributable to that State, but the Commission might decide that, under certain circumstances, the organization would have to bear responsibility. Paragraph 1 was therefore drafted in general terms. It did not give any indication of the acts for which an organization might be responsible or the circumstances under which a State might be responsible for an act of the organization. The commentary would explain that the article simply indicated what sort of issues the articles covered without providing a solution in advance. Paragraph 1 was drafted in such a way that it also covered the responsibility of an international organization which was a member of another international organization.

6. Paragraph 2 corresponded to the second sentence of article 1 proposed by the Special Rapporteur and dealt with the responsibility of a State for an internationally wrongful act of an international organization. It complemented paragraph 1 and filled a vacuum. The Drafting Committee had made some slight drafting changes. To be consistent with paragraph 1, the word “question” had been deleted and the words “conduct of an international organization” had been replaced by the words “the internationally wrongful act of an international organization”, to make it clear that reference was being made to the possible responsibility of a State for a *wrongful* act of an international organization.

7. It should also be noted that paragraph 2 did not refer to the responsibility of a “member State” of an organization, but only to the responsibility of “a State”. That was a deliberate choice in order to make provision for the situa-

tions covered by Part One, Chapter IV, of the draft articles on State responsibility for internationally wrongful acts, in which a State might not be a member of an organization, but might, for example, direct, assist or coerce an organization to commit a wrongful act.

8. Article 2 (Use of terms), which so far defined only the term “international organization”, had been extensively discussed in the plenary before being referred to an open-ended Working Group, which had drawn up a text that the plenary had subsequently referred to the Drafting Committee. The Committee had worked on the basis of that text.

9. During the plenary debate, the comment had been made that a wide variety of organizations operating across the globe could regard themselves as “international”. Their members ranged from States to non-State entities. As it would be difficult to take account of all those organizations, it would be necessary to indicate clearly what type of “international organizations” the draft articles covered. That did not, however, mean that the principles and rules which would ultimately be prepared—or at least some of them—would not apply to other organizations. That point should be explained in the commentary. Some members had found the definition of “international organization”, as proposed by the Special Rapporteur, rather abstract and had asked for an explanation of the *types* of existing international organizations, so as to have a clearer idea of what the definition should include. Other members, however, had been of the opinion that the definition would have to rely on some genuine and verifiable characteristics. The text produced by the open-ended Working Group had been formulated on that basis. The article identified three criteria which an international organization should satisfy in order to fall within the scope of the topic: mode of establishment, legal personality and membership. The Drafting Committee had made only a few modifications to the text submitted by the Working Group.

10. As it stood, the text comprised two sentences. The first dealt with the first two elements of the definition, namely, the mode of establishment and the legal personality of the organization, and the second dealt with the membership requirement. As far as the mode of establishment was concerned, an “international organization” within the meaning of the draft articles had to be established by a “treaty” or “other instrument” governed by international law. The general view in the Drafting Committee had been that an international organization that came within the purview of those articles should be created by an act under international law clearly expressing the consent of the parties. The word “treaty” was broadly defined in article 2, paragraph 1 (a), of the 1969 Vienna Convention. The same definition was to be found in article 2, paragraph 1 (a), of the 1986 Vienna Convention. That definition also applied to the term “instrument”. The inclusion of both terms in the definition proposed in article 2 was useful as it covered declarations, resolutions, covenants, acts, statutes and the like. The Drafting Committee had considered other alternatives such as “agreements”, “forms of expression of consent”, “acts of international law” and “other means”, but had finally settled for “instrument” as the most appropriate term in the context. Article 2 likewise specified that such treaties or instruments should be “governed by international law”, a notion that



was also to be found in article 2, paragraph 2 (a), of the 1969, 1978 and 1986 Vienna Conventions. The aim was to distinguish between treaties and instruments governed by international law and other instruments regulated by national law.

11. The second criterion was that such an international organization should possess “its own legal personality”. The definition proposed by the Working Group had contained the bracketed phrase “distinct from that of its members”. The Drafting Committee had deleted it because it agreed with the general view expressed in the plenary that the phrase was superfluous, since that condition was already implied in the requirement of independent legal personality.

12. The third criterion was that there must be “States” among an organization’s members, for some international organizations’ members included other international organizations, territories and non-governmental organizations. The presence of States as members was indispensable in order to delimit the scope of the topic and exclude non-governmental organizations from the definition. The words “other entities” at the end of the sentence referred to international organizations, territories and non-governmental organizations, which could be members of an international organization. No express mention had been made of international organizations consisting solely of international organizations. In the view of the Drafting Committee, such international organizations were rare. It had, however, agreed in principle that there was no reason why the draft articles should not also apply to such international organizations.

13. Article 3 (General principles) reproduced articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts, except that it replaced the word “State” with the term “international organization”. The article proposed by the Special Rapporteur had received considerable support in the plenary and the Drafting Committee had therefore retained it, apart from changing the words “is attributed” in subparagraph (a) to the words “is attributable”, so as to be consistent with the wording of draft article 2 on State responsibility.

14. The point had been made in the plenary that the general principle embodied in article 3 was incomplete, since it covered only the responsibility of an international organization for an internationally wrongful act. It did not apply to the responsibility of a State for a wrongful act of an international organization, as dealt with in article 1, paragraph 2. The Drafting Committee had agreed with that viewpoint, but had drawn attention to the fact that the Commission was not yet in a position to lay down a principle on State responsibility for a wrongful act of an international organization. While article 1 on the scope of the topic must clearly state the issues involved, the article on general principles did not need to be exhaustive at the current stage. When work on the topic had made sufficient progress and there was a better understanding of how and under what circumstances a State might incur responsibility for a wrongful act of an international organization, the Commission could decide whether it was advisable to state some general principles on that issue. It would be premature to formulate a legal principle without a deeper knowledge of the circumstances entailing

such responsibility and of possible exceptions, although plainly the Commission would have to consider that matter at some time. The Drafting Committee had also taken note of a proposal made in the plenary (2755th meeting), which read:

“An internationally wrongful act of an international organization may also entail the international responsibility of a State because:

(a) The State has contributed to the wrongful act of the international organization;

(b) The international organization has acted as a State organ.”

15. The Drafting Committee had also considered a further issue that had been raised in the plenary, namely, the fact that article 3 did not contain a provision equivalent to draft article 3 on State responsibility, which stated that the characterization of an act of a State as internationally wrongful was governed by international law and was not affected by its characterization as lawful by internal law. The Drafting Committee held that that provision did not apply to international organizations and that that point should be explained in the commentary.

16. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 1.

*It was so decided.*

17. Mr. MELESCANU said that, on the basis of the first three articles, he could see that, despite its similarities to the topic of State responsibility, the responsibility of international organizations had its own distinguishing features. He was among the members of the Commission who would have preferred a broader definition of international organizations. It was difficult to keep the definition within close confines, although he understood the practical requirement of limiting its scope on the basis of objective criteria. Having heard no strong objections to the idea that the draft articles might also cover the responsibility of other international organizations, he proposed that a “without prejudice” clause should be included to indicate that it could also apply to other international organizations not covered by the narrow definition given.

18. With regard to article 3, the best solution would be to consider the problem of the responsibility of States for the acts of international organizations in the context of the draft articles on State responsibility for internationally wrongful acts, because by taking it too far the Commission might become deadlocked.

19. Mr. PAMBOU-TCHIVOUNDA said that he had reservations about draft article 2. He had difficulty understanding the linear presentation of the article, which seemed to state two different things. The first sentence corresponded well to the title, but the second dealt with the composition of the international organization. Article 2 should therefore be entitled “Definition and composition”.

20. Mr. KAMTO said that he shared Mr. Pambou-Tchivounda’s views. Article 2 as drafted combined two elements that should be set out separately. In addition, the

use of the words “a treaty or other instrument governed by international law” might cause confusion. He had to admit that he had some difficulty seeing what the Commission was referring to. In his view, the definition of a treaty given in the 1969 and 1978 Vienna Conventions covered practically the whole range of international legal instruments expressing the will of the State to be bound. All the other ideas put forward in plenary fell under that definition. The Commission could perhaps explain what it meant by “other instrument governed by international law” so as to make its concerns clearer.

21. Mr. GAJA (Special Rapporteur) said that the Commission would be facing a never-ending task if it was to revert to questions that had already been discussed in plenary, then in the Working Group and finally by the Drafting Committee.

22. With regard to Mr. Melescanu’s comment on international organizations that were not covered by the definition proposed in article 2, he believed that the problem did not need to be addressed at the present stage and could be taken up again later.

23. He had no fundamental objection to Mr. Pambou-Tchivounda’s proposal that article 2 should be divided into two separate paragraphs, but thought the idea should have been brought up earlier to enable the Drafting Committee to look into it.

24. However, he did not agree with Mr. Kamto about the use of the words “other instrument”. The matter had been thoroughly discussed in plenary. The Drafting Committee suggested that examples of international organizations that had not been established by treaty should be given in the commentary. He thought that there might be implicit treaties in certain cases, something that would be mentioned in the commentary. He urged the members of the Commission not to reopen the debate on the substance of the issue.

25. Mr. PAMBOU-TCHIVOUNDA said that he was not trying to reopen the debate on substance, but thought that the two consecutive sentences clearly dealt with two different matters.

26. The CHAIR suggested that a logical connection should be introduced between the two sentences, for instance, with the words “such organizations could include as members ...”, in order to clarify the point.

27. Mr. Sreenivasa RAO thanked the Chair of the Drafting Committee for a job well done. The proposed text seemed well balanced and sufficiently clear. Perfection could always be sought, of course, but the Commission had made great progress in relation to its starting point.

28. Mr. GALICKI said that he endorsed article 2 as proposed by the Drafting Committee. It was carefully balanced and, more importantly, it faithfully reflected the discussion. Proposals designed to improve the definition of an international organization had been made. He thought the definition had two very important components: first, treaties alone must not be considered the basis for establishing an international organization; and, second, the members of international organizations were not only States. The inclusion of those two components was justified on the basis of the practice of international

organizations. Certainly, more criteria could be added and factors, sometimes artificial ones, could be included, but the two factors mentioned were the ones that he found to be the most important, as they gave a clear idea of what the Commission was thinking of when it referred to an international organization.

29. Mr. KAMTO said that he did not want to reopen a substantive discussion either, but that whenever someone could propose an idea for consideration that might clarify the Commission’s work, he or she should not hesitate to do so. His comments had been aimed solely at drawing attention to the fact that, when the Commission arrived at the stage of the commentary to the articles, it must take care to explain what it meant to say. He remained appreciative of the results achieved by the Drafting Committee and by the Working Group.

30. Mr. KATEKA (Chair of the Drafting Committee) said he hoped that the Commission would adopt the draft articles as they stood, with no amendments. The text was a balanced one and any addition, even the one proposed by the Chair, might upset that balance. During the next reading, the Commission could look into how to word things differently. For the present, he appealed to the members of the Commission to adopt draft article 2 as it stood.

31. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 2 on the use of terms, as proposed by the Drafting Committee and in the light of all the comments and observations which had been made during the meeting and would be reflected in the relevant summary record.

*It was so decided.*

32. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 3 on general principles, as proposed by the Drafting Committee.

*It was so decided.*

33. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee on the responsibility of international organizations, as a whole.

*It was so decided.*

### **Diplomatic protection<sup>3</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>4</sup> A/CN.4/L.631)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

34. Mr. KAMTO congratulated the Special Rapporteur on the draft articles included in his fourth report (A/CN.4/530 and Add.1) which he had submitted to

<sup>3</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>4</sup> See footnote 1 above.

the Commission, which were extremely useful and well thought out. It would appear, however, that the *lex specialis* provided for in article 21 did not correspond to the way it was provided for in article 55 of the draft articles on State responsibility for internationally wrongful acts.<sup>5</sup> As Mr. Gaja had said at the preceding meeting, article 55 was designed to cover cases when there was an actual contradiction between a general rule and a special rule. If article 21 had been designed with the same purpose in mind, Mr. Galicki would be right to say that it should be revised to include the concept of incompatibility between the two types of rules. But that was not the purpose of article 21 as proposed by the Special Rapporteur. For it to apply, there had to be a conflict between the provisions of an investment protection treaty and the future draft articles on diplomatic protection. Whereas article 55 introduced the idea of the settlement of conflicts between rules contained in two legal instruments of differing scope, article 21 embodied the principle that, as far as the protection of corporations was concerned, preference should be given to special procedures as opposed to the rules of diplomatic protection. That was why article 21 should be retained as worded.

35. The wording of article 21 showed that the future articles on diplomatic protection would probably be residual rules and would therefore be residually applicable. It had been pointed out that there was a very large number of bilateral and multilateral investment treaties, but attention could also be drawn to the development of regional systems for the protection of human rights involving a dispute settlement mechanism. He therefore agreed with the members who had suggested that the provision should be broadened to apply to the draft articles as a whole and placed at the end. It might also be that the final wording would be arrived at only later, when the Commission had an overall view of the articles, since it could then decide what the scope of the *lex specialis* should be.

36. Article 22 called for two comments. First, the examples given by the Special Rapporteur in paragraphs 117 to 121 of his report to illustrate the diversity of legal persons and the difficulty of finding “common, uniform” features in them were interesting, but the situation was like that only because the examples given confused the legal nature of legal persons with their purpose or object. If a proper answer was to be given to the question of what a legal person was instead of trying to determine the purpose for which it had been set up, it would be discovered that such entities, which were so varied in the way they were set up and in their activities, were covered by one and the same functional definition. The basic feature common to all legal persons was their capacity to have rights and obligations, and that was true in both internal law and international law. Thus, if the internal law of a State, which was the relevant legal order, designated an entity as being a legal person or provided legal elements enabling it to be identified as such, that was sufficient: the international legal order had to accept it as such for the purposes of diplomatic protection. It therefore appeared that, on that point, paragraph 117 of the report was debatable and too categorical.

37. The second comment related to the use of the words *mutatis mutandis*. He had listened to the concern expressed by Mr. Gaja at the preceding meeting about that Latin expression, the exact meaning of which might not be correctly understood by everyone. He had then looked at various international law and general law dictionaries and had seen that those words could be used without confusing persons for whom the draft articles were intended.

38. Since he was in favour of the wording proposed by the Special Rapporteur for articles 21 and 22, he supported the proposal that they should be referred to the Drafting Committee.

39. Mr. KEMICHA congratulated the Special Rapporteur on the excellent work he had done to enlighten the Commission on the use of dispute settlement procedures provided for, on the one hand, by bilateral investment treaties and, on the other, by the ICSID machinery established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The two mechanisms had the common feature of excluding the application of the rules of customary law concerning diplomatic protection, as was clearly indicated in article 27, paragraph 1, of the Convention. Everyone, including the Special Rapporteur, agreed that those mechanisms, which applied international arbitration techniques, offered better guarantees for investors than did diplomatic protection, which depended on the goodwill of States.

40. He therefore questioned whether an article 21 on a special investment protection regime, a *lex specialis*, should be included, since, from the standpoint of practice, such a special regime was the rule and diplomatic protection was the exception. He nevertheless understood the Special Rapporteur’s didactic approach and welcomed the wise decision he had announced at the preceding meeting to make the reference to *lex specialis* applicable to the draft articles as a whole. Subject to that reservation, he recommended that draft article 21 should be referred to the Drafting Committee.

41. He had no major difficulty with the use of the Latin phrase *mutatis mutandis*, in draft article 22, but he was concerned that States might use diplomatic protection to benefit legal persons other than corporations, such as non-governmental organizations. A decision to exercise diplomatic protection on behalf of a natural or legal person was highly political and depended on the discretion of the State that took it. In some cases, the State might be tempted to take up the cause of a legal person properly registered in its territory against another State with which it did not have diplomatic relations and for which it wished to create problems, for whatever reason, wrong or right. In paragraph 120 of his report the Special Rapporteur referred to Doebling’s view that a non-governmental organization had insufficient connection with its State of registration to qualify for diplomatic protection,<sup>6</sup> but he did not transpose it to or take account of it in the proposed wording of draft article 22. He would be grateful for an explanation of the Special Rapporteur’s position on that point and for an indication whether some sort of protective measure should be considered for that type of situation.

<sup>5</sup> See 2751st meeting, footnote 3.

<sup>6</sup> Doebling, *loc. cit.* (2774th meeting, footnote 7), pp. 573 *et seq.*



42. Ms. ESCARAMEIA, congratulating the Special Rapporteur on his excellent report, noted that Mr. Kamto had said, in relation to draft article 21, that article 55 of the draft articles on State responsibility did not necessarily apply because the situation was different. She was not sure that the situation was different. Her reading of the report was that the Special Rapporteur's intention had been to propose a replacement, even if some paragraphs were slightly too categorical, as Mr. Matheson had pointed out at the preceding meeting. Bilateral investment treaties or even multilateral agreements sometimes made no mention of diplomatic protection provided only for partial coverage or even set up mechanisms that ultimately failed. For that reason, it would be as well, from a pragmatic point of view, to insert, in draft article 21, the words "and to the extent that" between the word "where" and the words "the protection of corporations". Whenever the mechanisms foreseen failed or were not complete, the possibility of diplomatic protection should arise again. That was surely what the Special Rapporteur had had in mind.

43. There had been a lengthy discussion at the preceding meeting on the question whether a general rule on *lex specialis* should be adopted and not simply a rule applicable only to corporations. She agreed with the Special Rapporteur that a *lex specialis* rule should be mentioned wherever that was justified. Since special rules, rather than general rules, would apply to corporations, it would be useful to mention the fact in draft article 21. It was by no means certain, however, that the same would apply in all other circumstances, especially in the case of individuals. In fact, she feared that, if the draft articles said that there would be a *lex specialis* for every entity, including individuals, that might preclude the use of diplomatic protection whenever special human rights regimes came into play. Such regimes were usually based on multilateral conventions and made no mention of diplomatic protection, but they undoubtedly did not preclude it. If it was decided to draft an article on *lex specialis* that would apply to individuals or other entities, the impression might be given that whenever a special regime—concerning human rights, for example—was applicable, it was somehow impossible to exercise diplomatic protection. That was not the aim of the draft articles. She therefore thought that it would be best to be careful and state that a *lex specialis* rule could apply exclusively and in its entirety only when expressly provided for and that otherwise the general rules of diplomatic protection also applied.

44. With regard to article 22, she supported Mr. Kateka's suggestion concerning the word "other" in the title, since corporations were legal persons. As for the reference to articles 17 to 21, it was clear that articles 18 and 19 did not apply, since there was no longer any reference to shareholders in article 22. Indeed, she was not sure that the reference to article 17, or even to article 21, should be retained. It might well be that only the reference to article 20, and perhaps to article 17, should be retained, but she reserved the right to speak again on the subject.

45. The expression *mutatis mutandis* was too vague. She agreed with Mr. Gaja that it gave no indication of how the regime should be applied to other persons, and that it should be more precise. The Special Rapporteur had said that it was extremely difficult to find examples of State practice in that regard, although Mr. Brownlie had drawn

attention to some cases heard by PCIJ. In the current context of globalization, she believed that in the future there would be far more interaction between foundations, non-governmental organizations and universities, for example, and that other such legal persons would be increasingly involved in international activities. More research should therefore be done in order to work out a rather more specific regulation or principle. She therefore supported Mr. Gaja's comment on the need to establish a link between such organizations and the State presenting the claim for diplomatic protection. Such a link could be based on a principle similar to that contained in draft article 17 relating to the nationality of a corporation or could be something slightly different. It was not, however, necessary for both States to recognize the legal personality of the entity; only the State presenting the claim for diplomatic protection would need to do so. Otherwise, a State that did not recognize non-governmental organizations or allow them a legal personality would feel free to treat them or any other entities however it liked. Moreover, the rule had not been applied in the case of corporations because there were States which did not recognize the legal personality of corporations.

46. The definition of a corporation, for the purposes of the draft article, given in paragraph 117 of the report, should be clearly stated at the very beginning of the commentary or, in any case, as soon as the subject of corporations was introduced. There were, after all, corporations without shareholders or limited liability; the term could even be used to describe entities that were not enterprises and were not run for profit.

47. Notwithstanding her reservations, she thought that draft articles 21 and 22 should be referred to the Drafting Committee.

48. Mr. DUGARD (Special Rapporteur) drew attention to an extremely important point in the statement by Ms. Escarameia, namely, her reference to the difference between special regimes for foreign investment and special regimes for human rights protection.

49. The purpose of bilateral and multilateral investment treaties was to exclude the normal rules of diplomatic protection. Those engaged in foreign investment considered the customary rules of diplomatic protection inadequate, since they were dependent on the discretion of the national State to intervene. In practice, States were very reluctant to intervene to protect foreign investments. International investment treaties were therefore drafted precisely in such a way as to eliminate the discretionary element and also to confer rights on the shareholders, something which was not possible under customary international law as reflected in the *Barcelona Traction* case.

50. There was thus a tension between investment treaties and the customary rules of diplomatic protection, whereas there was no such conflict with human rights conventions. In such cases, the two regimes were designed to complement each other, to work in tandem. Where the rules of diplomatic protection did not apply, the human rights conventions did, and vice versa. If the Commission therefore decided that the best course of action was to draft a general provision on *lex specialis*, it would be essential to

bear in mind the important difference between bilateral investment treaties and human rights instruments.

51. Mr. KOSKENNIEMI said that the Special Rapporteur's explanation of the difference between bilateral or multilateral investment protection treaties and human rights instruments was correct, in that the former had the intention of setting aside the general rules of diplomatic protection, whereas the latter had no such intention. The treatment of investment protection treaties in terms of *lex specialis* was therefore not the right way to proceed. The fact that the rationale of such treaties was to set aside the general rules of diplomatic protection was simply an illustration of the dispositive nature of such rules, so the reference to an operation of *lex specialis* as a conflict settlement rule became redundant. There was no reason to apply an interpretative principle such as *lex specialis* when the rule from which it was meant to derogate was not *jus cogens*. That led him to believe that there was no need to mention *lex specialis* at all in the draft articles, for two reasons. First, such a reference could inadvertently lead to the inference that, if a special regime that was relevant in some broad sense was in place, the diplomatic regime was completely and immediately excluded, and that was not the case. Second, as other speakers had noted, the language used by the Special Rapporteur, particularly in paragraph 112 of the report, was too categorical and tended to suggest that the rules of diplomatic protection applied either completely or not at all. It might therefore be better, as Mr. Brownlie had first proposed, not to mention *lex specialis* at all because the principle would apply in any case and, if it was constantly mentioned, any instrument lacking a reference to it might give rise to an *a contrario* conclusion.

52. Mr. ECONOMIDES said that, in the case of both human rights and investment protection, the problem was not so much *lex specialis* as the priority to be given to remedies that were more effective than those provided by human rights instruments or investment treaties, compared to the weighty political procedure of diplomatic protection, which should be reserved for the more extreme cases. From that point of view, diplomatic protection was not totally excluded, in that it could come into play if the defendant State did not implement the decision arising out of the remedy of first resort. It was not that there was mutual and complete exclusion, as in the case of *lex specialis*, *sensu stricto*. Rather than a provision on *lex specialis*, therefore, it would be preferable to have a different kind of provision on the remedies that should be resorted to before diplomatic protection was invoked. That would, however, mean that the draft articles could not immediately be referred to the Drafting Committee for its consideration.

53. Mr. MANSFIELD (Rapporteur) said that, although it was quite clear that the Commission was simply codifying a residual rule relating to corporations, the situation was quite different in the case of natural persons. A blanket application of the *lex specialis* principle, as suggested in the draft articles, could create problems. The Commission should perhaps look at the matter in greater detail or even consider another provision. If the draft articles were referred to the Drafting Committee, the latter could consider requesting the Commission to establish a small group to examine the issue in greater depth.

54. Mr. BROWNLIE said that his doubts concerning the need to include a *lex specialis* provision related more to the commentary than to draft article 21 itself. On the other hand, although the Commission had always included the rule in any articles that it drafted, in the draft articles on diplomatic protection it had not only included *lex specialis* but seemed to want to define its meaning and even to venture into the complicated maze of relations and hierarchies that constituted international law. That had been the crux of the *Pinochet* case, in which general principles of international criminal law had begun to gain in importance without anyone taking into account that they were beginning to contradict the standard regime of immunity of Heads of State. It would take the Commission years to disentangle the question of priorities of that kind. The sensible course of action would therefore be not to include any *lex specialis* provision, or else to include it but to say as little as possible about its application.

55. Mr. MATHESON said that the answer might be simply to recognize that there were important special regimes in the area of investment protection and that the purpose of the draft articles was not to modify or supersede such special regimes. As a result, rules of customary law could continue to be used, to the extent that they were not inconsistent with those regimes. That idea could be stated in an article—which was the intention of draft article 21—or in the commentary.

56. Mr. KAMTO said that the debate had confirmed him in his view that draft article 21 related to a preference principle, giving more flexibility to investment treaties and more effectiveness to human rights instruments. In the draft articles, therefore, the *lex specialis* clause should, as in the draft articles on State responsibility, appear as a waiver clause at the end, worded in such a way as to ensure that all *lex specialis* regimes—investments, human rights, questions of immunity and so on—would be covered by the provision.

57. Mr. GAJA said that the problem of priorities related to the treaty regime and did not need to be defined in draft articles concerned with general international law. Apart from peremptory norms, all rules of general international law could be subject to derogation by treaty, including such rules as the exhaustion of local remedies rule. The Commission should therefore envisage a provision of a general nature.

58. Mr. CHEE said that international law was passing through a process of erosion, in which the rules of customary international law and of diplomatic protection were gradually being replaced by new State practice, such as bilateral investment treaties, of which there were currently more than 2,000. Priority should thus be given to such State practice.

59. Mr. DUGARD (Special Rapporteur) said he wished to make it clear that, when he had drafted article 21 and the commentary thereto, he had had in mind only bilateral and multilateral investment protection treaties; he had been concerned that corporations and their shareholders protected by such treaties might be prejudiced if there was no *lex specialis* clause. Mr. Brownlie and Mr. Matheson had correctly pointed out that, as it stood, the provision did not take sufficient account of the possibility of us-

ing customary international law in cases where there were gaps in investment treaties. It was an important criticism. Since he had not had human rights treaties in mind, he had not made draft article 21 a general clause applicable to the draft articles as a whole. The extension of the scope of the clause to human rights instruments was not without risk, however, as the following example would illustrate: a State whose national was detained without trial or tortured in another State could not exercise its diplomatic protection on behalf of its national if the defendant State was party to a human rights convention and the procedure under that convention consequently applied. The person detained or tortured would then be deprived of a protection that could have been more effective. Thus, a measure of prudence was in order when formulating the rule. The Commission currently had three options: it could avoid having any *lex specialis* provision at all; it could apply such a provision only to bilateral or multilateral investment treaties; or it could couch the provision in general terms. The fourth option mentioned by some members of the Commission, namely, to draft a more substantive provision, might lead the Commission into a whole new topic, that of the conflict between special regimes and customary law.

60. Mr. KOLODKIN said that he had no clear-cut position on draft article 21 but took note of Mr. Brownlie's remark that the provision might be superfluous, since, according to a general legal principle special law took precedence over general law for questions covered by the former. If the Commission decided to retain the article, it must determine whether it should apply to the draft articles as a whole—in other words, to natural persons as well. That would entail defining what was meant by special rules for protecting that category of persons, and that was no easy task. It might well be asked whether human rights treaties really constituted special laws which would rule out the possibility of the State having recourse to diplomatic protection. In that connection, it would be advisable to study practice of States and their views on the question, which seemed relevant to the discussions underway in the Study Group on the Fragmentation of International Law. Moreover, there was no reference in article 21 to a limitation which appeared in article 55 of the draft articles on State responsibility, namely, that article 21 should be applied not only in the case where, but also to the extent to which, the matter was governed by special provisions of international law. The introduction of such a limitation in article 21 would avoid the unjustified exclusion of the right to diplomatic protection. He was not certain that the subordinate clause in the text of the draft article was really necessary.

61. With regard to draft article 22, there did not seem to be enough information on State practice to justify a draft article on the diplomatic protection of legal persons other than corporations. The Special Rapporteur explained the reasons for the situation, but they did not solve the problem. The *mutatis mutandis* formula hardly seemed very useful under the circumstances. Could the members of an international non-governmental organization be likened to company shareholders? There was good reason to ask (a) what amendments and adjustments would have to be made to the rules in order to apply them to other legal persons, and (b) exactly what other legal persons they might be in view of the very broad range of persons concerned

and the different treatment given them by various legal systems, as the Special Rapporteur himself recognized in paragraph 121 of the report. Prudence was called for on the matter, which perhaps should remain outside the scope of the study.

62. Mr. MOMTAZ, referring to draft article 21, said it was clear that the provisions of the different draft articles introduced thus far by the Special Rapporteur could not be binding on States and were purely declaratory in nature. States were therefore free to agree not to apply such provisions in their relations. There had been many cases where an agreement had been reached to avoid applying the rules which the draft articles on diplomatic protection were trying to codify. A good example was the second Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by Iran and the United States, of 19 January 1981,<sup>7</sup> setting up the Iran–United States Claims Tribunal, which had jurisdiction to decide, under certain conditions, on claims filed by the nationals of one State against those of the other. The provisions of that declaration were undeniably special rules which derogated from those contained in the draft articles. In that connection, he did not see why the scope of article 21 should be limited to corporations and their shareholders and, like other members, was in favour of a more general provision which would be placed at the end of the draft articles and would apply to the provisions as a whole. He was thus in favour of the third option proposed by the Special Rapporteur.

63. There might be some doubt about the need for article 22, at least as far as the protection of non-governmental organizations was concerned, particularly since it was not based on established practice likely to be codified. He therefore endorsed the opinion of Doehring, as referred to in paragraph 120 of the report: in most cases, non-governmental organizations did not have a sufficient link with their State of registration to be able to claim diplomatic protection from it.<sup>8</sup>

64. Mr. FOMBA said the first question to be asked in connection with draft article 21 was the extent to which the expression *lex specialis* could be considered as being provided for and clearly defined in international law in terms of both form and substance. That was probably why Mr. Melascanu, with other members, had expressed some justifiable concerns. More importantly, pending the outcome of the debate on the fragmentation of international law, which should provide some clarifications in that regard, it should be recalled that Article 38, paragraph 1 (a), of the Statute of the International Court of Justice drew a distinction between general and particular international conventions. Moreover, the Court had used the expression *lex specialis* in a number of cases—for instance, in its decisions in the *Barcelona Traction and Military and Paramilitary Activities in and against Nicaragua* cases, where it had referred to the specific character of *lex specialis* (paras. 62 and 274, respectively). The Commission had included a provision relating to *lex specialis* in article 55 of its draft articles on State responsibility for internationally wrongful acts, and the legitimacy of that provision seemed to have been demonstrated by the Special Rap-

<sup>7</sup> *ILM*, vol. 20, no. 1 (January 1981), p. 230.

<sup>8</sup> See footnote 6 above.



porteur. In his view, the provision should be placed at the end of the draft articles.

65. As far as the wording of article 21 was concerned, the French text should use the words *des règles spéciales* instead of the words *les règles spéciales*. Like Mr. Economides, he thought that the contradiction between customary international law relating to diplomatic protection and special investment treaties was not absolute, but conditional.

66. With regard to article 22, he endorsed the Special Rapporteur's conclusions in paragraphs 122 and 123 of his report. The existence of legal persons other than corporations depended on different domestic laws, not on international law. As to whether such legal persons should be given diplomatic protection, it was too early, even though there did not seem to be any well-established practice, to reach a negative and definitive conclusion. For the individual, the governing criteria was nationality, just as for corporations nationality was defined according to their place of establishment, headquarters or other criteria; for legal persons other than corporations, the criteria should be the most relevant legal link established by analogy and *mutatis mutandis*. He endorsed Mr. Kateka's proposal on the title of article 22: "Other legal persons" would better reflect the contents of the provision. In conclusion, he considered that articles 21 and 22 could be referred to the Drafting Committee.

67. Mr. DAOUDI, referring to draft article 21, said that, if the Special Rapporteur's reasoning was followed and bilateral investment treaties were regarded as *lex specialis* that excluded the application of customary rules relating to the diplomatic protection of corporations and their shareholders, the following points would need to be borne in mind.

68. Bilateral investment treaties could provide for direct recourse to international arbitration either *ad hoc* or in the framework of an international body not only by corporations (legal persons) but also by natural persons (investors). Moreover, since those natural persons benefited from direct access to international courts in certain areas of international law, as other members of the Commission had pointed out at the preceding meeting, another means of indicating a derogation from the application of customary rules with regard to diplomatic protection needed to be found. It seemed that a general article applying to the draft articles as a whole, along the lines of article 55 of the Commission's draft articles on State responsibility for internationally wrongful acts, would be more in line with the Special Rapporteur's objective.

69. That was all the more justified in that article 21 provided for the exclusion of the application of the four draft articles. It was not clearly stated, however, that those provisions would not be applied if the respondent State did not comply with the arbitral award which settled the dispute. It was also not certain that, where an investment treaty was involved, the application of the provisions of the four articles as a whole could be ruled out, particularly in view of the reference to the nationality of corporations.

70. In draft article 22, the Special Rapporteur proposed the application *mutatis mutandis* of the principles embodied in articles 17 to 21 to legal persons other than corporations, the justification being that it was not possible to

draft further articles dealing with the diplomatic protection of each kind of legal person, according to paragraph 113 of the Special Rapporteur's report. In the commentary to the article, the Special Rapporteur cited the cases of universities and municipalities, as well as the case of partnerships. He nonetheless had the impression that the persons most likely to be included in the category of legal persons to which diplomatic protection was extended were non-governmental organizations, as was borne out by paragraphs 117 to 120 of the report.

71. In the first place, he was not sure that the rules relating to the diplomatic protection of corporations and their shareholders could be applied *mutatis mutandis* to other bodies, even subject to some changes. On the one hand, it was questionable whether the members of a non-governmental organization could be likened to the shareholders of a corporation. On the other hand, a non-governmental organization's link with a State was not at all the same as that of a corporation. Whatever sympathy one might feel for non-governmental organizations, giving the States where they were registered the possibility of exercising diplomatic protection over them would be giving certain States a further means of interfering in the internal affairs of other States. It was significant that, in paragraph 120 of his report, the Special Rapporteur referred to diplomatic protection in the context of internationally wrongful acts whose victims were legal persons, such as foundations in developing countries where they financed projects relating to social welfare, women's rights, human rights or the environment.

72. Although the Special Rapporteur's proposal was based on two examples of international jurisprudence, there was not enough international practice to support it. The Commission should be as demanding in connection with the need for sufficient State practice in that area as it was in that of unilateral acts of States. If there was no practice justifying the inclusion of a specific category of legal persons in the draft articles on diplomatic protection, it would be wiser not to rush matters.

73. In conclusion, he proposed that, in article 21, the reference to *lex specialis* should be deleted and that there should be only a general reference along the lines proposed by Mr. Kamto. He also proposed that article 22 should be deleted and that the relevant rules should be derived from State practice.

74. Ms. XUE, referring to article 21, said it seemed that many members would prefer a more general provision along the lines of article 55 of the draft articles on State responsibility for internationally wrongful acts, and that point of view was certainly understandable. Human rights had been mentioned, but those provisions might also concern special rules relating to the exhaustion of local remedies, particularly if the Commission subsequently decided to transpose articles 8 to 10 to Part Four of the draft text. If some countries drafted specific rules on the need to exhaust local remedies before acceding to a procedure for the settlement of disputes, those special rules must take precedence; the provisions of the draft articles on the exhaustion of local remedies would thus not apply.

75. In his statement at the preceding meeting, Mr. Economides had raised another question which warranted consideration and related to the absolute or relative nature of special rules. If rules were absolute—if the dispute settlement procedures provided for in a bilateral investment treaty or by ICSID resulted in a definitive settlement and were binding on the parties—the matter was straightforward, and in that case draft article 21 was valid. However, if the settlement was not definitive, it could not be said that the rules of customary law relating to diplomatic protection did not apply. If one of the parties to the dispute did not comply with the decision handed down, a complaint could be lodged through diplomatic channels, as was shown by the treaty provisions referred to in the footnotes of the pages corresponding to the last sentence of paragraph 108 of the Special Rapporteur's report. It must be remembered that bilateral and multilateral investment protection treaties were concluded to prevent abuses of diplomatic protection; the proper protection of foreign investments promoted the stability of diplomatic relations.

76. That was the theory. In practice, when two parties, a State and a foreign investor, agreed on settlement procedures, that was in their own interest, and they would endeavour to settle their dispute under that procedure. That was why the Commission must either make article 21 a general provision or consider the possibility of deleting it because it stated the obvious. If the majority of the members wanted to refer the article to the Drafting Committee, however, she would not object.

77. Having read the commentaries to article 22, she now had a better understanding of why the Special Rapporteur had initially tried to limit the provisions to corporations. Unfortunately, for perfectly logical reasons, he now had in mind legal persons other than corporations, but he was neglecting an important factor, namely, the virtual absence of State practice in that regard. As the Special Rapporteur himself had acknowledged, legal persons other than corporations were extremely diverse and sometimes very complex in nature. As it stood, the article did not indicate how or according to which criteria to identify the effective link between them and the State likely to exercise diplomatic protection. The very fact that the expression *mutatis mutandis* was used showed that there was a great deal of uncertainty. As Mr. Kabatsi had pointed out at an earlier meeting, moreover, it was doubtful whether articles 18 and 19 could be applied to legal persons other than corporations and, in particular, to non-governmental organizations, foundations, partnerships and the other legal persons mentioned by the Special Rapporteur. That would be going too far, and the political uncertainties inherent in the discretionary nature of diplomatic protection raised far more serious problems which warranted careful consideration. Like other members of the Commission, she thought that it would be useful to give more in-depth consideration to relevant State practice.

78. Mr. DUGARD (Special Rapporteur) asked Ms. Xue and Mr. Momtaz whether they considered that, since there was no State practice on the protection of legal persons other than corporations, the Commission should not include a provision such as article 22 in its draft text or whether, on the contrary, it should include it with a view to the progressive development of the law.

79. Mr. MOMTAZ said that he was not in favour of the progressive development of the law in that area and agreed with Mr. Daoudi that the provision should be deleted.

80. Ms. XUE said she also thought that it would be better to delete article 22 and to bring the matter before the Sixth Committee to seek the views of States.

81. Mr. YAMADA said that when customary law relating to diplomatic protection and special rules were in conflict, it was the special regime which prevailed under customary international law and article 21 was not necessary. When rules relating to diplomatic protection and special rules were not entirely in conflict and some of them were compatible, both would be applied in parallel, in accordance with customary international law; as article 21 stood, however, the special regime would prevail. Was that the Special Rapporteur's objective?

82. Mr. DUGARD (Special Rapporteur) said that Mr. Yamada had put his finger on a weakness in article 21. It would need to be clearly stated, either in the commentary or in the article itself (if it was referred to the Drafting Committee), that when the two regimes were compatible, they both applied.

83. Mr. MANSFIELD (Rapporteur) said that he was not in favour of a very elaborate rule concerning *lex specialis* and that it was necessary to be clear if a generalized provision was decided upon. In that sense, he endorsed Mr. Economides' comment: draft article 21 should be dropped and the matter should be dealt with in the commentaries, or, if it was decided to draft a general provision, information relating to its scope should be given in the commentary.

*The meeting rose at 1 p.m.*

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## 2777th MEETING

*Friday, 18 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

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**Diplomatic protection<sup>1</sup> (concluded) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631**

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

1. Mr. SEPÚLVEDA said that there had been much debate on draft article 21, contained in the Special Rapporteur's fourth report (A/CN.4/530 and Add.1), in connection with the nature and scope of the *lex specialis* provision and where it should be placed in the set of draft articles. A different yet related matter was the special, autonomous regime with specific characteristics provided for in bilateral and multilateral investment guarantee treaties. The invocation of dispute settlement procedures under such treaties excluded the possibility of applying customary law rules relating to diplomatic protection. However, it was interesting to note which subjects were protected by those treaties or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In their definitions the terms "investment" and "investor" were described, but not the rights and obligations of corporations and shareholders as referred to in article 21. For the Commission's purposes such definitions ultimately constituted *lex specialis*, although in some instances the scope was broader and might include intellectual property rights. In general, the term "investor" was taken to mean any natural or legal person that made or had made an investment, a natural person being a national of one of the contracting parties, a legal person having been established in accordance with the legislation of one of the contracting parties and having its registered office on its territory. That was a conceptually different term from the one set out in article 21 and must be duly taken into account. Since the specific rule applicable in the circumstances defined the subject of the regulations differently, the provisions of the draft would not apply when investors were protected by special rules of international law. That included the settlement of disputes between investors and the States having subscribed to such special rules. For those reasons, he suggested that the text of the article be more closely aligned with that of the terminology of investment treaties. He nonetheless endorsed the basic thrust of article 21: the injured party must first of all exhaust all domestic remedies, and, if that did not prove satisfactory, the dispute could be submitted for international arbitration, where appropriate. At that stage, the party could not additionally claim diplomatic protection, for it was expressly prohibited by treaty law, as could be seen from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as cited in a footnote in paragraph 108 of the report. Again, as the Special Rapporteur had pointed out, the rights and duties under customary international law whereby a State could, at its discretion, extend diplomatic protection to a corporation were inconsistent with a treaty system that granted jurisdiction to an international

arbitration tribunal in order to settle a dispute between a foreign investor and the host State.

2. As to draft article 22, the reference to article 21 should be deleted, as it concerned a special regime under which it would be difficult to extend protection *inter alia* to universities, municipalities or non-profit-making associations. He endorsed Ms. Escameia's remarks in that connection. Since it would be impossible to draw up separate provisions on diplomatic protection for the different types of legal persons concerned, an approach whereby the decision should be incumbent on the State that was competent to extend diplomatic protection seemed appropriate, along the lines suggested by Mr. Gaja. The State had discretionary power to provide diplomatic protection, and therefore it might also be competent to extend it to legal persons besides those that were essentially profit-making or with economic interests, provided they had been established in conformity with domestic legislation and had suffered injury as a result of an internationally wrongful act by another State. Those comments were intended to clarify and strengthen the text of the two draft articles, which could be useful for a proper interpretation of the nature and of the contemporary modalities of diplomatic protection.

3. Reverting to the subject of the debate on *lex specialis*, which had been conducted in two forums, he wished to express appreciation of Mr. Koskenniemi's very useful report in connection with the Working Group on the Fragmentation of International Law. Despite all the arguments put forward on the nature of *lex specialis*, a different approach to the problems raised by article 21 should probably be adopted. In fact, it was not a case of *lex specialis*, but simply a special legal formula or alternative mechanism to diplomatic protection for the peaceful settlement of a dispute arising from an injury caused to the national of one State through an internationally wrongful act by another State.

4. On the assumption that diplomatic protection and the procedures for the settlement of disputes outlined in investment treaties came under the general legal framework of State responsibility, both legal regimes would constitute *lex specialis*. As Mr. Koskenniemi had posited, the two special mechanisms would represent the development or application, in a particular situation, of general law. However, there was no exception to that general law, nor any conflict between the principles of State responsibility and the two optional but mutually exclusive methods for reparation of harm caused by another State.

5. What was surprising was that the draft articles should make no reference to the alternative mechanism to diplomatic protection found in investment agreements, a mechanism or institution about which one should have no reservations in view of its significant development in the last 25 years. Accepting that institution and codifying rules on the links between the two methods of resolving problems stemming from State responsibility was a task the Commission must undertake without further delay. Finally, while the title of article 21, "*Lex specialis*", should be deleted, the basic rule outlined in the article should be retained.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



6. Mr. Sreenivasa RAO said that the discussion had been both constructive and instructive. Draft article 21 required careful review, and the desirability of including a provision on *lex specialis*, its scope and its place in the structure of the article must be considered. As many members had already observed, there did not seem to be a case for the application of *lex specialis*: it would rule out the possibility of extending diplomatic protection to natural persons, whenever other remedies under separate regimes became available, even if there was no direct conflict between such regimes and that of diplomatic protection. The Commission thus had three options: (a) to delete the article, while acknowledging in the commentary that there were other regimes for the protection of foreign investment and natural persons, applicable as appropriate; (b) to redraft the article and incorporate it as a general clause in the final provisions of the set of articles; and (c) to establish a working group to consider the matter in greater depth. He shared the view that the Commission should not attempt to define the nature and scope of *lex specialis*—a task extraneous to the subject of diplomatic protection and already being done in connection with another agenda item. He was therefore in favour of the first option, namely to delete the article.

7. As for draft article 22, if an article along the lines of article 17 was desired, then it should incorporate a formal legal connection between a legal person and the State espousing its claim. Furthermore, he agreed with other members that it was difficult to cover in one provision the various categories of legal persons on a *mutatis mutandis* basis without first identifying the differing circumstances and legal principles involved. He also endorsed suggestions to delete references to articles 18 and 19.

8. Still referring to article 22, he questioned the appropriateness of the third sentence of paragraph 120 of the report, which read: “Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created.” Taken at face value, that sentence might give the impression that diplomatic protection could be extended as soon as an internationally wrongful act had been committed against a person by a host State. It should be made clear, that under normal circumstances, such wrongful acts would first of all have to be submitted to arbitration, and only when there was some discrimination or denial of justice with respect to the seeking of proper remedies would the question of diplomatic protection arise. Given the number of problems in connection with the article, he, like some other members, would go so far as to suggest deleting it, particularly on account of the absence of relevant State practice. He would rely on the guidance of the Special Rapporteur and collective wisdom of the Commission to find a suitable solution.

9. Mr. RODRÍGUEZ CEDEÑO, referring to draft article 22, said that paragraph 117 mentioned some legal persons, including associations, universities, municipalities and non-governmental organizations, which in some respects could be likened to corporations. Such legal persons were in general established in conformity with domestic legislation, but on account of their widely differing characteristics and objectives, it was difficult to draw up a set of common rules for them. More importantly, it was

not as easy to establish a clear link between those legal persons and their State of nationality, as it was for corporations. In the event of injury caused by a host State, it was difficult to know whether it could be considered as injury to the State of nationality and thus sufficient grounds for extending diplomatic protection.

10. He wished to focus attention on non-governmental organizations, which played an increasingly important role in international relations, although his remarks might also apply to other legal persons established under domestic law and thus not subject to the provisions of international law. Non-governmental organizations were generally national in character and scope. Any injury to them or violation of their rights would be dealt with in the same way as for any other natural or legal person belonging to that State, including through recourse to international human rights mechanisms. However, transnational non-governmental organizations, namely organizations set up in one State, with interests and activities at the international level, could only operate in the host State which accepted them as such either through special procedures or through broader legislation. In most cases, the activities of such non-governmental organizations were conducted through offices in States other than the ones in which they had originally been established, and any claim, procedure or reparation relating to injury or violation of their rights would be dealt with under the legislation of the State concerned, although there was nothing to prevent protection being sought under domestic legislation and international agreements to which the State was party. While some States recognized the transnational legal personality of such non-governmental organizations, the principle was far from being universally accepted. For that reason, he considered that comparing other legal persons to corporations was untenable. Moreover, given the absence of practice and general uniform criteria allowing such a comparison to be drawn, the codification of a rule, even on the basis of progressive development, did not seem viable. He therefore agreed that article 22 should be deleted. The topic should nevertheless be given further consideration to seek a way of extending the scope of article 17 to cover the case of States which had accepted the transnational or non-governmental character of such organizations.

11. Mr. MANSFIELD said that Mr. Momtaz had sought clarification regarding the *Rainbow Warrior* case, in particular as to whether the compensation paid to Greenpeace was an example of a State exercising diplomatic protection in respect of a non-governmental organization. According to the memorandum sent by the New Zealand Government to the Secretary-General of the United Nations under its agreement with France to submit all problems relating to the case to the United Nations for a binding ruling, New Zealand sought *inter alia* an apology for the violation of its sovereignty. The memorandum also specified that, as the vessel had not been flying the New Zealand flag and the deceased crew member had been a Netherlands citizen, it was unable to assert any formal standing to claim on their behalf. It had, however, expressed concern that both Greenpeace and the family of the deceased should receive adequate compensation and that settlement of the

case would depend on that or reasonable and binding arrangements to that effect.<sup>3</sup>

12. In his ruling, the Secretary-General, as well as ordering an apology and compensation for New Zealand, had said that there was no need to rule specifically on compensation to Greenpeace and the crew member's family because the statement submitted by France had contained an account of the arrangements that it had made for such compensation and the assurances had constituted the response that New Zealand had been seeking.<sup>4</sup>

13. Mr. BROWNLIE said that, although he could see the argument for deleting article 22, there was also a case for signalling that such cases did exist. It was not true to say there was no State practice; that was to disregard the jurisprudence as shown, for example, in the *Peter Pázmány University* case). The draft article was all the more valuable since it usually related to municipal law which gave rise to various "unincorporated associations", as they were known in English law. The Special Rapporteur could not be expected to come up with a list of all the social entities that might be involved. He was therefore in favour of retaining the *mutatis mutandis* formula.

14. As for the *Rainbow Warrior* case, the arrangement had been that the Secretary-General's requirements had been met because France had admitted responsibility. A period had been allowed for negotiation—for valuation of the vessel and other issues—and, in the event of failure, arbitration should take place in Geneva. He recalled that Greenpeace International had personality (*stichting*) in the Netherlands but was also recognized in England as an unincorporated association, having a *siège social* in Lewes. The arbitration court had decided that the applicable law should be English law, since most of the affecting factors were in England; but the applicable law had in fact been a mixture of English and public international law. It was therefore dangerous to generalize. Non-governmental organizations might have a reality under more than one national law.

15. Mr. DUGARD (Special Rapporteur) said that article 21 had been included, first, in order to follow the example of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>5</sup> and, second, to take account of the fact that bilateral investment treaties deliberately aimed to avoid the regime of diplomatic protection, because States had discretion as to whether to intervene diplomatically and, moreover, the diplomatic protection regime failed to confer a right to claim on the State of nationality of shareholders. He had, however, been persuaded by the debate within the Commission that he had been wrong on both counts: there was no need to blindly follow the draft articles on State responsibility, and Mr. Brownlie and Mr. Matheson had rightly pointed out that bilateral investment treaties did not completely exclude customary international law, to which the parties often had recourse in interpreting their treaties. The two regimes therefore complemented each other. Article 21, insofar as it suggested that bilateral investment treaties excluded customary rules, was therefore

inaccurate and possibly dangerous. If retained, it should be substantially amended—for example, by deleting the *lex specialis* element, as suggested by Mr. Sepúlveda. Mr. Matheson, meanwhile, had suggested a clause reading: "These articles do not supersede or modify the provisions of any applicable special international legal rules or regimes relating to the protection of investment."

16. Another criticism had been that there was no reason to confine the provisions of the article to bilateral investment treaties. There were, after all, other special regimes, such as treaties excluding the exhaustion of local remedies rule or human rights treaties, that might complement or replace diplomatic protection. It had therefore been suggested the Commission should add a general provision at the end of the text, as it had in the draft articles on State responsibility. While having its attractions, that approach was dangerous, since it might give rise to arguments that diplomatic protection might be excluded by a human rights treaty, even though the former might offer a more effective remedy. If individuals were to receive the maximum protection, they should be able to invoke all regimes. He drew attention to the situation in the occupied Palestinian territories, where Israel claimed that international humanitarian law was the applicable *lex specialis*, to the exclusion of international human rights rules. His considered suggestion was therefore that draft article 21 should be deleted.

17. According to his calculations, nine members of the Commission were against including the draft article and four, while indicating no particular enthusiasm, believed that it could be included *ex abundanti cautela* or else as a general provision at the end of the draft. Perhaps the Chair might wish to take a tentative vote. If the draft article was deleted, he would deal with the question of bilateral investment treaties in the commentary.

18. With regard to article 22, there was little State practice regarding the circumstances in which a State would protect legal persons other than corporations, for the simple reason that corporations were the legal persons that engaged in international commerce and therefore featured most prominently in international litigation. He had, in response to a suggestion by Mr. Brownlie, examined the pleadings in two cases, the *Peter Pázmány University* case and the *Certain German Interests in Polish Upper Silesia* case, but could find no evidence of State practice. In the first of those cases, the university had based its claim on article 250 of the Treaty of Peace between the Allied and Associated Powers and Hungary (Treaty of Trianon), under which the property of a Hungarian national should not be subject to retention, but the debate had really revolved around the question of whether the university was a juridical person separate from the Hungarian State. The second case, again, had turned almost entirely on the interpretation of the German-Polish Convention concerning Upper Silesia.<sup>6</sup> Despite the paucity of State practice, however, there was a real need to provide guidance on legal persons other than corporations. The article could not therefore be deleted simply because there was inadequate State practice or uncertainty over the status of non-governmental organizations. It should be retained either

<sup>3</sup> See UNRIIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 202–203.

<sup>4</sup> *Ibid.*, pp. 213 and 215.

<sup>5</sup> See 2751st meeting, footnote 3.

<sup>6</sup> See G. Kaackenbeeck, *The International Experiment of Upper Silesia* (London, Oxford University Press, 1942), p. 572.

because it dealt with general principles of the kind contained in the *Barcelona Traction* case, by way of analogy, or for the sake of progressive development. A majority of the Commission appeared to be in favour of retaining it, but changes were obviously necessary. Mr. Kateka had made the helpful suggestion that, in the title, the word “other” should be deleted and that reference should be made only to articles 17 and 20, since articles 18 and 19 clearly related to shareholders. As for the words *mutatis mutandis*, most members seemed to be in favour of keeping them. The Drafting Committee could make the final decision in that and other cases.

19. The Commission might need to examine the status of non-governmental organizations in a separate study.

20. Mr. ECONOMIDES said he would be reluctant to see total deletion of article 21. He therefore suggested that a clause should be added at the end of the draft articles, to the effect that such a provision was without prejudice to human rights treaties or others offering protection of patrimonial or personal rights. He himself would prefer a provision giving priority to human rights or investment protection regimes; diplomatic protection involved a cumbersome political procedure that States were often reluctant to set in motion, whereas human rights and other regimes were easier to implement.

21. Mr. BROWNLIE said that the two cases that had come before PCIJ—or, at least, the *Peter Pázmány University* case—had related to important multilateral treaties and established significant precedents. If not actually State practice, they could be said to be analogous to it.

22. Mr. SEPÚLVEDA said he agreed with Mr. Economides that the article should not be deleted altogether. It would be strange if draft articles on diplomatic protection did not take account of investment treaty regimes. The Commission should not lose sight of the real world. Moreover, there was a wealth of State practice to be found in many decisions by arbitral tribunals, either those exclusively concerned with bilateral investment treaties or special tribunals. The matter warranted more detailed consideration. Second, he noted that the commentary to article 22 contained no reference to the possibility that it was for the State to determine whether there were grounds for granting diplomatic protection.

23. Ms. XUE said that deletion of article 21 would send the wrong political signal. The Commission had drafted the article because State practice included over 2,000 investment protection agreements, which had an important impact on the exercise of diplomatic protection and, as Mr. Matheson had said, should be given priority rather than being played down. To restrict guidance to the commentary would be a grave mistake.

24. As to article 22, she could see little evidence of State practice in the matter. In most of the existing cases, the State would not exercise diplomatic protection. It was, in any case, difficult to establish a legal basis for such protection being extended to schools, churches or foundations. The Asia Foundation, for example, annually got funding from the United States Congress, but, according to the Special Rapporteur, it was questionable whether the United States could extend diplomatic protection to

it. The human rights element in the article was important, but diplomatic protection was not all about human rights. The two regimes, although different, were complementary. That complementarity would break down if article 21 were deleted and article 22 retained. No hasty decision should be reached. The issue was one not of drafting but of policy.

25. Mr. MELESCANU said that the issue would not be resolved by reverting to a general debate. He therefore suggested that the Special Rapporteur’s suggestion should be adopted, on the clear understanding that, in future debates, the relationship that might exist between special regimes and general rules governing diplomatic protection would be given due attention. An article covering the concerns expressed by Ms. Xue and Mr. Economides could then be drafted. It would thus be possible for the Drafting Committee to move ahead without reaching a final decision.

26. Mr. GALICKI said that he still favoured retaining the substance of article 21, including the *lex specialis* element, but, as he had previously said, application might not be limited to the diplomatic protection of corporations: it might also apply to other legal persons or even to natural persons. He therefore suggested that the article should be located outside the third part to give it wider application. It was an approach that tallied with Mr. Melascanu’s suggestion. *Lex specialis* must appear at some point in the draft articles, but not necessarily in the part dealing with corporations and shareholders.

27. Mr. DAOUDI, after expressing support for the view expressed by Ms. Xue, said that his impression of the debate on article 21 differed from that of the Special Rapporteur. Some reservations had been expressed, but it had been generally agreed that *lex specialis* should be reflected. On article 22, the general feeling had been that, since there was a shortage of State practice, the provision should be retained, but placed elsewhere in the draft articles.

28. Ms. ESCARAMEIA said that article 21 did not really deal with *lex specialis* but with complementary regimes, even though some bilateral investment treaties did introduce special rules which purported to reject the general rule.

29. The title of the article was, however, less important than the question whether reference should be made to bilateral investment regimes, since they frequently precluded the exercise of diplomatic protection. The other crucial issue was human rights regimes, which could not be given priority because there were no legal precedents for doing so. Yet the existence of those regimes must be acknowledged, and so she supported the proposals by Mr. Economides and Mr. Melescanu. Placing a general “without prejudice” clause at the end of the section would do no harm and would demonstrate an awareness of the existence of investment and human rights treaties.

30. As to article 22, she queried assertions that there was a total absence of State practice, for it was highly improbable that in the modern world there had not been even an exchange of letters on the subject of diplomatic protection for foundations or local authorities. For that reason,



she was in favour of referring article 22, together with the amendments proposed by Mr. Kateka, to the Drafting Committee.

31. Mr. CHEE said that the chief purpose of article 21 was to protect corporations and their shareholders. Paragraph 70 taken with paragraph 90 of the *Barcelona Traction* judgment confirmed that ICJ had been fully aware of the lack of shareholder protection, a lack which had prompted the development of a network of bilateral investment treaties. He therefore urged the retention of the *lex specialis* rule. If it were to be deleted, the Commission would have to devise some kind of provision to protect shareholders of corporations, because paragraph 90 of the judgment in question made it clear that hitherto diplomatic protection for them had been contingent upon the conclusion of individual international agreements.

32. He supported article 22, in the belief that there might well be a need to protect entities that were not corporations, although caution was needed when speaking of "legal persons" since it was a very broad, ill-defined term. Moreover the distinction drawn between "business corporation" and "non-business corporation" was unclear. International law was primarily interstate law and did not normally relate to corporations, universities and similar entities, which probably explained why there were few examples of State practice in which those entities had been granted diplomatic protection. For that reason, article 22 should be omitted, since there was no point in promoting an inapplicable rule.

33. The CHAIR, speaking as a member of the Commission, suggested a compromise in respect of article 21. The Drafting Committee could be requested to draw up a text which could then be placed among the final provisions. It should be flexible enough to take account of the existence of human rights treaties, which might arguably take precedence over other agreements. A general, broadly applicable clause might satisfy the wish expressed by the majority of members that the reality of those treaties should be acknowledged. Article 22 should be a "without prejudice" clause that was sufficiently elastic to allow for any developments in State practice which might extend diplomatic protection to a wider circle of legal persons.

34. Mr. DUGARD (Special Rapporteur) submitted that his recommendations had reflected the view of the majority of Commission members. Even if there was no State practice in the matter, some provision on the subject of legal persons other than corporations had to be included in the draft articles. What would have happened in the *Rainbow Warrior* case if the Netherlands had attempted to give diplomatic protection to Greenpeace? What principles would have applied? Surely a tribunal confronted with that issue would have regarded the general principles of law that had emerged from the protection of corporations. It would have turned to the *Barcelona Traction* case and reasoned by analogy. If it had had before it draft article 17 proposed by the Commission, the court would have been guided by that provision and would have tried to ascertain whether the non-governmental organization was formed in the territory of the State which wished to exercise diplomatic protection on its behalf, whether it had its registered office there, or whether there was some other similar connection. It was therefore incumbent upon

the Commission to give courts guidance in that respect. In that spirit, article 22 should be referred to the Drafting Committee.

35. The change of course in the debate made it more difficult to make a firm recommendation about article 21. Nevertheless he concurred with the Chair's suggestion that it should be referred to the Drafting Committee, which should be given a broad mandate to draw up a "without prejudice" clause. That topic should be considered at the meeting with ILA on 29 July 2003. Although a slim majority of members had wished to drop article 21, he would prefer to retain it as a general provision at the end of the set of draft articles to ensure that account was taken of both bilateral investment treaties and human rights regimes, but without damaging either of them.

36. The CHAIR suggested, by way of a compromise, that article 21 should be referred to the Drafting Committee so that the Committee could draw up a general "without prejudice" clause to be placed at the end of that section. That provision should take account of other special regimes and the fact that they might derogate from the general rule. Article 22 and the proposed amendments to it should also be referred to the Drafting Committee.

*It was so agreed.*

### Cooperation with other bodies (*continued*)\*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR  
THE COUNCIL OF EUROPE

37. The CHAIR welcomed Mr. Guy de Vel, Director-General of Legal Affairs of the Council of Europe, and invited him to address the Commission.

38. Mr. de VEL (Observer for the Council of Europe) said the Commission was a point of reference for all who were interested in international law. The participation of Commission members in meetings of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the information the Council secretariat regularly provided about developments in areas of interest to the Commission had strengthened cooperation between both institutions. In that connection, he particularly welcomed General Assembly resolution 57/156 of 16 December 2002 on cooperation between the United Nations and the Council of Europe, and for that reason he had been keen to attend the Commission's session in person.

39. Serbia and Montenegro had become the forty-fifth member of the Council of Europe in April 2003, which meant that almost all the countries of Europe had joined the Council, with the exception of Monaco and Belarus. The examination of Monaco's application was making progress, whereas the Parliamentary Assembly had suspended consideration of the candidature of Belarus. The Holy See, Canada, Japan, Mexico and the United States of America, which were observers to the Parliamentary

\* Resumed from the 2775th meeting.

Assembly, had requested enhancement of that status to allow them to participate in Committee of Ministers meetings at the ambassadorial or ministerial level.

40. The Committee of Ministers had decided to convene a summit of member States at the end of 2004 and the beginning of 2005. It would be an important juncture for the European continent because, after the Convention on the Future of Europe and the Intergovernmental Conference, it would be easier to determine the role played by the various European institutions. The Council of Europe had contributed to the Convention by submitting a memorandum on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and a memorandum on cooperation in the fields of justice and home affairs and by organizing an international conference on the Council's Contribution to the European Union's *acquis*, since some 20 Council of Europe conventions formed part of that *acquis*. Those moves had been rewarded by the inclusion in the draft European constitution of a provision stipulating that the European Union should seek accession to the European Convention on Human Rights. There were already some precedents for such a major political step, in that the European Union was a party to eight Council of Europe conventions. Some further provisions of the draft European constitution concerning cooperation between the Union and the Council would cement the good relations which existed as a result of his six-monthly meetings with the justice and home affairs troika and with the directors-general of the European Commission's legal services.

41. Another important area of general policy was the reform of the European Court of Human Rights, which was likely to be deluged with applications following the accession of the new member States to the European Convention on Human Rights. The Steering Committee for Human Rights had submitted a number of proposals concerning procedural reform, and the Court itself had made several suggestions. Consequently, the measures under consideration were aimed at reducing the number of applications by heightening the effectiveness of domestic remedies, screening and speeding up applications, expanding the system of friendly settlement, revising the conditions of admissibility and improving the enforceability of the Court's judgements. A protocol embodying those reforms was being drafted.

42. The intergovernmental activities of the Council of Europe gave priority to combating terrorism in the wake of the events of 11 September 2001. The Protocol amending the European Convention on the Suppression of Terrorism, opened for signature in May 2003, had considerably widened the purview of the Convention. To date, the Protocol had been signed by 34 member States, and it was hoped that the number would increase rapidly, because the entry into force of the Protocol would signify that the 1977 Convention could be opened to non-Members. The Directorate General of Legal Affairs had also drawn up Guidelines on Human Rights and the Fight against Terrorism, and, in pursuance of the terms of reference it had received from the Committee of Ministers, it had proposed other activities in the sphere of counter-terrorism.

43. In that context, it had turned its attention to the question of the financing of terrorism, and it had taken as a basis the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. In addition, the Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures (MONEYVAL/PC-R-EV) had been set up to appraise measures to prevent money laundering taken by member States which were not part of the Financial Action Task Force on Money Laundering. To date, the Committee had held two meetings at which it had discussed the drafting of legal instruments on special investigation techniques and examined ways of protecting witnesses and persons repenting of acts of terrorism. Several years ago, the Committee of Ministers had adopted Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence, and it was therefore hoped that a binding legal instrument would be produced shortly.

44. A report on identity documents and the fight against terrorism had led the MONEYVAL Committee to consider what activities should be launched in that respect. Incitement to terrorism would also be scrutinized by the Committee, which would take as its starting point not only the Convention on the Suppression of Terrorism and the Protocol amending it but also the *travaux préparatoires* to the Convention on Cybercrime.

45. The Council of Europe could, however, play an absolutely crucial role in the fight against terrorism by virtue of more than 50 years' experience in the field of protecting human rights while fighting crime. In view of the difficulties encountered in the drafting of a general United Nations convention on the subject, the Council had been encouraged to draw up a pan-European convention by its Parliamentary Assembly, which was optimistic that such a text would lend impetus to the drafting of the United Nations convention, on account of the momentum that would be built up at the regional level by the introduction of treaty-monitoring machinery. The Committee of Ministers had welcomed that idea, and the next stage would be the holding of a conference of European ministers of justice in Sofia in October. The Committee of Experts on Terrorism would then meet at the end of October to discuss the conference's findings and propose follow-up action.

46. The Council of Europe was likewise seriously concerned about trafficking in human beings. The Committee of Ministers had long ago issued a recommendation to the member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults (Recommendation No. R (91) 11), and more recently it had set up a Committee of Experts to draft a European convention on trafficking in human beings, which would meet for the first time in September. The Council had received strong support for that step from the United Nations and OSCE.

47. In regard to family law, in May 2003 the Committee of Ministers had opened for signature the Convention on Contact concerning Children, which dealt with transfrontier parental access. The European Commission had requested authorization to accede to that Convention. In the domain of bioethics, an Additional Protocol to the Convention on Human Rights and Biomedicine concerning

Transplantation of Organs and Tissues of Human Origin had just been opened for signature, and an additional protocol on biomedical research was being finalized.

48. Anti-corruption measures also received much attention from the Council of Europe. It had issued 20 guidelines on how to combat corruption, and, what was more important, its Criminal Law Convention on Corruption and Civil Law Convention on Corruption had both entered into force and an Additional Protocol to the Criminal Law Convention on Corruption had been adopted in 2003. In addition, the Council had adopted a European Code of Conduct for Public Officials as well as Recommendation Rec(2003)4 of the Committee of Ministers on common rules against corruption in the funding of political parties and electoral campaigns. All those legal instruments were monitored by the Group of States against Corruption (GRECO), which comprised most of the Council's member States plus the United States. Moreover, the European Union had expressed a desire to join the Group. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime was to be revised in the near future. The Convention on Cybercrime had been supplemented by an Additional Protocol concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, which had been signed by six States so far.

49. Another of the Council's vital concerns was the functioning of judicial systems in member States, since the best way to stem the rising tide of applications to the European Court of Human Rights was to improve the course of justice at the national level. To that end, the Committee of Ministers had set up the European Commission for the Efficiency of Justice (CEPEJ), which was not a monitoring body but a forum where the member States could exchange ideas on good practice and receive assistance in that respect. It would initially concentrate on investigating the quantitative and qualitative indicators for evaluating the functioning of judicial systems and on the length of judicial proceedings in member States. The Consultative Council of European Judges (CCJE), the first regional body consisting of legal practitioners and judges, was strongly backing that initiative.

50. The main beneficiaries of Council of Europe Cooperation Programmes had been the countries in transition, but long-standing member States had also been able to take advantage of them. While great importance was attached to those bilateral programmes, which had served many countries well and had covered a multitude of subjects, it had been decided that in the future they should focus on countries in South-Eastern Europe and in the Commonwealth of Independent States. Accordingly, in 2002 the Council had assisted with the reform of the Russian Federation's judicial system, which had been completed in under a year. Several of the dozens of laws on which the Council had provided expert advice were currently before the Duma. In many other countries, the Council was offering counselling in constitutional matters, a field where the European Commission for Democracy through Law (Venice Commission) was active. The Venice Commission likewise helped with the drafting and revising of penal codes, codes of criminal procedure, civil codes, codes of civil procedure, laws on defence lawyers and public

prosecutors, as well as legislation on bioethics and data protection.

51. As to cooperation in international law, at the initiative of CAHDI, a meeting was to be organized on 17 September 2003 to exchange views on the implications of the Rome Statute of the International Criminal Court. The President of the Court would participate in the meeting. Through two previous exchanges of views, the Council of Europe had contributed to ratification of the Rome Statute by its Member States.

52. At CAHDI's most recent meeting in March 2003, it had been briefed on the Morgan case, in which an American citizen had brought proceedings against the Council of Europe before a New York District Court. In dismissing the application, the judge had indicated that the Council of Europe was an "agent or instrumentality" of a foreign State. Since the deadline for appeal had been 3 February 2003, the case could be considered closed.

53. The case had some bearing on the immunities of States and international organizations, and he wished in that connection to mention CAHDI's pilot project on State practice concerning State immunities. A great many contributions had been received from States, and the Committee had decided on follow-up measures including the joint preparation by three research institutes of an analytical report. That effort was a practical contribution to the work of the United Nations which Mr. Hafner had shepherded to success.

54. CAHDI's most recent meeting had been attended by Mr. Mikulka, who had described the codification efforts of the United Nations and had an exchange of views on the subject with the Committee's members. Mr. Gil Robles, Commissioner for Human Rights of the Council of Europe, had also attended the meeting and had described the activities of his office, a young institution but one which already had a remarkable record, attested to by its reports on Chechnya and the Basque region.

55. Another of CAHDI's activities that deserved mention was its operation as a European observatory of reservations to international treaties. That activity, which, he understood, had been mentioned in the Commission's reports, had steadily intensified and was becoming increasingly useful, as was demonstrated by extending it to cover reservations to international treaties on the struggle against terrorism. Many such reservations were no longer open to objection but needed to be studied closely with a view to contributing to the Council's efforts to combat international terrorism.

56. Mr. MOMTAZ thanked Mr. de Vel for the very useful information provided and said that article 1 of the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003 gave no definition of terrorism, referring instead to offences within the scope of 10 other international instruments. What was the reason for that? Had the Council experienced difficulties in developing a comprehensive definition of terrorism, and was anything being done to produce one now? Article 5 of the amended Convention referred to exceptions to the obligation to extradite, and an explanatory report on that article indicated that the list



of exceptions given was not exhaustive. Did that mean that the corresponding article in the European Convention on Extradition should be interpreted in the same way, namely, as not giving an exhaustive listing of exceptions?

57. Mr. SEPÚLVEDA asked about the Council of Europe's experience in putting into effect regulations against financing and money laundering for both terrorism and drug trafficking. Had intelligence services found links or common denominators in terms of the financial controls that must be adopted?

58. Mr. DUGARD noted that in 2002 the European Union had adopted a framework resolution attempting to define terrorism in the most all-embracing, indeed frightening, terms, and said that the Council was to be congratulated for not following that example. Was its cautious approach motivated by fear that a comprehensive definition of terrorism might interfere drastically with human rights? As to the International Criminal Court, the European Union had actively discouraged its members from entering into agreements with the United States under article 98, paragraph 2, of the Rome Statute of the International Criminal Court. Had the Council attempted to do likewise?

59. Mr. ECONOMIDES asked whether the expansion of the membership of the Council of Europe to 45 members had resulted in additional ratifications of conventions on international law, specifically the European Convention for the Peaceful Settlement of Disputes and the European Convention on Consular Functions. Had there been any progress in the implementation of decisions of the European Court of Human Rights, notably in the *Loizidou* case?

60. Mr. GALICKI, noting that the Council of Europe had made real achievements in the legal field, said that the revision of the European Convention on the Suppression of Terrorism had involved a very difficult and delicate process of reaching consensus, and that that was one of the reasons why article 1 included no definition of terrorism. Especially after the difficulties encountered in the United Nations, a decision had intentionally been taken not to define terrorism but to prepare an instrument that could be applied in practice as quickly as possible. It was to be hoped that work in the United Nations on a comprehensive convention would continue, however, and that the Council's efforts would contribute to it.

61. Another of the Council's achievements was the finalizing of work on an additional protocol to the European Convention on Nationality, which would deal with a matter familiar to the Commission: how to prevent statelessness in the event of succession of States. Having chaired the committee responsible for those efforts, he could say that the efforts of the Commission in the same field had been extremely helpful.

62. Mr. YAMADA said he had attended CAHDI's meeting in September 2002 as an observer and had been impressed by its serious work on a wide range of subjects. One of the subjects extensively discussed at the meeting had been immunities of States and their property. A number of substantive issues had been solved, but what had remained open was the form of the future instrument on that subject. At a meeting of the Asian-African Legal

Consultative Organization in June 2003, views had been exchanged on that subject, and he wondered if CAHDI was also going to coordinate the positions of its members.

63. Mr. de VEL (Observer for the Council of Europe) said that there was no definition of terrorism in the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003, because the 1977 Convention, which itself had contained no definition of terrorism, had had to be rapidly adapted to make it functional in contemporary conditions. It was not that obstacles had been encountered, and indeed in the European context the problems were not the same as in the United Nations, but instead, there had been no desire to take up the question at the time. The issue would come up, however, in the context of the comprehensive convention criminalizing the offence of terrorism that was being developed by the United Nations. The members of the European Union had adopted a definition in 2002, but it had been aimed at instituting a European arrest warrant, and it would be difficult to get the 45 members of the Council of Europe to go so far as to agree on such a measure.

64. Drug trafficking always lay in the background in the fight against money laundering and would undoubtedly come up during the revision of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The MONEYVAL Committee of the Council of Europe was responsible for reviewing measures to combat money laundering and financing of terrorism adopted by members of the Council that were not members of the Financial Action Task Force on Money Laundering: it used the same methods as did the Task Force and had in fact been set up at the latter's behest.

65. The Council of Europe had indeed taken a position on bilateral agreements under the Rome Statute of the International Criminal Court: two recommendations had been made by the Parliamentary Assembly to the Committee of Ministers establishing clear parameters for this. The Chair of the Committee of Ministers and the Secretary-General had also made their views known on the subject.

66. With the recent expansion in the membership of the Council of Europe, a campaign had been launched to promote ratification of its conventions. In response, the number of signatories to conventions, particularly in the areas of crime and terrorism, had significantly increased. He did not at present have the figures on ratifications of specific conventions, but would provide them later in writing.

67. Implementation of the decisions of the European Court of Human Rights was one of the central issues in the discussions about reform of the Court and its functioning. The problem, though important, should not be overemphasized: according to his statistics, the implementation of only 2 per cent of the decisions had been problematic. He was not at liberty to speak about the *Loizidou* case except to say that new proposals had recently been formulated, holding out hope for a solution to the current impasse.

68. The importance of the work of the Committee on Nationality could not be overemphasized. The Council of Europe had been involved in the issue for a great many years: the Convention adopted in the 1960s had become somewhat out of date, and a new convention had been opened for signature several years ago. A protocol to that Convention was now being drafted, an effort to which Mr. Mikulka had made a very useful contribution.

69. As a representative of the Council of Europe, it was not his place to comment on the relations between the Council and the European Union. The draft European Convention was certainly a welcome initiative, however.

70. Mr. BENÍTEZ (Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe, Observer for the Council of Europe), replying to the question about the Council's work on immunities of States, said that CAHDI would be considering the outstanding issues in mid-September 2003 as a practical contribution to the preparations for the discussions at the Sixth Committee of the General Assembly. The pilot project on State immunities was in the second stage of implementation.

71. The European Convention for the Peaceful Settlement of Disputes provided a well-regulated framework for inter-State dispute settlement. As had just been pointed out, there had been an increase in the number of signatories to certain specific conventions as a result of the enlargement of the Council of Europe. CAHDI, like other steering committees and *ad hoc* committees of the Council, had been asked to review the operation of the international instruments under its responsibility. Accordingly, for the past five years it had been systematically reviewing the impact of European conventions in the field of public international law with a view to recommending to new member States of the Council whether to accede to them or not, the ultimate objective being the efficient functioning of the conventions. CAHDI had been receiving progress reports by countries that were working out bilateral agreements under the Rome Statute of the International Criminal Court, enabling it to review the situation periodically. The exercise had been extremely useful in that the legal advisers who were members of CAHDI were able to speak very frankly about their concerns.

72. The European Convention on the Suppression of Terrorism had not criminalized the act of terrorism but sought to depoliticize it for the purposes of extradition. The review committee had been asked, not to develop a new instrument, but rather to review the existing one. It had decided first of all not to change the nature of the Convention, which the introduction of a definition of terrorism would certainly have done. It had borne in mind the definition adopted by the European Union, on the understanding that that could not be incorporated at that time as it was part of a criminalizing exercise. The definition would certainly be included now as part of the development of a comprehensive convention on terrorism.

73. As for article 5 of the European Convention on the Suppression of Terrorism and possible exceptions to the obligation to extradite, the list was not exhaustive. At the request of the Parliamentary Assembly, for the purpose of highlighting the grounds for refusal to extradite, the

Council of Europe had decided explicitly to enlarge the list of such grounds. As a result of the entry into force of the amending protocol, the original Convention would be open to the signature of non-member States of the Council, which were not bound by the provisions of the European Convention on Human Rights or of its Protocols. Since the list was not exhaustive, however, a State party could refuse extradition on other human rights grounds.

74. The CHAIR thanked the representatives of the Council of Europe for the very important information provided and reiterated the Commission's interest in continuing dialogue with that institution.

*The meeting rose at 1.10 p.m.*

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## 2778th MEETING

*Tuesday, 22 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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### Shared natural resources (A/CN.4/529, sect. G, A/CN.4/533 and Add.1<sup>1</sup>)

[Agenda item 9]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. YAMADA (Special Rapporteur), introducing his first report on shared natural resources (A/CN.4/533 and Add.1), explained that it was a preliminary report that was intended to provide background on the topic and seek guidance from the Commission on the future course of the study.

2. The topic of shared natural resources had been included in the Commission's programme of work in 2002.<sup>2</sup>

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 11, para. 20, and p. 100, para. 518 (a).

He had prepared a discussion paper<sup>3</sup> for consideration in informal consultations during the second part of the fifty-fourth session, in 2002. The paper had been based on the syllabus prepared by Mr. Rosenstock and included in the report of the Commission to the General Assembly on the work of its fifty-second session.<sup>4</sup> He had proposed to cover three kinds of natural resources under the topic: confined groundwater, oil and gas. They had the common features of being underground resources, moving across borders—and thus falling into the category of “shared” resources—and usually being non-renewable. He had excluded other resources such as minerals, which were not usually considered shared resources, and marine fauna and flora, land animals and birds, which were already subject to many global and regional arrangements and would be more appropriately dealt with in other contexts. He had also proposed adopting a step-by-step approach, first taking up groundwater and later proceeding to oil and gas after at least a preliminary stage of work on groundwater. The decision whether to adopt a separate set of rules for oil and gas could be taken at a later stage. He had proposed the timetable of work contained in paragraph 4 of his first report.

3. Members who had taken part in the informal consultations had generally supported the approach he had suggested in his discussion paper. No discussion had been held in plenary on the topic itself, aside from the adoption of the work programme contained in the report of the Commission to the General Assembly on the work of its fifty-fourth session.<sup>5</sup> During the debate in the Sixth Committee in 2002, very few delegations had commented on the topic. Those who had done so had generally supported its study. Two critical views had been expressed, however. According to the first, it was open to question whether the title was appropriate. The concept of “shared” resources was a matter of concern to some delegations in connection with the concept of permanent sovereignty over natural resources, and all the more so in the case of oil and gas. The title had nevertheless been officially approved by the General Assembly.<sup>6</sup> The second view was that the topic should be limited to the study of groundwater as a complement to the work already done on international watercourses. According to that view, expressed by the delegation of the United States, oil and gas were not ripe for consideration, and an effort to extrapolate customary law from divergent practices with respect to those resources would not be productive. Since he was taking a step-by-step approach, starting with groundwater, he saw no need to alter the work programme at the current stage.

4. The Commission had first dealt with the problem of shared natural resources when codifying the law of the non-navigational uses of international watercourses. Although its main focus had been on surface waters, the fourth Special Rapporteur on the topic, Mr. McCaffrey, had included in his seventh report a detailed study on groundwaters, emphasizing their large quantity, their mobility and their relations with surface waters.<sup>7</sup> He had

been in favour of including groundwater in the scope of the draft convention, but, after discussing that idea, the Commission had finally agreed to include only those groundwaters which were related to surface waters. The previous Special Rapporteur, Mr. Rosenstock, had reopened the issue of groundwater on second reading. He had contended that confined groundwater should be included in the scope of the draft convention because of the recent trend towards the adoption of an integrated approach to the management of water resources. He had been convinced that the principles and norms applicable to surface waters and related groundwaters were equally applicable to unrelated confined groundwaters. In his view, a few minor changes to the draft would have achieved the wider scope. The proposal had been the subject of extensive discussions in 1993 and 1994 that had indicated that the views of members were sharply divided. Those who had not supported the proposal had said that they did not see how “unrelated” groundwaters could be envisaged as part of a system of waters that constituted a unitary whole. In the end, the Commission had decided not to include unrelated confined groundwaters in the scope of the draft convention and had adopted draft article 2,<sup>8</sup> as formulated in the text adopted on first reading,<sup>9</sup> with one minor change. The definition of “watercourse” contained in draft article 2, subparagraph (b), was now article 2, subparagraph (a), of the Convention on the Law of the Non-navigational Uses of International Watercourses. Those members who had not accepted Mr. Rosenstock’s proposal had nevertheless agreed that a separate study was warranted in view of the fact that groundwaters were of great importance in some parts of the world and that the law relating to confined groundwater was akin to that governing the exploitation of natural resources, particularly oil and gas. The Commission had also adopted at its forty-sixth session and submitted to the General Assembly a resolution on confined transboundary groundwater,<sup>10</sup> reproduced in paragraph 15 of the first report, in which it recognized the need for continuing efforts to draft rules pertaining to confined transboundary groundwater and commending States to be guided by the principles contained in the draft articles, where appropriate.

5. It was against that background that he proposed to cover the topic. He had the impression that Mr. Rosenstock had thought that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would be mostly applicable to confined transboundary groundwaters. To ascertain whether that was so or whether a new set of rules or adjustments would be required, it was necessary to find out what exactly those groundwaters were. Their uses, State practice in their management, contamination, conflicts and existing domestic and international legal norms would have to be examined. The work of Mr. Sreenivasa Rao on the topic of international liability for injurious consequences arising out of acts not prohibited by international law,

<sup>3</sup> ILC (LIV)/IC/SNR/WP.1.

<sup>4</sup> *Yearbook ... 2000*, vol. II (Part Two), annex, pp. 141–142.

<sup>5</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 520, pp. 100–102.

<sup>6</sup> General Assembly resolution 57/21, para. 2.

<sup>7</sup> *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/436, paras. 8–58.

<sup>8</sup> The final text of the draft articles on the law of the non-navigational uses of international watercourses appears in *Yearbook ... 1994*, vol. II (Part Two), pp. 89–135, para. 222.

<sup>9</sup> *Yearbook ... 1991*, vol. II (Part Two), para. 59, p. 66.

<sup>10</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 135.



particularly the prevention aspect,<sup>11</sup> was very relevant to the study of the topic.

6. It was precisely to gain knowledge of confined transboundary groundwaters that he had prepared an addendum to his first report which was intended as a technical and reference paper. It was based on the contributions of several groundwater experts who were involved in the international efforts now being organized to manage that important resource, principally within the framework of the Internationally Shared Aquifer Resources Management Programme. In retrospect, he felt that the Commission had taken a wise decision to conduct a separate study of confined groundwaters as opposed to surface waters. He now believed that the understanding that Mr. McCaffrey and Mr. Rosenstock had had of groundwaters had not been entirely correct. Groundwaters and surface waters both originated in precipitation, but that was where their similarity ended. Ninety-nine per cent of all fresh water on earth was underground, so Mr. McCaffrey had been right to say that groundwaters were more important than surface waters. Groundwaters were the world's most commonly extracted raw material. Since hydrogeology was still a young science, little was known of the hidden treasure that was groundwater resources except that it took years to recharge them when depleted and that most, but not all (as was erroneously stated in paragraph 20 of the report), were not renewable. When groundwater was contaminated, it remained so for much longer than surface water. Another difference was that a great many human activities that took place on the surface could have adverse effects on groundwater. That might mean that the Commission must consider regulating activities other than uses in the case of groundwater.

7. The Commission was supposed to be dealing with groundwater not covered by the Convention on the Law of the Non-navigational Uses of International Watercourses. He had decided to use the phrase "confined transboundary groundwater" for the time being, as that was the terminology used by the Commission in its 1994 resolution. The word "confined" was used to mean "unrelated" to surface waters. While that concept was perfectly understandable in the abstract, it was quite difficult to know in practice which aquifers were related to surface waters. One must also note that hydrogeologists used the term "confined" in the sense of a pressurized aquifer. For them, a shallow aquifer was not confined, whereas a fossil or deep underground aquifer was confined. The Commission might have to find terminology that could be readily understood by groundwater experts and administrators. The definition of the scope also called for more detailed study. Even though it might be difficult for members to comment on the report because of its preliminary nature, he would greatly appreciate their providing him with guidance for pursuing his study.

8. Mr. MANSFIELD thanked the Special Rapporteur for his first report, which he had found very informative. He supported the decision to proceed along the lines suggested in paragraph 4 of the report, including the time-

table contained therein. The only reservation he had in that regard was that, as the Special Rapporteur himself suggested at the end of paragraph 5, the study on groundwater might take longer than initially envisaged.

9. In reading the addendum to the first report, he had come to the recognition that the subject was much more complicated than it seemed. He had little doubt, however, that the subject of confined groundwater resources was of the greatest importance, not just for States that shared such resources, but more generally for the international community as a whole because of the long-term implications for international peace and security. He supported the Special Rapporteur's view that it was important to understand exactly what was and what was not covered by the phrase "groundwater resources" before trying to develop legal norms that could be understood and implemented by experts and managers. He had found it interesting, for example, that the definition of the word "confined" given by the Commission in the past, namely, as meaning groundwater that was "unrelated" to surface water, differed from the definition used by hydrogeologists, who considered a "confined aquifer" to be an aquifer stored under pressure. The terminological clarifications provided by the Special Rapporteur in the addendum to the report justified his careful approach of gathering the necessary technical information and expert assistance before proceeding to define the scope of the subject and proposing a number of approaches to it.

10. It might well be the case, as was suggested in paragraph 20 of the first report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would prove to be applicable to confined transboundary groundwater, but that did not mean that the Commission should not first gain a full understanding of the differences between such groundwaters and other types of water bodies. The Special Rapporteur had pointed out at least two such differences: the fact that confined transboundary groundwaters were generally not renewable in the same way as surface waters and the fact that it was not just the use of groundwaters that needed regulating, but also any activities that might adversely affect their quality. The addendum to the report, however, suggested that it might prove necessary to make further distinctions within the category of confined transboundary groundwater and that special standards might be appropriate in the case of fossil aquifers, for example.

11. The truly appalling statistics quoted by the Special Rapporteur in paragraph 21 of the report, especially the number of infants who died every day as a result of unsafe water in developing countries, showed that the world was moving towards a water crisis, which both enhanced the importance of transboundary water resources and increased the potential for harm as a result of the mismanagement or pollution of such resources. The Special Rapporteur's preliminary analysis of shared aquifers under pressure from cross-border pumping or pollution in the addendum indicated that there might be significant differences between the factors that needed to be taken into account in different areas, which would tend to confirm that, as was stated in paragraph 24 of the report, the Commission needed, in order to formulate rules regulating confined transboundary groundwater, an inventory of such

<sup>11</sup> For the text of the draft preamble and 19 draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, see *Yearbook ... 2001*, vol. II (Part Two), pp. 146–148, para. 97.

resources worldwide and some analysis of their different regional characteristics. It was obviously difficult and, in any case, premature to make any firm recommendations about the standards that the Commission should seek to develop. Two general points could be made, however. First, the information contained in the addendum clearly showed that, owing to their vulnerability, groundwaters should be regulated by stricter international standards of use and pollution prevention than those applying to surface waters. Second, the situation was likely to have no legal solution as such. The “solution” would involve, rather, a complex mix of political, social and economic considerations and processes, the success of which would largely depend on the depth and breadth of understanding by peoples and their leaders of the vulnerability of such resources and the interrelationship between all actions taken in respect of them. The Commission’s role was therefore not to create some prescriptive set of rules, but to endeavour to construct a regime to encourage States to recognize their interdependence with regard to groundwater and to work together to identify ways in which they could obtain the appropriate assistance and techniques for resolving any disagreements that might arise as they worked through the complex process of managing and using such resources.

12. Mr. OPERTTI BADAN said he agreed with the Special Rapporteur that the Commission had been right to decide that transboundary groundwater should be the subject of a separate regime. The topic should be considered as being a subject in its own right, in terms both of regulation and of principles. He greatly doubted that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses could apply to groundwater. He was also doubtful about the title, which raised the question of who the parties to the shared resources were, as well as the question whether the topic included oil and gas or was restricted to water resources. It was all the more important to settle the problem of terminology since hydrogeology, as a science, was barely 50 years old.

13. At the end of the report, the Special Rapporteur recommended that the Commission should study the socio-economic importance of groundwater, State practice with regard to use and management, contamination and measures to prevent it, cases of conflicts and, last, domestic legislation and international agreements on managing such resources. Existing international agreements, however, related only to management and contained no binding provisions that would affect the ownership or exploitation of such resources. It might therefore be wiser to avoid an excessively all-embracing, universalist approach that failed to take sufficient account of the basic sources found in regional practice.

14. Article 2, subparagraph (d), of the Convention on the Law of the Non-navigational Uses of International Watercourses, which acted as a point of reference, recognized the role of regional economic integration organizations. The provision lent legal support to the transfer to such organizations of competence in various areas, including the legal aspects, at the regional level, of prospecting and using groundwater.

15. The world water crisis mentioned in paragraph 21 of the report raised the question of whose responsibility it should be to establish the institutional, legal and technical framework required to ensure the good management and maintenance of water resources. In the case of oil and gas, the responsibility belonged to the State in whose territory the resources were found, and there was no reason why the same should not be true of groundwater, which the water crisis made increasingly valuable. The guiding principles and standards that the Commission would formulate for worldwide application would have to be restricted to rules relating to cooperation on all natural resources, either for marketing purposes or for planning by the States in the subsoil of which the resources were located. Otherwise, the regional approach should be adopted, taking as a model, perhaps, the mechanism set up as part of a joint project between the World Bank and the States Parties to MERCOSUR, which covered an area of 1.2 million km<sup>2</sup> containing 160 million km<sup>3</sup> of water and 15 million beneficiaries. The project document contained seven main points, including the need to improve understanding of the scientific and technical aspects of aquifers and to establish a common management framework combining the public and private sectors. The project did not involve any kind of permanent institutional elements, but its operational components were to be found in the management and administration mechanism that the implementation of the project would involve.

16. Ms. ESCARAMEIA said that she wished to highlight the link between the subject of shared natural resources and that of liability; the link should be institutionalized, at least to the extent that the two Special Rapporteurs should both participate in the meetings of any working groups that might be set up on each of their subjects.

17. With regard to the title, the use of the word “shared” was less of a problem than the excessively broad nature of the current title. It might be preferable to add, in brackets, at the end of the title, the words “groundwater, oil and gas”. That would indicate the natural resources involved and would guarantee that the three resources were covered by the same regime. The scope of the subject would also be determined by the definition given to the expression “confined groundwater”. The Commission’s definition not only differed from that adopted by hydrogeologists but also lacked clarity in itself. In the resolution in which the Commission had recommended for adoption by the General Assembly various principles to be applied to transboundary groundwater, confined groundwater had been defined as “groundwater not related to an international watercourse”.<sup>12</sup> The resolution had not been adopted, whereas article 2 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which had, spoke of “ground waters constituting ... a unitary whole and normally flowing into a common terminus”. The question thus arose as to whether confined groundwaters, in the sense of the topic under consideration, included those that flowed into a lake or a spring or whether lakes and springs came under the Convention. There was also the question of confined groundwaters that were fed, sometimes on a massive scale, by rainwater. There was an obvious need to clarify the relationship be-

<sup>12</sup> See footnote 10 above.

tween the definition to be adopted by the Commission and that contained in article 2 of the Convention.

18. In the addendum, the Special Rapporteur described the differences between groundwaters and surface waters, concluding that the former required periodic assessment and monitoring on a more constant and accurate basis than the latter, particularly since they were subject to depletion and contamination. They therefore required standards that were not only stricter than those applying to surface waters, but also stricter than general standards of liability, such as standards of significant harm or standards of prevention. It might therefore be dangerous to take the Convention on the Law of the Non-navigational Uses of International Watercourses as a model. It would, however, be possible to draw up some general principles which would be of a peremptory nature, but would by no means preclude the existence—or even the priority status—of regional arrangements.

19. Mr. KATEKA said he doubted that it was wise to limit the scope of the topic to groundwater, gas and oil. In paragraph 4 of the report, the Special Rapporteur excluded from the scope of the study such shared natural resources as mineral deposits, marine living resources or birds and land animals, on the grounds that they were dealt with more appropriately elsewhere. He wondered, however, what regime governed the massive migrations of animals between Tanzania and Kenya, which could be counted in millions, and which, if not regulated, could lead to complications that could ultimately jeopardize international peace and security.

20. Mr. CHEE, referring to Ms. Escameia's comments on dispute settlement, said that, to his knowledge, there were very few cases dealing with that topic, since inter-State disputes concerning water resources were most often settled by negotiation. More generally, the criterion applied to shared resources was equitable utilization. Account was also taken of the precautionary principle, the aim of which was to prevent the contamination of the resources in question. Disputes could also follow the diversion of a watercourse by an upstream State.

### Cooperation with other bodies (*concluded*)

[Agenda item 11]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

21. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization, hereafter AALCO) said that, at its forty-second session, held in Seoul from 16 to 20 June 2003, AALCO had considered an agenda item entitled "Report on the matters related to the work of the International Law Commission at its fifty-fourth session", all items on the agenda of the Commission being of immense interest to member States of AALCO and to AALCO itself. During the deliberations on the Commission's work, many representatives had made elaborate comments on the general thrust of such work on various topics and had presented their country positions on individual draft articles.

22. Most representatives had been in favour of the codification of the topic of diplomatic protection by the Commission. One had stressed that it could advance the promotion of human rights. With regard to scope, one delegation had supported the Special Rapporteur's conclusion that the draft articles<sup>13</sup> should be confined to issues relating to the nationality of claims and the exhaustion of local remedies, while, for another, the Commission's work should be limited to precedents and practice. As to the extension of the draft articles to other specific situations, representatives had been against including provisions in the draft articles on the diplomatic protection of crew members and passengers on ships because it was already covered by articles 94 and 292 of the United Nations Convention on the Law of the Sea. One representative had stated that, as there was no nationality link involved, the issue of the protection exercised by international organizations in respect of their officials did not fall within the domain of diplomatic protection. It had also been considered that the question of a State exercising diplomatic protection on behalf of the inhabitants of a territory other than its own which it occupied, administered, or controlled should not be included in the draft articles, as such an occupation of territory was illegitimate under international law. As to the possibility of the exercise of diplomatic protection by an international organization administering a territory, such situations were temporary in nature and should be considered instead in connection with the topic of the responsibility of international organizations.

23. It had been pointed out that the Calvo clause<sup>14</sup> was simply a contractual device and that no individual could waive the protection of his or her State of nationality, since the right to exercise diplomatic protection belonged to the State. As the Calvo clause had increasingly been losing its practical usefulness in the global economy, there was no reason to deal with it in the draft articles.

24. Most representatives had welcomed the general thrust of draft article 3 and recalled that diplomatic protection was a discretionary right of a State. As it was becoming increasingly possible for individuals to submit their claims directly to different forums, concern for their interests should not be such that it became obligatory for the State of nationality to espouse their claims. On the individual draft articles, one representative had felt that they reflected the rules of customary international law, namely, that diplomatic protection was a right of a State and depended on a nationality link between the individual and the State concerned. Another representative had welcomed the commentary to draft article 7, which stated that the term "refugee" was not limited to refugees as defined in the Convention relating to the Status of Refugees and its Protocol relating to the Status of Refugees, but also covered persons who did not strictly conform to that definition, thereby leaving the scope of the definition open for further expansion. Diplomatic protection through "peaceful settlement", as stipulated in draft article 1, had also been welcomed. Diplomatic protection should not be abused to justify the use of force against a State, and, according to one representative, exceptional cases of diplomatic protection must be sanctioned by the

<sup>13</sup> See 2756th meeting, footnote 3.

<sup>14</sup> See 2757th meeting, footnote 5.



Security Council under Chapter VII of the Charter of the United Nations. There had been general support for the rule of continuous nationality in draft article 4. Delegations had welcomed the formulation of draft article 12 on the exhaustion of local remedies, presented by the Special Rapporteur in his second report.<sup>15</sup> With regard to draft articles 12 and 13,<sup>16</sup> it had been felt that, since the principle of exhaustion of local remedies was part of customary international law and played an essential role in the implementation of diplomatic protection, it must be stated as clearly and unambiguously as possible. Second, to ask whether an available remedy was effective or not would raise questions about the standards of justice employed in the State concerned. As long as those remedies were in conformity with the principles of natural justice, variations in standards should not allow for their effectiveness to be called into question. Third, greater caution was required when dealing with exceptions to the exhaustion of local remedies rule, as any tilt in the balance would undermine the domestic jurisdiction of the State where the alien was located.

25. Representatives who had commented on draft article 14 relating to the futility of local remedies, presented by the Special Rapporteur in his third report,<sup>17</sup> had stated their preference for the third option proposed by the Special Rapporteur. According to one delegation, subparagraphs (e) (Undue delay) and (f) (Denial of justice) should be considered along with the question of the futility of local remedies. As to draft article 15 on the burden of proof,<sup>18</sup> it had been felt that, as a principle of evidence, it came under the rules of procedure and need not be elaborated on in a separate article. With respect to implied waiver, caution had been called for, as it was difficult to devise any objective criteria in that regard.

26. The Commission had sought the views of States on the issue of the diplomatic protection of shareholders. In that connection, the representative of the Republic of Korea had supported the basic rule laid down by ICJ in the *Barcelona Traction* case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. He had said that his country did not wish to grant a right of diplomatic protection to the State of nationality of the majority of shareholders, as that could result in the discriminatory treatment of small shareholders and it would be difficult to establish a quantitative standard for such a distinction. It would also be difficult to recognize that the State of nationality of the majority of shareholders in a company had a “secondary” right to exercise diplomatic protection if the State where the company had been set up had failed to do so.

27. As far as reservations to treaties<sup>19</sup> were concerned, delegations had considered the guidelines as useful and practical recommendations for States to bear in mind when formulating, modifying and withdrawing their reservations to treaties. According to one delegation, the guidelines should be assessed in the light of their com-

patibility with the 1969 Vienna Convention. Furthermore, they would be more useful if they were accompanied by model clauses. One representative had suggested that the Commission should shorten some of its commentaries since lengthy commentaries on non-controversial matters might give the impression that the law regarding reservations to treaties was less clear or more complex than it really was. As to late reservations, one representative had stated that, in order to ensure stability and predictability in treaty relations, such reservations should be avoided as far as possible; they were permissible only if none of the contracting parties objected to them.

28. On individual draft guidelines, one delegation had considered that guidelines 2.1.1, 2.1.2, 2.1.5 and 2.1.7 were acceptable, while for another delegation interpretive declarations, whether simple or conditional, needed to be formulated in writing, something which had not been stipulated in guideline 2.4.1. With regard to the role of the depositary in the light of draft guideline 2.1.8 [2.1.7 *bis*], many delegations had felt strongly that the depositary should play a strictly procedural role, in accordance with the relevant provisions of the 1969 and 1986 Vienna Conventions. Many delegations had considered that draft guideline 2.1.8 [2.1.7 *bis*] went beyond the 1969 Vienna Convention: if the depositary were to intervene on the question of the compatibility of a reservation with the object and purpose of the treaty, as the guideline in question proposed, it might prompt the State to react, but that would not help to solve the problem. It was unlikely that a more active role of the depositary would lead to the withdrawal of the reservation.

29. Since the Commission had sought the views of States on draft guideline 2.1.6 [2.1.6, 2.1.8], which provided for the communication of a reservation by electronic mail and its subsequent confirmation in writing, one delegation had stressed that reservations were generally made at the time of ratification or accession and were thus communicated at the same time as the instrument of ratification or accession. The question of the communication of reservations by electronic mail or facsimile did not therefore seem to arise. The representative of the Republic of Korea had stated that such forms of communication were not normal practice in his country, but had acknowledged that under certain circumstances they might be useful.

30. In response to the Commission’s request for clarification on draft guideline 2.5.X pertaining to withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, presented by the Special Rapporteur in his seventh report,<sup>20</sup> two delegations had made comments. Asserting that the withdrawal of reservations was a sovereign prerogative of the State, one delegation had said that recent developments where some monitoring bodies were assigned the role of assessing reservations to a treaty were exceptional and should thus not be covered by the guidelines. According to the representative of the Republic of Korea, the expression “body monitoring the implementation of the treaty” required clarification, since the competence of monitoring bodies to pronounce on the validity of a reservation depended on the powers assigned to them by the treaty in question.

<sup>15</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1.

<sup>18</sup> *Ibid.*

<sup>19</sup> See 2760th meeting, footnote 4.

<sup>20</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

Otherwise, only the States or international organizations that were parties to those treaties had that power.

31. Referring to unilateral acts of States, some delegations had underlined that it was possible to codify and progressively develop the law in that area and that it would be useful for States to know the risk they ran in formulating such acts. For others, the topic involved progressive development rather than codification. One delegation had pointed out that unilateral acts could have extraterritorial effects and negatively affect international peace and security, thereby warranting further examination of the topic. As to methodology, one delegation had said that it would be useful to study each type of act, such as promise, recognition, waiver or protest, before drawing up general rules. According to another delegation, the Special Rapporteur should first study unilateral acts which, on the basis of international practice, gave rise to obligations. On the classification of unilateral acts, one representative had stressed the need to use the "legal effects" criterion. Consequently, there would be two major categories of acts, those whereby a State undertook obligations and others whereby a State reaffirmed a right. One representative had contested the Special Rapporteur's proposal that, by analogy with the expression *pacta sunt servanda*, which formed the basis of treaty relations, the binding nature of unilateral acts could be based on a new expression, *acta sunt servanda*; that analogy was unacceptable, as there was no basis for it in international law.

32. In connection with the question of international liability for injurious consequences arising out of acts not prohibited by international law, most representatives had referred to the close links between prevention and liability and had welcomed the Commission's decision to begin work on the latter. One delegation had underscored the fact that it was not easy to codify and progressively develop rules in that area because the existing treaty regimes had been developed primarily at the regional and sectoral levels and involved profound interests of States parties. The Special Rapporteur's decision to refer to "allocation of loss" in the title of the topic had been deemed constructive, as, in the final analysis, the allocation of loss concerned the relationship between economic development and environmental protection. As to the scope of the Commission's work, one representative had stressed that it should be the same as for the work on prevention, while, for another, the Commission should draw up general rules so as to ensure that States had enough options to handle each case on the basis of its specific circumstances. That would reflect the general principle of the peaceful settlement of international disputes.

33. On allocation of loss, delegations had taken the view that it was not the State but the operator who benefited from the activity and should bear the primary responsibility in that regard. As for the role of the State under the liability regime, international jurisprudence would need to be carefully studied. In particular, it had been felt that liability regimes established under sectoral conventions could provide some guidance.

34. AALCO member States had generally welcomed the inclusion of other new topics in the Commission's work programme. With a view to keeping the Commission informed about the law and State practice of Asian

and African States, AALCO had adopted a resolution at its forty-second session committing its member States to respond to the Commission's request for comments.

35. In 2002, he had mentioned that, owing to the lack of time, it was becoming more difficult for AALCO to discuss, during its annual sessions, important legal aspects of topics studied by the Commission. In that connection, he had proposed considering the feasibility of the Commission and AALCO jointly organizing a seminar on one of the topics recently included in the Commission's work programme. The Commission had approved that idea, and it had been agreed that the seminar might take place at the meeting of legal advisers of AALCO member States, usually held in New York during the regular session of the United Nations General Assembly. However, the proposal had not materialized in 2002. The idea had been considered during the last session of AALCO, which had stated categorically in a resolution adopted on the subject that it was in favour of such a seminar. He wished to hear the Commission's views and suggestions in that regard.

36. At its forty-second session, AALCO had considered not only the Commission's work, but also jurisdictional immunities of States and their property; the International Criminal Court; the deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in all occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War; the follow-up to the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, from 3 to 14 June 1992; cooperation in measures against trafficking in women and children; drawing up of an effective international legal instrument against corruption; human rights and Islam; and WTO as a framework agreement and code of conduct for world trade. During the session, AALCO had also organized a special one-day joint meeting with ICRC on "The relevance of international humanitarian law in today's armed conflicts".

37. Pursuant to AALCO's efforts in the past few years to rationalize its work programme, the Seoul session had been the first time it had focused its deliberations on a set of priority agenda items, which would be identified for each annual session. A full report on the forty-second session would be submitted to the Commission at the earliest possible opportunity.

38. As far as future cooperation between AALCO and the Commission was concerned, the AALCO secretariat would continue to prepare notes and comments on the substantive items considered by the Commission so as to assist the representatives of member States of AALCO in the Sixth Committee when they debated the Commission's report on the work of its fifty-fifth session. An item entitled "Report on the work of the International Law Commission at its fifty-fifth session" would thereafter be included in the agenda of AALCO's forty-third session.

39. On behalf of AALCO, he invited the members of the Commission to participate in the forty-third session of AALCO, which would be held in Indonesia in 2004.

40. Mr. KATEKA, welcoming the fact that, at its forty-second session, AALCO had spent a great deal of time on

the Commission's work, said it was nevertheless regrettable that the members of AALCO had not had before them the results of the first part of the Commission's session, and he therefore trusted that they would be able to consider them in the near future. He also thanked AALCO for encouraging its members to express opinions on matters dealt with by the Commission.

41. It would be interesting for the Commission to have more information about the items on the agenda of AALCO's sessions.

42. AALCO's rationalization of its work was a welcome step. It was to be hoped that it would not follow the example of the United Nations General Assembly, whose credibility was undermined because its agenda contained some items that had been the same for many years. Since AALCO was a legal body, its work should focus on legal matters, although the latter might have a political or economic dimension.

43. Ms. XUE thanked AALCO for its interest in the Commission's work and trusted that the dialogue between the two bodies would continue in future. AALCO's work and efficiency had improved, and the organization was looking into the latest developments in international law. Clearly, the international legal order could not progress effectively without the participation of African and Asian States.

44. Speaking as the representative of the Asian Group, she requested the Secretary-General of AALCO to provide more information on the positions adopted by AALCO's members on the problems now being encountered by international law.

45. Mr. GALICKI said that AALCO was certainly the only regional body that showed so much interest in the Commission's work, and he welcomed that interest. It was important and instructive for the Commission to hear the opinion of African and Asian lawyers, and he therefore hoped that cooperation between the two bodies would continue. In that connection, he agreed with the idea of holding joint meetings, such as the planned seminar. A meeting with the legal advisers of the AALCO member States during the session of the United Nations General Assembly in New York was bound to be enriching.

46. Mr. AL-MARRI said that he wished to know what role AALCO played with regard to human rights in the African and Asian region, where much remained to be done in that field.

47. Ms. ESCARAMEIA said that she would like to receive the report on AALCO's debates on the Commission's work. Like Mr. Galicki, she was agreeably surprised by the interest AALCO had shown in that work and hoped that the results of the first part of the Commission's session would quickly be forwarded to it.

48. She supported the idea of arranging a joint AALCO/Commission seminar, but she also wished to know whether the only people who could attend would be the members of the Commission, particularly the Special Rapporteurs, who would be in New York at that time.

49. With regard to the other items discussed at AALCO's forty-second session, she asked for more details on human

rights and Islam and on the International Criminal Court. The latter point was vital, primarily because, compared to the number of African States, few Asian countries had acceded to the Rome Statute of the International Criminal Court.

50. Mr. MOMTAZ said that he was impressed by the thematic review of the Commission's work, which did not duplicate the one by the United Nations Secretariat. Experience had often shown that States which had no opportunity in the Sixth Committee to state their opinions on matters of interest to them did so at AALCO sessions, where they felt freer to express their views.

51. He requested details of AALCO's efforts to encourage its members, which represented more than one quarter of the member States of the international community, to reply to the questionnaires prepared by Special Rapporteurs on the various topics considered by the Commission.

52. Mr. DAOUDI, noting that AALCO covered two continents with different legal civilizations, asked whether the work of that organization reflected an interest in the development of certain aspects of international law at a time when the principles and foundations of international law were being threatened. He wished to know whether a common position that reflected the opinions of those countries on the content of the rules of international law was taking shape on specific questions and what contribution to AALCO's work was being made by African and Asian legal commissions or committees.

53. Mr. RODRÍGUEZ CEDEÑO said that the statement by the Secretary-General of AALCO reflected that organization's interest in the Commission's work. The exchanges of views between the Commission and AALCO were very important and of great use to both bodies in their respective areas of endeavour.

54. Mr. KAMIL (Secretary-General of AALCO), replying to Mr. Kateka, said that, although Mr. Chee, who had represented the Commission at AALCO's forty-second session, had given an overview of the first part of the Commission's session, he was looking forward with interest to the full report on its work which would be drafted at the end of the second part of the session.

55. As to Mr. Kateka's fear that AALCO's agenda might resemble that of the United Nations General Assembly, which included too many irrelevant items, he said that AALCO made sure that the questions discussed at its sessions were topical and reflected member States' interests and concerns. AALCO had also rationalized its work: whereas there had been 15 items on the agenda the previous year, that number had been halved at the forty-second session.

56. While it was true that many Asian countries had not yet ratified the Statute of the International Criminal Court, AALCO was an advisory body and could only urge its members to accede to that instrument.

57. As far as human rights were concerned, two years earlier, his organization had signed an agreement with Mary Robinson, the then United Nations High Commissioner for Human Rights, which had been aimed at establishing closer cooperation between AALCO and OHCHR.



Moreover, at its forty-first session, held in Abuja in 2002, AALCO had held a special meeting on human rights and action to combat terrorism. Cooperation in the field of migrants' and workers' rights was continuing with IOM. One week earlier, AALCO had signed an agreement with ICRC which was designed to strengthen AALCO's work relating to international humanitarian law. The AALCO member States were therefore aware of human rights issues, a matter with which he dealt personally.

58. The planned seminar would be held after, and not during, the meeting of the legal advisers of the AALCO member States in New York. That seminar, in which the current members of the Commission would participate, would cover a topic to be chosen by the Commission. Its purpose would be to help the representatives of the AALCO member States to acquire more in-depth knowledge of the topic chosen. The topic should therefore be important both for the Commission and for the AALCO member States.

59. The CHAIR thanked the Secretary-General of AALCO for his statement and said that the topic chosen for the seminar should probably be one of the questions dealt with by one or more of the Special Rapporteurs who would be present in New York at that time.

*The meeting rose at 1.10 p.m.*

## 2779th MEETING

*Wednesday, 23 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### **Shared natural resources (concluded) (A/CN.4/529, sect. G, A/CN.4/533 and Add.1<sup>1</sup>)**

[Agenda item 9]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

1. Mr. NIEHAUS said the Special Rapporteur's excellent report was a good starting point for the Commis-

sion's work on a topic of major importance in the field of international law. Everyone was aware that access to safe drinking water was a serious problem for developing countries that threatened to grow much worse in the years ahead. The decision to deal with confined transboundary groundwater separately was a wise one, given the great variety of other types of groundwater listed in paragraph 19 of the report.

2. The objections raised to the title of the topic were unfounded, since it had already been officially approved by the General Assembly<sup>2</sup> and expressed with great clarity the focus of the study: the fact that certain natural resources were under the jurisdiction of, or shared by, two or more States. Study of the legal regime for shared natural resources was appropriate in that equitable exploitation and management of such resources required the active cooperation of the States that had jurisdiction over them and entailed considerations relating to their rational and sustainable use.

3. Not only were shared natural resources physically located within the jurisdiction of two or more States, but their exploitation in the territory of one State inevitably affected the use that the other State or States might make of them. Resources that were capable of moving through or being located in more than one jurisdiction, such as hydrological resources and hydrocarbons, were of particular interest. The report concentrated on groundwater, leaving hydrocarbons to one side, but a general report covering both oil and gas in addition to groundwater would have given a better overview of the subject. The question of what principles were applicable to all three resources and how they differed remained unanswered, and it was to be hoped that that gap would be filled in future reports.

4. When the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses,<sup>3</sup> it had expressed the view that the principles contained in the draft could be applied to confined transboundary groundwater. Unfortunately, the General Assembly had not endorsed that view, nor had the conditions governing the application of principles designed to regulate the use of surface water to the regulation of groundwater use been specified.

5. As the Special Rapporteur pointed out in paragraph 20 of the report, surface water resources were renewable, while groundwater resources usually were not, and they accordingly represented different challenges. One might also ask whether the principles incorporated in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to fossil aquifers and which principles of international environmental law could be applied to the exploitation, distribution and conservation of a resource that was non-renewable or only slowly renewable.

6. Article 5 of the Convention laid down the principle of the equitable and reasonable utilization of water resources, and of the equitable and reasonable participation in the use, development and protection of such resources, with a view to attaining optimal and sustainable utilization

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2778th meeting, footnote 6.

<sup>3</sup> *Ibid.*, footnote 8.

thereof. Unfortunately, that fundamental principle could not be automatically transposed to the management of a non-renewable and finite resource: sustainable use of a non-renewable resource was precluded by its very nature. Nor could the factors relevant to equitable and reasonable utilization outlined in article 6 of the Convention be automatically applied to a non-renewable resource. For a renewable resource, adjustments could be made according to circumstances, but for a non-renewable resource, what seemed equitable at the time might cause irreparable damage later on.

7. Hence the need to draw up a list of technical criteria that took into account the actual distribution of water resources within each national jurisdiction in order to facilitate the precise allocation of quotas for exploitation. Water was a resource that was fundamental to human life, and the fundamental right to water was upheld by a body of opinion. The Global Consultation on Safe Water and Sanitation for the 1990s held in New Delhi in September 1990 had formalized the need to provide, on a sustainable basis, access to safe water in sufficient quantities and proper sanitation for all, emphasizing the “some for all rather than more for some” approach. Accordingly, in defining what constituted equitable and reasonable utilization of confined transboundary groundwater, priority must be given to meeting basic human needs.

8. The obligation to take all appropriate measures to prevent the causing of significant harm to other States, reflected in article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, was too weak, given the vulnerability of fossil aquifers to pollution. Environmental considerations called for the adoption of strong precautionary measures to prevent the pollution of such resources. As was pointed out in chapter 18.35 of Agenda 21, adopted by the United Nations Conference on Environment and Development, a preventive approach, where appropriate, was crucial to avoiding costly subsequent measures to rehabilitate, treat and develop new water supplies.<sup>4</sup>

9. The general obligation to cooperate, as outlined in article 8 of the Convention, did seem applicable to the exploitation of confined transboundary groundwater. Since both fossil aquifers and hydrocarbon deposits were non-renewable natural resources, they could be covered by a similar legal regime. Water being fundamental to human life, however, some adjustments should be made to the legal regime for confined transboundary groundwater to permit the introduction of certain humanitarian criteria in the allocation of exploitation quotas.

10. Mr. ECONOMIDES said he welcomed the clear and concise report on shared natural resources. The Special Rapporteur had asked for advice, no doubt of a general nature at the present preliminary stage of work, on the approach to be taken.

11. He agreed with Ms. Escameia that a more restrictive wording should be adopted for the title and proposed “Shared natural resources: confined transboundary

groundwater”, which would correspond better to the content of the report. Oil and gas would, of course, be taken up at a later date.

12. Before seeking to regulate the areas covered by the topic, the Commission needed to develop a definition and to determine the significance for States, especially developing countries, of transboundary groundwater not connected to surface water. The Special Rapporteur had recognized the need for technical advice and had called in some very high-level hydrogeologists and legal experts, including Mr. McCaffrey, a former member of the Commission.

13. It was somewhat premature to state, as did paragraph 20 of the report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. That question should be treated separately, as Mr. Opetti Badan had suggested at the previous meeting, at least in the initial stage of the work. Analogies with other conventions could be made at a later stage. For the time being, the specific features of non-connected groundwater should be analysed.

14. One possible question now was whether the “significant harm” principle was applicable to confined transboundary groundwater. In paragraph 7 of the addendum to the report, the Special Rapporteur said it was not: a stricter standard should be applied to such water. He endorsed the views just outlined by Mr. Niehaus on that subject and concurred with the comments on the vulnerability of fossil groundwater, as opposed to surface water, in paragraph 40 of the addendum.

15. Finally, it was very important to deal with non-connected groundwater pollution straightaway. An analogy might be established with the work on transboundary harm, in which the question of prevention had been dealt with before responsibility.

16. Mr. KATEKA, responding to the Special Rapporteur’s request for comments on the scope of the topic, said he had already expressed his misgivings about the exclusion of shared resources such as minerals, animals and birds. There were regimes to regulate marine resources, some of which were highly migratory, and there seemed no reason not to have regimes for migratory wildlife. While he understood the Special Rapporteur’s reluctance to widen the scope of the topic, there was no reason to exclude from his background study general remarks on other shared natural resources as a way of providing additional perspective. A convention apparently existed on migratory birds, for example, and the Special Rapporteur might look into whether there were similar arrangements for other shared natural resources.

17. Paragraph 7 of the report misstated the sensitive issue of the rights of upper riparian States *vis-à-vis* lower riparian States of major river systems, giving the false impression that it was only upstream States that created environmental concerns. The remark that new uses of waters by upstream States were bound to affect in some way the historically acquired interest of the downstream States touched a raw nerve. Some river systems were still

<sup>4</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex II, p. 287.

governed by agreements concluded by colonial powers that favoured downstream States at the expense of those upstream. A case in point was the Nile Waters Agreement.<sup>5</sup> In view of the controversy between upstream and downstream States outlined in paragraph 11 of the report, caution had to be exercised. Accordingly, it was not clear why there was a reference in that paragraph to “underdeveloped upstream States”: an *a contrario* situation could arise for downstream States.

18. The Special Rapporteur said in paragraph 20 of the report that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. The principle of equitable and reasonable utilization in article 5 of that Convention was relevant, as was article 6 on the factors relevant to equitable and reasonable utilization. The requirements of addressing vital human needs and not giving priority to any State were crucial. The obligation not to cause significant harm to other watercourse States set out in article 7 of the Convention was to be found, in a different form, in the draft articles on prevention of transboundary harm.<sup>6</sup> As Ms. Escameia had pointed out at the previous meeting, the Special Rapporteurs on shared natural resources and liability should harmonize their efforts.

19. Paragraph 12 of the report indicated that groundwater constituted over 95 per cent of the earth’s freshwater, yet paragraph 21 said that the portion of freshwater available for human consumption was 1 per cent. Because of increased water usage, large populations and pollution, freshwater was becoming a scarce resource. Indeed, the Special Rapporteur said a world water crisis was imminent. That seemed incongruous, however. If only 1 per cent of the earth’s groundwater was being used, and presumably it was periodically replenished through precipitation and percolation, then 99 per cent remained untapped, and where was the crisis?

20. People in developing countries went without water, and thousands died every day, while others watered their lawns. The statistics given in the report seemed to come mainly from large waterworks and not from small-scale users. It was to be hoped that the next report would include more statistics from developing countries, which used groundwater more than did developed countries. Boreholes and wells, for example, might be worth looking into. Finally, he generally supported the Special Rapporteur’s scheme of work.

21. Mr. PAMBOU-TCHIVOUNDA said that, using a hydrogeological approach to the study of groundwater resources, the Special Rapporteur had positioned himself as a reliable guide to help the Commission cross *terra incognita* without foundering. The precautions he had taken, particularly the recruitment of expert assistance, were to be applauded.

22. The addendum to the report informed the Commission that groundwater occurred in aquifers—in other words, geological formations (para. 8); that it could move

sideways as well as up or down in response to gravity and differences in elevation and pressure (para. 9); and that certain aquifers extended over international boundaries (para. 14). That seemed to be the crux of the issue as far as establishing a legal regime was concerned. If the flow of groundwaters was to be covered by a legal regime, it would probably have to be multifaceted, for three reasons.

23. First, locating aquifers required the mobilization of major operational resources, including technical resources, which might not be available to the States concerned; if third parties had to be called in, legal problems would arise. Second, exploitation of groundwater and aquifers could be likened to an activity that was not prohibited by international law yet generated transboundary risk: What regime should be applied in such a situation? Third, such an activity might necessitate the pooling of human and technological resources, not only among the basin States but perhaps also among those external to it.

24. The structuring of all the components of the future regime would sharply highlight various elements of power, strength, time constraints and human survival, and a number of simple questions came to mind. Did groundwater fall into the territory of the State of residence of its users? Should a distinction be made, perhaps depending on the distance from the earth’s surface, between groundwater that was within a State’s jurisdiction and groundwater that was not? If so, one might be tempted to apply to underground water resources a regime comparable to the one for maritime resources—for example, the exclusive economic zone and the sea bed—although, since the seas and oceans were made of different material than dry land, an analogy would appear to be very difficult.

25. It was clear that the regime governing shared natural resources must involve above all the permanent sovereignty of States over the resources on their territory. However, the concept of sharing—the crux of the matter—was not *a priori* a norm. It was a norm that had to be developed, and this could only be done with the consent of the States concerned. Such consent must be based on a conception of the interests at stake arising from a fundamental change in the thinking of the international community. For the time being, those were but a few simple comments on what was a very complex and interesting subject. He looked forward to the second report.

26. Mr. MATHESON commended the Special Rapporteur on his first report, which provided useful background information on the consideration of the topic and the technical aspects of confined groundwaters. It was an important subject to which the Commission should make a contribution, not only with respect to the development of international law, but also for the sake of the health and welfare of large numbers of people in countries that depended on groundwater resources. The Special Rapporteur had been prudent in emphasizing the need for further study of the relevant technical and legal aspects before taking any final decision on how the Commission should proceed. It was proposed to complete the second report on confined groundwaters by 2004, but the Special Rapporteur should take whatever time was required, including to seek State views and technical input, on the basis of which the Commission could prepare its contribution. On

<sup>5</sup> Concluded between the United Kingdom and Egypt in Cairo on 7 May 1929 (League of Nations, *Treaty Series*, vol. XCIII, no. 2103, p. 43).

<sup>6</sup> See 2778th meeting, footnote 11.



the other hand, it was not clear whether the Commission could make a comparable contribution in regard to oil and gas. The debate thus far had highlighted concerns about the suitability of the topic, and it was apparent that the problems relating to confined groundwaters were quite different from those relating to oil and gas, both in technical and in legal terms. Much work had already been done by the Commission on confined groundwaters in connection with the non-navigational uses of international watercourses, and the issue presented immediate and serious concerns for human health and welfare, which was not the case for oil and gas. There was no reason to assume that States could not resolve issues concerning oil and gas through normal diplomatic and legal processes. While it was premature to decide what the ultimate scope of the shared natural resources topic would be, it was clear that confined groundwaters must take priority. The Special Rapporteur had proposed 2005 as the date for a third report, on oil and gas, but it would seem wiser to complete the report on confined groundwaters beforehand. He looked forward to the second report on confined groundwater and was confident that it would provide an excellent basis for the Commission's work.

27. Mr. OPERTTI BADAN said that, in the light of comments made so far, he had two basic concerns. First, the Commission should adhere for the time being to the subject of the specific resource of confined groundwaters; other aspects of shared natural resources such as animal migration would merely complicate matters. Second, it should not lose sight of the original proposal to include in the study of shared natural resources the three resources: water, oil and gas. Presumably, the rationale behind such a proposal was that those resources had some common features, for one the fact that they were all underground. To be sure, a legal regime governing oil and gas already existed, and in some cases was being developed. The way in which countries coordinated the exploitation and utilization of natural gas was a case in point. However, it must be remembered that the criterion on which the oil and gas regimes had been established was sovereignty, and he would strongly object to the issue of water being dealt with in a different way simply because the legal regime was being established at a later date, or on the humanitarian grounds of the necessity and usefulness of the resource to mankind. If that line of argument were followed, no one could deny the usefulness to mankind of oil and gas, albeit chiefly for commercial purposes. He therefore urged the Special Rapporteur to be very prudent in his handling of what was an enormously sensitive matter. The Commission's objective was to establish a legal regime based on cooperation for the preservation and utilization of confined groundwaters and not to turn it into a resource of mankind as a whole. Moreover, the law of the sea could not serve as a basis for discussion, since it did not cover territorial sovereignties for the purposes of regulation. He hoped that, in the second report, the Special Rapporteur would not depart from the approach adopted in the first report, which took into account the three natural resources of water, oil and gas, given the need for a legal regime for those resources based on similar criteria.

28. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his technically detailed but clear report on a very difficult and important subject in legal, political,

technical and socio-economic terms, on account of the problems of water access, use and pollution, above all for developing countries. In view of the complex nature of the topic and the current progress of the debate, it was likely that the work programme for the quinquennium outlined in paragraph 4 would need to be revised. He agreed that, for the time being, the study should focus exclusively on confined groundwater, defined by the Special Rapporteur as waters that in general were not connected to a body of surface water; that aspect having been deferred, the non-navigational uses of international watercourses had been considered. The very different characteristics of other geological structures such as oil and gas as well as flora and fauna subject to transboundary movements would certainly complicate the study, not least the establishment of rules governing the protection, efficient management and equitable use of such resources. The Commission should therefore first complete its study on confined groundwaters before embarking on a study of oil and gas to see whether there were any similarities that might help in establishing common rules.

29. Aside from a detailed analysis of the different confined groundwater systems, such as the Guaraní aquifer referred to at a previous meeting by Mr. Operti Badan, the Commission must also consider doctrine, State practice, international agreements and domestic legislation relating to the protection and management of such systems. The study must be comprehensive and well-balanced and cover the rational use of confined groundwaters, the interests of States and the protection of the environment.

30. He had no wish to prejudge the outcome of the study, but an overall objective should be decided on without further delay. He would suggest the establishment of rules for the protection and better utilization of confined groundwaters, along the lines, but not necessarily strictly adhering to, the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles already adopted on prevention of transboundary damage, as well as the principles and norms applicable to objective responsibility or liability. The principles governing the permanent sovereignty of States over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962 should also be taken into account. The States with such resources on their territories would also have to adopt appropriate national legislation and to negotiate and conclude relevant agreements. In addition, it was important to define a mechanism for settlement of disputes, based on Article 33 of the Charter of the United Nations, although State practice showed that such disputes had been few in number and had generally been resolved through practical means.

31. Mr. MOMTAZ thanked the Special Rapporteur for his report, which provided a good introduction to hydrogeology and established a framework for a legislative regime governing the invisible resource of transboundary confined groundwaters. In that connection, he welcomed the fact that the Special Rapporteur had drawn on the advice of high-level experts. His comments would focus on two issues: the scope of the study, and possible links between the topic under study and the Convention on the Law of the Non-navigational Uses of International Watercourses.

32. He endorsed the work programme proposed in the report and the decision to treat confined groundwaters separately from other underground resources such as oil and gas. That gradual approach would expedite the progress of the Commission's work. Both those categories of resources should be governed by the principle of permanent sovereignty, but there were a number of differences between them. For instance, confined groundwaters were vulnerable to agriculture and industrial activities, whereas the same could not be said of oil and gas. States on whose territory water resources were located must adopt measures to avoid their contamination. Moreover, the work being carried out by the Study Group on International Liability was of relevance to the subject of transboundary confined groundwaters. Such risks were not involved for oil and gas, as the principles governing the management of relevant transboundary structures were already well established. The exclusion of solid minerals from the study was justified, since they were static deposits and did not present particular sharing problems for States. He understood the concerns expressed by Mr. Kateka concerning animal migration but considered that they could be dealt with under bilateral or multilateral agreements such as the Convention on the Protection of Migratory Birds.<sup>7</sup>

33. He welcomed the background information provided in the report on the Convention on the Law of the Non-navigational Uses of International Watercourses, which was designed to manage the resource shared among States on the territory through which it flowed. According to the provisions relating to equitable and reasonable State utilization of and participation in international water resources, water flowing through a river basin was not considered a resource subject to permanent sovereignty. While the principle had always been upheld by upstream States, which had never claimed sovereignty or exclusive right over those resources, it was not true of confined groundwaters, to which the principles of permanent sovereignty applied. Mr. Operti Badan was therefore fully justified in insisting that the rules to be established with respect to confined groundwaters should be identical to those relating to oil and gas. He also shared his concerns about the possibility in both cases of any reference to the resource as part of the shared heritage of mankind. For those very reasons the Commission had decided that confined groundwaters should not come under the scope of the draft of the Convention, nor, as a result, had the General Assembly followed up the Commission's compromise-based recommendation, included in its 1994 resolution on confined transboundary groundwater, that States should be guided by the principles enshrined therein in the case of confined transboundary groundwaters.<sup>8</sup> He therefore questioned the statement in paragraph 20 of the report to the effect that it was obvious that almost all of the principles embodied in the Convention were also applicable to confined transboundary groundwaters. However, he fully endorsed the statement in paragraph 24, stressing the need for an inventory of the resources worldwide and a breakdown of their different regional characteristics so as to formulate rules regulating confined transboundary groundwaters. The addendum to the report clearly showed that problems

relating to confined groundwaters differed greatly from one region to the next. It would therefore probably be necessary to establish general rules, taking into account the specific characteristics of each region.

34. Mr. KAMTO commended the Special Rapporteur's wisdom in drawing on expert advice, thus enabling the Commission to reach some understanding in a field that was generally unfamiliar to lawyers. As to the title of the topic, it would be premature to seek precision or finality. Not only had the existing title been approved by the General Assembly, but experience showed that a fully appropriate title could be established only once the whole process was completed.

35. Parts of the addendum, particularly paragraphs 7 to 9, were difficult to understand, but the problem might well lie in the French translation. He was grateful for the inclusion of the terminology list in annex I, although he hoped that in the future it could be expanded to include such expressions as "hydraulic gradients", which appeared in paragraph 9 of the addendum to the report.

36. Paragraph 9 of the addendum also contained the telling statement that groundwater moved through aquifers very slowly, with flow velocities measured in metres per year. Over decades or centuries, however, those metres built up, and a given aquifer might become a shared resource. He therefore agreed with Mr. Momtaz's suggestion that the Commission should identify the various aquifers that should be regarded as shared, so as to establish a basis for further research.

37. Such research should not be confined to practice on protecting the quality of aquifers but should be extended to practice—if any existed—on exploiting them. Thought should be given to whether the principles governing surface waters could equally apply to groundwaters. Another important question was whether the criteria for sharing a resource would be based on the needs of States, on proportionality or on fairness. In that context, he commended the Special Rapporteur's decision to consider water separately from oil and gas for the time being, as long as that approach did not become an obstacle to a more comprehensive consideration of the matter: the three were inextricably connected. Common principles must be found and a distinction must be drawn between exploitation regimes and protection regimes, which could vary according to the resource in question.

38. Mr. BROWNLIE expressed concern that the metaphor "shared resource" was too simple, as though groundwater undercutting a boundary, for example, could be regarded as a single geological structure like oil or natural gas. It was clear from the addendum that the nature of aquifers was extremely varied, so the metaphor of sharing, with which the international community was familiar in the context of oil or gas, hardly applied. He had in mind, for example, the fascinating case study in the addendum concerning the Nubian Sandstone Aquifer System, which covered an enormous area. Situations of that kind would need to be governed by sophisticated concepts of legal interests; "sharing" was too simple. It was difficult to believe that, if some event occurred in the Libyan area, the "share" of Sudan would immediately be diminished. Yet, at the same time, those two States were obviously con-

<sup>7</sup> Signed in Washington, D.C., on 16 August 1916 (United States, 39 Stat. 1702, *Treaty Series*, no. 628).

<sup>8</sup> See 2778th meeting, footnote 10.

cerned States in relation to the aquifer and, in hydrological and possibly other terms, had an interest in the welfare and integrity of the aquifer as a whole. He urged the Commission to have no truck with facile analogies with oil and natural gas.

39. Mr. KEMICHA said the report afforded an excellent basis for discussion. There was one potential difficulty, however—the title could give rise to confusion. It was not clear whether the word “shared” meant that the resource in question was exploited jointly with another State or that it would be shared in future. The question would become crucial when the Commission moved on to consider the question of oil and natural gas. Indeed, he wondered whether, in view of the specificity of legal regimes governing the exploitation of oil and gas, it was appropriate for the latter to form part of the study at all.

40. Mr. GALICKI said that, although preliminary, the report was extremely valuable, especially since it contained scientific and technical information that would be crucial in shaping the Commission’s understanding of the legal problems that might arise. He shared the doubts of some members of the Commission concerning the title of the topic, for it seemed both too wide and insufficiently precise. The terms “shared” and “natural resources” required much more consideration.

41. Similarly, the Special Rapporteur’s decision to deal with three kinds of natural resources—confined transboundary groundwaters, oil and natural gas—might also be regarded as both too narrow and too wide a choice. There were numerous other natural resources of a transboundary nature; yet, at the same time, the three chosen by the Special Rapporteur presented a very broad scope. Oil and gas had characteristics extremely different from those of groundwaters and might require different legal regulations. He would be inclined to favour restricting the topic to groundwaters, although he did not exclude the possibility of extending consideration at a later stage to other shared natural resources, such as oil and gas.

42. Limiting the scope of the topic would not, however, mean that other serious difficulties would be avoided. The very concept of “confined transboundary groundwaters” was problematic, especially in the light of the Convention on the Law of the Non-navigational Uses of International Watercourses, article 2 of which grouped surface waters and groundwaters together as “constituting by virtue of their physical relationship a unitary whole”. Moreover, the Special Rapporteur’s choice, after examining a variety of terms used in practice, of the phrase “confined transboundary groundwaters” did not diminish the difficulties arising from the need to define the term precisely from both a hydrogeological and a legal standpoint. There seemed to be differences even between various kinds of groundwaters. Further consultation with hydrogeologists might, as suggested by the Special Rapporteur, be useful.

43. As the Special Rapporteur had also stated, almost all the principles embodied in the Convention applied also to confined transboundary groundwaters. One of the Commission’s most important tasks should therefore be to identify the legal similarities and differences between groundwaters and other international watercourses, which

would enable it to draft specific rules dealing exclusively with confined transboundary groundwaters.

44. He agreed with the suggestion that, in order to formulate rules, the Commission should have an inventory of confined transboundary groundwaters worldwide and a breakdown of the different regional characteristics of such resources. As wide a knowledge as possible of the State practice with regard to the use and management of confined groundwaters, and of existing domestic legislation and international agreements, was also desirable. The serious and time-consuming nature of such tasks was yet another reason to limit the scope of the topic.

45. Ms. XUE, after commending the report, said that the very concept of shared natural resources was likely to trigger controversy, especially at a time when environmental law was developing at increasing speed. All parts of nature were interconnected but, as well as being the common heritage, natural resources were also subject to the concepts of sovereignty and security. It was therefore understandable that States tended to adopt a prudent attitude. She supported the Special Rapporteur’s approach of concentrating on just three areas—groundwater, oil and natural gas—since they shared the characteristic of flowing. At the same time, the situation of other natural resources should be borne in mind, so that the scientific and technical situation was thoroughly understood, as well as the related human activities and the impact on resources. Meanwhile, the decision to focus first on groundwater was very wise. Data on hydrogeology would be crucial, and she looked forward to hearing a hydrogeological report at a future meeting, which would place the Commission’s work on a scientific footing.

46. The heated discussion which had arisen in the Commission a few years ago as to whether confined groundwater came within the scope of the law on the non-navigational uses of international watercourses had been caused by the vague definition of the natural connection between underground water and surface water and by the lack of scientific data on the impact that one country’s use of groundwater had on the use of the same body of water by another State. Another moot point had been whether groundwater should be governed by domestic or international water law. Although the Commission’s decision to exclude confined groundwater from the Convention on the Law of the Non-navigational Uses of International Watercourses had been dictated by the principle of States’ sovereignty over their domestic resources, according to the last of the four criteria mentioned in paragraph 6 of the addendum, groundwater did fall within the scope of the Convention if the body of water in question was international in nature.

47. Since then, the Commission had adopted the stance that groundwater was a shared natural resource. She agreed with Mr. Brownlie about the need for a scientific basis in order to delimit the scope of the topic and for an explanation of why the Commission took the view that groundwater was a shared resource. One good reason for studying the issue might be that sharing had led to a variety of interrelated actions by States, which called for regulation under international law. Nevertheless the impact of groundwater use had to be precisely quantified and must not rest on general assumptions; hence more research was



needed. The Special Rapporteur should therefore pursue his investigation of the subject because, regardless of the final form taken by the Commission's study, it would enhance countries' knowledge about the depletion of natural resources and would contribute to a better understanding of the current situation in that respect.

48. While oil, natural gas and groundwater all had one common feature, namely that they flowed, their geological structure diverged. Once again, the Commission's study should be based on scientific evidence, and so consideration of oil and natural gas should be deferred.

49. Mr. YAMADA (Special Rapporteur), summing up the discussion, said that, in future reports he would take account of all the comments made in the course of the debate and endeavour to provide more scientific data.

50. Concern had been expressed about the term "shared", on the grounds that it was unclear by whom the natural resources in question were shared, and, in that connection, several members had emphasized the concept of permanent sovereignty. He understood the notion of "shared" to refer not to ownership but to responsibility for resource management. It was to be hoped that that controversy could be overcome by defining the scope of the topic in physical terms. While some members had contended that wildlife was also a shared natural resource, he, like a number of others, would prefer to concentrate on groundwater, which might become a subtopic, because he did not feel qualified to deal with the subject of migratory animals and birds. He therefore agreed with Mr. Galicki that the final decision regarding scope should be postponed.

51. He concurred with the view that groundwater involved political, social and economic factors and that legal solutions were not a panacea. For that reason, it might be a good idea to formulate certain principles and then to focus on cooperation regimes, including dispute settlement. He accepted criticism of the statement in paragraph 20 of the report that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters, because more had to be known about groundwater before it could be said with any certainty that those principles did apply.

52. Several references had been made to the great vulnerability of groundwater and to the need for stricter thresholds of transboundary harm. That area did indeed require serious consideration. It would be inadvisable to adopt a universal approach, for regional regimes might be more effective. If rules were formulated, they should resemble the articles of the Convention on the Law of the Non-navigational Uses of International Watercourses, which recognized the important role played by regional efforts.

53. In response to the question whether groundwater discharging into a spring was covered by the Convention, he drew attention to the four conditions set out in paragraph 6 of the addendum to his report and said that, in his opinion, if a spring did not satisfy those criteria, the groundwater discharging into it would not come within the purview of the Convention either.

54. The query regarding the meaning of the phrase "normally flow into a common terminus" in article 2 of the Convention was hard to answer. Usually a common terminus was an ocean. The word "normally" had, however, been included in the text at the very last minute, despite the Special Rapporteur's objections, and even the scientific community experienced difficulty with that definition. For that reason, it would be necessary to reconsider the definition of the groundwater to be dealt with in the study in hand.

**The fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded)\* (A/CN.4/529, sect. F, A/CN.4/L.644<sup>9</sup>)**

[Agenda item 8]

REPORT OF THE STUDY GROUP

55. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law), presenting the Study Group's report (A/CN.4/L.644), said that the Study Group's discussions of the *lex specialis* rule and "self-contained regimes" had taken as their point of departure the previous year's report<sup>10</sup> and the debate in the Sixth Committee (A/CN.4/529, sect. F). The current report confirmed that the Study Group's approach to fragmentation would be substantive and not institutional. An analytical distinction ought to be drawn between the different patterns of interpretation or apparent conflict. It had been decided that such differences should be treated separately, because they raised many questions relating to fragmentation. The report did not pass judgement on the merits of the cases referred to in paragraph 9 and did not imply that the interpretations placed on them were the only ones possible.

56. It was envisaged that guidelines might emerge from the Study Group's consideration of the different aspects of the topic which had been chosen by the Commission itself and endorsed by the Sixth Committee. The Study Group had been of the opinion that *lex specialis* could be understood in a variety of ways, but that there was no need to take a stand on them and that the Chair's study would try to encompass most of them. In discussing self-contained regimes, it had been emphasized that general law would intervene in a number of ways in the operation of those regimes. Finally, the necessity of dealing with regional laws in the study had been acknowledged.

57. Mr. MELESCANU said that the open-minded and flexible approach evident in the report was essential at such an early stage of work. The Romanian branch of ILA would be collaborating in the consideration of the application of successive treaties relating to the same subject matter. The fragmentation of international law was not a theoretical question, but the very real consequence of globalization and the diversification of public international

\* Resumed from the 2769th meeting.

<sup>9</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

<sup>10</sup> See 2769th meeting, footnote 8.

law. The Study Group's aim should be to produce guidelines for States; it should not become embroiled in theoretical debates that would be of no practical use.

58. Mr. MANSFIELD said that the New Zealand branch of ILA and the Law School of Victoria University of Wellington would be assisting him with his part of the study.

59. The CHAIR suggested that the Commission should take note of the report of the Study Group on the Fragmentation of International Law.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 2780th MEETING

*Friday, 25 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opetti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR said that the Commission would proceed to the official closure of the International Law Seminar and that, to that end, the meeting would be suspended.

*The meeting was suspended at 10.05 a.m. and resumed at 10.30 a.m.*

**Reservations to treaties<sup>1</sup> (*continued*)\*\* (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

\* Resumed from the 2770th meeting.

\*\* Resumed from the 2760th meeting.

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

## EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

2. Mr. PELLET (Special Rapporteur), introducing his eighth report on reservations to treaties (A/CN.4/535 and Add.1), said that the report began by outlining reactions to his seventh report,<sup>3</sup> presented at the previous session, and describing new developments relating to reservations that had taken place over the past year. With regard to the first point, the Commission should be informed that, in addition to the information contained in the report, the draft guidelines appearing in the seventh report had been examined during the first part of the session by the Drafting Committee, which had improved them before their adoption by the Commission. He had drafted the corresponding commentaries, which the Commission would consider when it adopted its report on the current session, in accordance with the usual practice. Moreover, with the exception of draft guideline 2.1.8 [2.1.7 *bis*] on the procedure in case of manifestly [impermissible] reservations, the Sixth Committee had given a good reception to the draft guidelines adopted at the preceding session. Some of the comments made on that occasion had been interesting, but they could be taken into account only when the Commission had considered the draft Guide to Practice on second reading. It should be recalled, meanwhile, that draft guideline 2.5.X, on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, had been withdrawn until the consequences of the impermissibility of a reservation had been considered. The reactions to the text and to its withdrawal were contained in paragraph 12 of the report, but it did not seem that any particularly enlightening conclusions could be drawn.

3. With regard to the second point, the most interesting new element was a document dated 13 March 2003, entitled “Preliminary opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights”,<sup>4</sup> whose totally undogmatic approach contrasted strikingly with that of General Comment No. 24 of the Human Rights Committee.<sup>5</sup> Rather than adopting a combative attitude towards States and ordaining that a given reservation was impermissible, the Committee on the Elimination of Racial Discrimination endeavoured to set up a dialogue with them so as to encourage as complete an implementation of the International Convention on the Elimination of All Forms of Racial Discrimination as possible. That was also the position of the Committee on the Elimination of Discrimination against Women,<sup>6</sup> as was stated in paragraph 21 of the report. It was also the main lesson that he had drawn from the meeting between members of the Commission and members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights during the first part of the session. Similar meetings with members of the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights were to take place during the second part. The introductory sec-

<sup>3</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

<sup>4</sup> CERD/C/62/Misc.20/Rev.3.

<sup>5</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

<sup>6</sup> See CEDAW/C/2001/II/4.

tion of the eighth report also contained a brief account of new developments as a result of the work of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the Grand Chamber of the European Court of Human Rights. Finally, it reported that the legal service of the European Commission had finally replied to section I of the questionnaire on reservations.<sup>7</sup>

4. Turning to the structure of the report, he explained, first of all, that, after the introduction and the first chapter, which would conclude the chapter on the withdrawal and modification of reservations and interpretative declarations held over from the report of the preceding year, he had intended, as was indicated in paragraph 31 of the eighth report, to devote a second chapter to the procedure for formulating acceptances of reservations and a third to the formulation of objections. While drafting the chapter on acceptances, however, he had realized that it would be more logical to reverse the order of the two chapters, since an acceptance was ultimately most often simply an absence of objection. That was why addendum 1 to the eighth report contained the beginning of the new chapter II concerning the procedure for formulating objections, while the report itself contained the introduction and chapter I.

5. Chapter I dealt with two points that he had not had time to include in his seventh report concerning the withdrawal and modification of reservations, namely, the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations. At the preceding session, the Commission had considered the question of modifications that sought to lessen the scope of reservations and concluded that they were, rather, partial withdrawals and, as such, ought to be encouraged; that had been the aim of draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12], adopted on first reading at the current session (see 2760th meeting, para. 76). The situation in which a State sought, in modifying its reservation, to enlarge its scope was quite different. In that case, it was no longer a partial withdrawal, but a kind of late formulation of a reservation; that situation was covered by draft guidelines 2.3.1 to 2.3.3, which had been adopted by the Commission at its fifty-third session, in 2001,<sup>8</sup> and certainly did not seek to encourage such action. By analogy, it would seem that the restrictions adopted in cases where the scope of a reservation was lessened should be transposed to the enlargement of such scope, without anything being added or removed. Without anything being added, because it was illogical that a State that had made a reservation to a provision of a treaty should be placed at a disadvantage in modifying that reservation in comparison with a State which had made no reservation, but which could nevertheless formulate a late reservation, provided that all the other parties were in agreement (draft guideline 2.3.1). With nothing removed, either, however, since such modifications should surely not be encouraged, for the same reasons for which the late formulation of reservations had been hedged about with extremely strict conditions. Moreover, that approach corresponded with the

practice, or at least with that of the “principal” depositary of multilateral agreements, the Secretary-General of the United Nations, as was described in paragraphs 41 to 45 of the report. He was therefore proposing a draft guideline 2.3.5 to deal with that point by simply referring to the rules applying to the late formulation of reservations, while leaving two aspects undecided. The first, less important and rather of an editorial nature, was whether those rules should be referred to explicitly or whether that was unnecessary. The second, which was mentioned in paragraph 48 of the report, was whether the “enlargement of the scope of a reservation” should be defined. He himself had not been in favour of that course of action, unless it was dealt with in the commentary, but the Drafting Committee, and then the Commission, had subsequently adopted draft guideline 2.5.10 [2.5.11], concerning the partial withdrawal of a reservation, the first paragraph of which defined what was meant by the term. If only for the sake of symmetry, it would seem sensible to proceed in the same way in dealing with the enlargement of the scope of a reservation and model draft guideline 2.3.5 directly on draft guideline 2.5.10 [2.5.11] by including in it a first paragraph that would define “enlargement”. The text of the definition would be that proposed in paragraph 48, which he had originally intended for the commentary, but could be simplified along the lines of paragraph 1 of draft guideline 2.5.10 [2.5.11], with the following text:

“Enlargement of the scope of a reservation has the purpose of excluding or modifying the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.”

The two situations were not entirely analogous in that, while the first case could be restricted to the effects (partial withdrawal lessened the legal effect of the reservation), in the second case there could be legal effects only if all the other parties were in agreement, and that was why it was necessary to include the phrase “has the purpose of” excluding or modifying the legal effect. The eighth report was fairly brief as far as the withdrawal of interpretative declarations was concerned, first because there was very little State practice in that regard (para. 51 of the report). States could nevertheless withdraw “simple” interpretative declarations whenever they wished, since the withdrawal was carried out by a competent authority. That was what draft guideline 2.5.12 said, and the only question to be asked was whether to refer explicitly to the rules which were applicable to the formulation of such declarations and which were the subject of draft guidelines 2.4.1 and 2.4.2. The modification of “simple” interpretative declarations did not pose a problem either. Since draft guidelines 2.4.3 and 2.4.6 provided that such declarations could be formulated at any time unless the treaty provided otherwise, those declarations could also be modified at any time in the same way. The very little practice he had been able to find (paras. 66 and 67) bore that out, as was stated in draft guideline 2.4.9, which raised the technical question whether mention should be made of the case where a treaty expressly prohibited the modification of an interpretative declaration. Since that was rather a moot point, perhaps it should be included in the commentary. Referring to paragraph 65 of the report, he noted that, as

<sup>7</sup> The questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

<sup>8</sup> *Yearbook ... 2001*, vol. II (Part One), para. 157.



the rules relating to the modification of simple interpretative declaration were exactly the same as those relating to their formulation, it might be enough to make a very minor amendment to the text of draft guidelines 2.4.3 and 2.4.6 and the commentaries thereto in order to combine them into one single rule on the formulation and modification of interpretative declarations. He acknowledged that was a rather unorthodox proposal, since the draft guidelines in question had already been adopted, but it would provide a more elegant solution.

6. There remained the problem of the withdrawal and modification of conditional interpretative declarations, and he was aware that several members were sceptical about whether the Commission should continue to take a particular interest in that category of interpretative declarations, on the grounds that they were most probably subject to the same legal regime as reservations and it would be enough to say so once and for all. He recalled that, as he indicated in paragraph 55 of his report, he did not oppose such a solution in principle, provided that the intuition on which it was based turned out to be correct. The Commission would not find that out until 2004, when he would submit a report on the validity of reservations and interpretative declarations and, possibly, on their effects. Until then, however, the Commission had agreed to accept the *status quo* and he sincerely hoped that that compromise would not be called into question when considering draft guidelines 2.5.13 and 2.4.10 dealing with the withdrawal and the modification of conditional interpretative declarations, respectively. It seemed to him that it would be difficult to simply transfer the rules applicable to the modification of reservations to conditional interpretative declarations. While it was relatively simple to decide whether the modification of a reservation was tantamount to partial withdrawal or enlargement of scope, it was very difficult to do so with respect to modifications of conditional interpretative declarations, as specified in paragraphs 59 and 60 of the report. He had therefore decided not to propose that the Commission should transpose the distinction drawn in draft guidelines 2.3.5 and 2.3.10 to conditional interpretative declarations. It had seemed reasonable to consider that any modification of a conditional interpretative declaration, which must, by virtue of guidelines 1.2.1 [1.2.4] and 2.4.5 [2.4.4], be made at the time the party concerned expressed its consent to be bound, must always follow the regime applicable to the late formulation or enlargement of the scope of a reservation. In other words, any modification of a conditional interpretative declaration must be subject to the absence of objection by one of the other contracting parties. That was what was proposed in draft guideline 2.4.10, as contained in paragraph 61 of the report. A more elegant solution would be to take draft guideline 2.4.8, adopted in 2001, and combine in one single draft guideline the principles applicable to the late formulation and modification of conditional interpretative declarations. However, he would not insist on such a solution if it was pointed out that the Commission's practice was not to go back on rules it had already adopted, even if, in the circumstances, it would actually be making them more complete.

7. With regard to the withdrawal of conditional interpretative declarations, of which no clear example had been found, it seemed that there was no choice but to follow

the rules relating to the withdrawal of reservations as, like them, conditional interpretative declarations limited the scope of the commitment by their authors unilaterally, and it was therefore in their interest to withdraw them; guideline 2.5.13 was worded along those lines, namely, in such a way that States would not hesitate to withdraw those declarations.

8. Addendum 1 to the report, containing paragraphs 69 to 105, was the beginning of the study on the formulation of objections to reservations; chapter II, which was just the start of the study, also dealt with the “reservations dialogue”—the trend that had developed in recent years of establishing a dialogue, instead of raising formal objections to a reservation, with a view to convincing the author of the reservation either not to make the reservation or to formulate it differently. The rest of the chapter would be submitted in 2004 along with chapter III dealing with the procedure for the acceptance of reservations. Before taking up certain aspects of the issue of objections to reservations, he pointed out that objections were not defined anywhere, while reservations were defined in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions—a provision which was reproduced in guideline 1.1 of the Guide to Practice—and it therefore seemed essential to fill the gap. The Guide to Practice would indeed be incomplete if it did not provide a reasonably accurate definition of what was meant by an objection to a reservation. Paragraphs 75 to 105 of the report endeavoured to do that, on the understanding that the more specific question of “enlarged” objections, namely, those whereby a State made known not only that it objected to the reservation, but also that it understood that it was consequently no longer bound to the reserving State, would be examined at the next session in addendum 2 to the report.

9. With regard to “simple” objections, he saw no reason, as he had stated in paragraph 76, why the moment when such objections must be formulated should be specified in the definition. Article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions indirectly dealt with the question of the time at which an objection could be formulated, but it did not solve the problem under consideration, and that was why he treated it in some length in paragraph 2, which would come later, of section 1 of that chapter. However, there appeared to be no doubt that an objection, like a reservation, was a unilateral statement, and he had merely made that clear in paragraph 78. He had not considered it wise to belabour the point, but had left the possibility of a joint objection open for later consideration. It was just as obvious, as was indicated in paragraph 79, that, regardless of the phrasing or designation of that unilateral statement, it was the underlying intention that counted, just as it did in the definition of the term “treaty”. The question of what a State's intention must be in order for its unilateral statement to be termed an objection called for a much more complex answer, which he had tried to provide in paragraphs 82 to 105 of his report.

10. An objection to a reservation was obviously a negative reaction to that reservation, but the intention behind it was crucial, as was illustrated by the decision handed down on 30 June 1977 by the court of arbitration responsible for settling the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Continental Shelf between the United*

*Kingdom and France* case, which was cited in paragraph 83 of the report. Several of the examples quoted in paragraphs 84 to 88 of the report showed that, in a reservations dialogue, it could and increasingly frequently did happen that States or international organizations, the European Union being one example, reacted negatively to a reservation without formally objecting to it. He was not sure that it was in the interests of either the author of the reservation or the objector to perpetuate such uncertainty. It would be wiser for States to say clearly that they objected to the reservation. He would come back to that point when he submitted his study of the reservations dialogue. Given the lack of clarity, it had to be emphasized that, if a State or international organization deliberately placed itself in that grey zone, it ran the risk that its reaction would not be deemed an objection and would not therefore produce the effects attaching to such a unilateral declaration.

11. The position was quite different if the objector, no matter what terminology it used, clearly indicated that it rejected or was opposed to the reservation or that it considered it to be invalid for some reason. Nevertheless, as was stated in paragraph 94, no reasons had to be given for an objection, and States did not necessarily have to specify the intended effects of their objection unless those effects departed from ordinary law. He was personally highly sceptical about the effects that certain States, modelling themselves on the bodies monitoring certain human rights treaties, intended their objections to have, and in paragraph 95 he provided some examples of cases where they expected too much. He did not, however, intend to adopt a final stance on that matter at present and would say only that, when a State formulated an objection, it could indicate what effects it intended the objection to have, and that it was even required to do so under article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, if its intention was to prevent the treaty from entering into force in its relations with the author of the reservation. That hypothesis and a study of practice had led him to propose, in paragraph 98 of his report, draft guideline 2.6.1 containing a definition of objections to reservations.

12. That rather unwieldy definition left out a number of points and was silent on the question whether the State or international organization formulating the objection must be a contracting party, since the definition of reservations itself did not shed light on the matter and, in his opinion, the nature of the objection, on which much had already been written, should form the subject of a separate study and draft guideline. Dealing with that question in the proposed definition would have made the definition incomprehensible. Intention had been mentioned, as it had been in the definition of reservations itself, but without adopting a stance on the validity of that intention. In paragraph 103 of his report he drew attention to the fact that, just as there could be impermissible reservations, there could be impermissible objections, which would not therefore produce their intended effect. That was a problem not of definition but of the validity of objections. In paragraph 101 of his report, he again referred to a problem which was dear to his heart, that of objections not to a reservation but to the late formulation of a reservation. He deeply regretted the fact that the Commission had used the term "objection" to refer to two operations which were in fact

totally different in intellectual terms. He did not suggest that a debate on that very questionable syncretism should be reopened, for that would call into question the wording of draft guidelines 2.3.1 to 2.3.3, which had already been adopted, but, for the sake of consistency, the Commission should specify somewhere that the same word was being used to refer to two separate legal operations. That could be done in draft guideline 2.6.1 *bis*, which he proposed at the end of paragraph 101, or at least in the commentary to draft guideline 2.6.1. He did not have any set ideas on the matter, although he did think that a separate draft guideline would be the best solution because the problem should be clearly flagged. He would like to know the Commission's preferences in that regard.

13. The proposed definition echoed the definition of reservations contained in draft guideline 1.1 in that it did no more than state the usual purpose of an objection, which was to prevent the application of the provisions of the treaty to which the reservation related in relations between the author of the reservation and the author of the objection. That definition was, however, incomplete and did not take account of draft guideline 1.1, which had already been adopted and which embodied the practice of across-the-board reservations, which purported to exclude or modify the legal effect of the treaty as a whole with respect to certain specific aspects. That point could be made clear either by means of an addition to draft guideline 2.6.1 or in a separate draft guideline, 2.6.1 *ter*, which he proposed in paragraph 104 of his report. The advantage of the second solution was that it followed the procedure used in draft guidelines 1.1 and 1.1.1 [1.1.4] on the definition of reservations themselves. The disadvantage was that it was less economical than the first solution, which would provide that explanation in the definition of objections given in draft guideline 2.6.1. Either solution was possible, but, one way or another, the Commission had to deal with the problem when it debated the draft guidelines. In conclusion, he suggested that the draft guidelines he proposed in his report should be referred to the Drafting Committee.

14. Mr. GAJA said that he endorsed the definition of the enlargement of the scope of reservations proposed by the Special Rapporteur, as well as his argument that a "simple" interpretative declaration could be withdrawn or modified at any time, unless the treaty provided otherwise. However, he believed that it would be better not to follow the suggestion in paragraph 65 of the report that two of the draft guidelines already adopted should be revised, since the only advantage was that it might be possible to do without one draft guideline.

15. The main problem was with draft guideline 2.6.1 in paragraph 98 of the report, concerning the definition of objections to reservations, which was not entirely satisfactory. It adapted to objections the definition of reservations contained in the 1969 and 1986 Vienna Conventions, indicating that objections were statements which purported "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection". Objections were thus aimed at one or another of the effects attributed to them by the 1969 and

1986 Vienna Conventions. It was true that, according to article 21, paragraph 3, of the Conventions, the normal effect of an objection was that the provisions to which the reservation related did not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation. The ambiguity of that wording had given rise to discussions at the 1969 United Nations Conference on the Law of Treaties. It was nevertheless clear that, according to the Vienna Conventions, if a reservation was intended to exclude the application of one of the provisions of a treaty, that had to be the result, regardless of whether the reservation had been accepted or whether an objection to the reservation had been formulated. In both cases, the provision that was the subject of the reservation did not apply.

16. With regard to a reservation aimed at excluding a provision, the 1969 and 1986 Vienna Conventions assimilated the legal effect of an objection to the legal effect of acceptance. It did not necessarily follow that the objecting State was pursuing the same goal as the State that accepted the reservation. The objecting State probably did not intend to accept the reservation; at the very least, that State intended to encourage the reserving State to withdraw it.

17. The definition of objections should therefore reflect the normal attitude of the objecting State and not link it to the effects that were attributed to objections under the 1969 and 1986 Vienna Conventions. State practice also showed that States that made objections often intended different effects from those provided for in articles 20 and 21 of the Conventions. Paragraph 95 indicated that the Special Rapporteur viewed as an objection the attitude of a State which, in objecting to a reservation, intended to exclude not only the provision to which the reservation applied but also a whole portion of a treaty. That type of objection should, regardless of its legal effects, also be included in the definition of objections.

18. The same should be true of objections which stated that a reservation was incompatible with the object and purpose of a treaty, but which, in a somewhat contradictory manner, indicated that treaty relations were nevertheless established between the reserving State and the objecting State. He gave the example of the declaration by the Government of the Federal Republic of Germany on some reservations made by Sudan to the Vienna Convention on Diplomatic Relations. The German Government had considered those reservations to be incompatible with the object and purpose of the treaty, yet had declared that that would not have prevented the treaty from entering into force between Sudan and the Federal Republic of Germany.<sup>9</sup>

19. The alternative version of draft guideline 2.6.1 contained in paragraph 105 of the report and draft guideline 2.6.1 *ter* contained in paragraph 104 dealt with cases when legal effects not provided for in the 1969 and 1986 Vienna Conventions were produced. Those guidelines covered the fairly rare case of an across-the-board reser-

vation whose purpose was to prevent the application of a treaty as a whole with respect to certain specific aspects “to the extent of the reservation”. An objection to such a reservation should be included in the definition; however, the aim pursued by the author of the objection and the legal effects attributed by the Convention to objections did not have to be identical.

20. The definition of an objection contained in draft guideline 2.6.1 should be broadened. That task could be given to the Drafting Committee, which could also decide whether or not the future definition obviated the need for draft guideline 2.6.1 *bis* on objections to late formulation of reservations.

21. With regard to the definition of the objecting State, the Special Rapporteur was correct to say that article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions must not be taken to mean that the objecting State must be a contracting State or a contracting international organization. In his view, the definition should be based on article 23, paragraph 1, of the Conventions: a State entitled to become a party to the treaty must be mentioned in addition to the contracting State or contracting international organization.

22. Mr. PELLET (Special Rapporteur) said that the definition of an objection raised a problem of principle. The definition he had proposed was faithful to the 1969 and 1986 Vienna Conventions, whereas Mr. Gaja’s position was different, more intuitive. In his view, a case could be made for both positions.

23. He called on the members of the Commission to comment on the two positions and to indicate whether it was better to adopt a definition which remained as faithful as possible to the 1969 and 1986 Vienna Conventions or a broader definition which was less faithful to the Vienna spirit, but undoubtedly clearer.

24. Mr. ECONOMIDES said that he was quite surprised by draft guideline 2.3.5 on the enlargement of the scope of reservations. According to the Special Rapporteur, a modification of a reservation that aimed at enlarging its scope should be viewed as a late formulation of a reservation. In his own view, that was only ostensibly true, and in fact there was a fundamental difference between the two. A reservation formulated late was one which a State had in good faith forgotten to attach to its instrument of ratification. That had happened twice in Greece. The late formulation of a reservation thus aimed to remedy an oversight. On the other hand, draft guideline 2.3.5 was outside the realm of good faith and opened up very dangerous prospects for treaties and international law in general. To enlarge the scope of a reservation was to enlarge the opposition to a treaty. In his view, the sort of provision which authorized the State to modify its reservations in order to enlarge their scope could not be equated with a late reservation; it was a new reservation which undermined the treaty. The provision should not be included in the draft guideline, since it represented a threat to international legal security. He favoured prohibiting such types of reservation and proposed the following wording: “The modification of an existing reservation in such a way as to enlarge its scope shall be prohibited.”

<sup>9</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002*, vol. I (United Nations publication, Sales No. E.03.V.3), pp. 89 (reservation by Sudan) and 91 (objection by the Government of Germany).



25. In paragraph 39 of his report, the Special Rapporteur pointed out that the Head of the Legal Advice Department and the Treaty Office of the Council of Europe had noted that, in some instances, States had requested the Secretariat of the Council of Europe to provide information on whether and how reservations could be modified. The Secretariat's response to such questions had always been the same: modifications which would result in an extension of the scope of existing reservations were not acceptable. He believed that the practice of the Council of Europe should be followed, even though the United Nations had used the opposite practice, which, in his view, was very dangerous.

26. During the second reading of the draft guideline, the possibility of formulating a late reservation should be restricted. The State must prove that it had already formulated the reservation prior to depositing its instrument of ratification in order for such a reservation to be accepted.

*The meeting rose at 11.45 a.m.*

## 2781st MEETING

*Tuesday, 29 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that the eighth report (A/CN.4/535 and Add.1) was rich and useful. The conclusions drawn by the Special Rapporteur in Chapter I, on

the withdrawal and modification of reservations and interpretative declarations, were quite correct, and the draft guidelines contained there could therefore be referred to the Drafting Committee. The logic underlying them was sound, and he endorsed the view, expressed in paragraph 36 of the report, that the rules applying to a late formulation of a reservation also held good for "enlargement" of the scope of a reservation, a term that could be interpreted in the commentary.

2. He could also subscribe to the Special Rapporteur's opinion that an interpretative declaration could be withdrawn at any time since, according to the general rule, it could be formulated at any time, although it was not clear why partial withdrawal was impossible. Draft guideline 2.4.9 was acceptable, and the new variants of guidelines 2.4.3 and 2.4.6 were, as the Special Rapporteur had said, more elegant. Personally he, like several other members of the Commission, would prefer to extend the provisions on reservations to conditional interpretative declarations as well.

3. The definition of objections to reservations, dealt with in paragraphs 98 and 105, was of central importance. The principal element of the definition was the intention of the objecting State "to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection" (para. 98). That element was consonant with article 21, paragraph 3, and with article 20, paragraph 4 (b), of the 1969 Vienna Convention, the latter provision being the only one in the Convention that referred to the intention of the objecting State. Nevertheless, there was nothing in the Convention or in State practice to indicate that that was the sole possible intention of States objecting to reservations. It was possible to discern the intention of the objecting State above all by analysing the text of the objection.

4. While the Special Rapporteur had done much research into State practice, he had held that only reactions to reservations that evidenced their authors' intentions could be termed objections. Accordingly, he had doubted whether Sweden's reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>3</sup> qualified as an objection to that reservation. In fact, the text of the objections of Sweden and Norway<sup>4</sup> to that reservation did show that their aims had been quite different, as the quotation in paragraph 96 of the report made plain, namely, to secure the application of the treaty to the objecting State and to persuade that State to withdraw its objection.

5. Recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe to member States on responses to inadmissible reservations to international treaties was pertinent to an analysis of the intentions of

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 316 (reservation by Qatar) and 318 (objection by Sweden).

<sup>4</sup> *Ibid.*, p. 317.

objecting States, and greater attention should therefore be devoted to it. Although it was only a recommendation of a regional organization, it testified to the existence and acceptance of a practice that was spreading in the domain of objections to reservations. First, the model responses set out in the recommendation were models of objections to reservations and not of any other kinds of reactions. Second, the reactions of Sweden and Norway, which he had just mentioned, had been fully in line with one of those model responses. Moreover, those countries had reacted in a similar manner to the reservation entered by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism.<sup>5</sup> Consideration of those objections by the Council of Europe's Ad Hoc Committee of Legal Advisers on Public International Law had led to the finding that, at least as far as the member States of that organization were concerned, they were indubitably objections to reservations.

6. Third, only 2 of the 11 model responses in the recommendation said that such an objection prevented the entry into force of the treaty between the objecting State and the State acceding to the treaty. That showed that the member States of the Council of Europe regarded the intention that was central to the definition of an objection proposed by the Special Rapporteur to be only one of several possible intentions.

7. Fourth, paragraph 88 of the report suggested that Austria's reaction to Malaysia's reservation to the Convention on the Rights of the Child<sup>6</sup> could be deemed either conditional acceptance or a conditional objection, yet one of the model responses in the recommendation of the Council of Europe reproduced almost word for word the final clauses of the Austrian reaction and termed it an objection. If the view were taken that, in that case, the objecting State was reserving the right to make a final appraisal of the reservation after it had received further explanations, it would be possible to call that a conditional objection or, better, a preliminary objection, but certainly not a conditional acceptance. The intention of the objecting State was clearly, as the Special Rapporteur had admitted, to prompt the State making the reservation to withdraw or modify it. The Council's recommendation had shown that very often the intention of objecting States was not to prevent the entry into force of a treaty between them and States entering reservations but, on the contrary, to secure the integrity of the treaty regime by persuading those States to withdraw their reservation. That was especially important in the context of universal international treaties establishing *erga omnes* obligations.

8. Apart from that, the intention of the objecting State was frequently to ensure that a reservation could not subsequently be made opposable to it, or to preclude the possibility of a customary norm based on the reservation being made opposable to it.

9. He therefore suggested that, if it was considered expedient to include the intention of the objecting State in the definition of objections, that intention should not be

restricted in the manner proposed by the Special Rapporteur, since it was often quite different. Naturally, the question arose whether it was necessary to link the intention of the objecting State with the legal effects of the objection, which were provided for in the 1969 Vienna Convention. If those issues were interrelated—and he was not certain that they were—then possibly the adoption of the definition of objections to reservations should be postponed until the legal effects of objections had been studied.

10. Ms. ESCARAMEIA thanked the Special Rapporteur for a clearly structured, highly informative report. His summary of the seventh report<sup>7</sup> and its follow-up had also been most useful. The efforts of the Special Rapporteur to secure the cooperation of a number of other important legal bodies were commendable.

11. The Special Rapporteur had drawn an analogy between enlargement of the scope of existing reservations and late formulation of reservations, to which draft guidelines 2.3.1 to 2.3.3 referred, and suggested that such enlargement was fine if all the parties accepted it. The reasons given were that, while no encouragement should be given to such a widening of the scope of reservations, legitimate grounds for doing so might exist and so some allowance had to be made for that eventuality. Similarly, a parallel was drawn with article 39 of the 1969 Vienna Convention, which required unanimous agreement among the parties whenever a treaty was amended, even though enlargement of the scope of a reservation entailed less modification than a treaty amendment.

12. The Special Rapporteur had, however, mentioned two contradictory practices: that followed by the Directorate General of Legal Affairs of the Council of Europe, which related more to human rights treaties, where no enlargement of the scope of reservations was accepted because it would jeopardize both the certainty of the treaty and its uniform application, and that followed by the Secretary-General of the United Nations, where enlargement of the scope of reservations was treated in the same way as late reservations.

13. Mr. Economides had raised the issue of bad faith and good faith, but in her opinion late reservations, or enlargement of the scope of a previous reservation could be prompted by either, although bad faith was a more likely motive for enlargement. The 1969 and 1986 Vienna Conventions provided a basis for adopting a more rigid position with regard to both the definition of reservations and their formulation and did not even allow late reservations. The principle of the integrity of treaties, particularly important in human rights treaties, deserved some consideration, and it was also necessary to remember that later interpretations of reservations to exclude the legal effects of treaty provisions were totally forbidden. For all those reasons, she believed that modification of a reservation by broadening its scope would affect the integrity of a treaty, and draft guideline 2.3.5 should either be deleted or limits should be placed on the extent to which the scope of a reservation could be enlarged. If that draft guideline was retained, a second paragraph should be added to define what was meant by "enlargement of the scope of a reservation". On the other hand, she agreed with the Special Rapporteur

<sup>5</sup> *Ibid.*, vol. II, p. 141.

<sup>6</sup> *Ibid.*, vol. I, pp. 289 (reservation by Malaysia) and 294 (objection by Austria).

<sup>7</sup> See 2780th meeting, footnote 3.

teur that a distinction should be established between an objection to a process and an objection to the contents of a reservation, and that different wording should be used to describe dissimilar situations.

14. As to the question of the withdrawal and modification of interpretative declarations, guideline 2.2.12 was acceptable and the sentence in brackets should be included for the sake of clarity. She was against dealing with conditional interpretative declarations as if they were different from reservations, but if the Commission was intent on doing so, she agreed with guideline 2.5.13 and also guideline 2.4.10, on the modification of conditional interpretative declaration, and guideline 2.4.9, on the modification of interpretative declarations.

15. As far as the reservations dialogue was concerned, undue weight seemed to have been given to the 1969 Vienna Convention in the Special Rapporteur's efforts to find a firm basis for a definition of objections to a reservation, although he then went on to mention circumstances in which a reservation dialogue could centre on quasi-objections, or in which States merely wished to give their reasons for withdrawing a reservation, or wanted to engage in a dialogue which would not necessarily culminate in an objection, but in which they would press another country to modify its position. Those situations, for which no provision was made in the 1969 and 1986 Vienna Conventions, did not really involve objections, but were encountered in practice. As the Conventions did not, in fact, define objections to reservations, the draft guideline rested on an analogy with the contents of article 21, paragraph 3, of the Conventions. Article 21, paragraph 3, offered scope for great flexibility, in that it implied that reservations could have a very wide ambit and were not necessarily restricted to situations making it impossible for treaties to enter into force, or for the particular provisions to apply between the two parties. The Conventions might allow for more elasticity than that offered by the addendum to the report. At all events, the definition proposed in guideline 2.6.1 closely followed the relevant articles of the 1969 Vienna Convention and was the most rigorous interpretation, but State practice needed to be taken into account, and allowance must also be made for many other situations which would not produce the effects mentioned in the guideline. For that reason, the definition of objections to reservations should be more flexible and guideline 2.6.1 *bis* should be included in the Guide to Practice. Finally, the Commission should make a recommendation to the effect that, as far as possible, the reasons for the objection should be stated.

16. Mr. KOSKENNIEMI said that the character and effects of objections to reservations were significant and perhaps controversial aspects of the regime of the 1969 and 1986 Vienna Conventions. The Special Rapporteur's definition of objections was too limitative and did not reflect ongoing discussions of the topic. He therefore agreed with Mr. Kolodkin that it was strange to define objections by reference to their actual or intended effects.

17. No doubt the regime of objections to reservations left much to be desired. The fact that few States took the opportunity to raise such objections might be indicative of a somewhat cavalier attitude to the way in which other States acceded to treaties, or it might simply stem from

a lack of time and resources for engaging in systematic reservation-watching. Not that making an objection was merely a matter of bureaucratic routine, since the "reservations dialogue" might well affect the relations of parties to the dialogue and give rise to some unease about individual States making judgements about others' reservations, because such judgements conflicted with the principle of sovereign equality.

18. That unease and the unsatisfactory character of the regime of objections under the 1969 and 1986 Vienna Conventions were caused by the decentralized and open-ended nature of the reservations regime. In the best of all worlds, judgements as to the permissibility of reservations would be made by law-applying organs that were not dependent on the political preferences of States parties and unaffected by the needs of diplomatic courtesy. Such a development had already occurred in some areas. The European Court of Human Rights and the Inter-American Court of Human Rights had determined that their jurisdiction extended to the scrutiny of the permissibility of particular reservations to the relevant conventions, and the European Court of Human Rights had found that it also had the competence to declare some reservations invalid, but to hold a State party bound irrespective of such a reservation. The doctrine of severability was, however, controversial.

19. The practice of individual States filing objections that applied to the severability doctrine was even more controversial. Nevertheless a number of States insisted that, in some situations, a State must be bound by a treaty as a whole, irrespective of a reservation it had made, when that reservation was contrary to the object and purpose of a treaty and undermined its integrity and the basis upon which it had been agreed. Such a view had been taken particularly with regard to multilateral treaties which gave rights and powers to third parties, human rights treaties being a case in point. The Special Rapporteur was aware of that practice since he had quoted an example of it in paragraph 96 of the report.

20. When a State made such an objection, it was principally motivated by a concern to maintain the integrity and effectiveness of the treaty and less by a concern to protect the consent of the reserving State. Whether or not the objection achieved that effect was a moot point, but the practice was gaining acceptance, as was shown by the fact that 33 objections made by States to reservations to the Convention on the Elimination of All Forms of Discrimination against Women<sup>8</sup> and to the Convention on the Rights of the Child<sup>9</sup> had applied the severability doctrine.

21. The best arguments in defence of the severability practice, which many States regarded as legally dubious, could be found in considerations that transcended the language of article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 Vienna Convention. Although a distinction should be made between *ab initio* impermissible reservations and permissible objections that entailed the reciprocal functioning of the Vienna regime, the Special

<sup>8</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 225 *et seq.*

<sup>9</sup> *Ibid.*, pp. 282 *et seq.*



Rapporteur, instead of dealing with that question in connection with the effects of objections to reservations, had made the unprecedented suggestion that such objections were not real objections.

22. His point was that the definition of an objection was one thing, and the definition of the effects of particular types of objection was another. Nothing was gained by mixing the two: on the contrary, that merely produced counterintuitive language that failed to reflect the usage and understandings that actually prevailed in the *dialogue réservataire* among States.

23. The suggestion that an objection that applied the severability doctrine—what the Special Rapporteur called the “super-maximum effect”—might not qualify as an objection under the 1969 Vienna Convention conflicted with one of the Convention’s most obvious principles, referred to by the Special Rapporteur in paragraph 79 of the report, namely that the intentions of States took precedence over the terminology they used to express them. The Special Rapporteur went on to say that the same should apply to objections. Whatever one might say about the legal effects of an objection like the Swedish one<sup>10</sup> reported in paragraph 96 of the report, one thing was clear: it was intended as an objection, and it was intended to fall under the Convention. If what the Special Rapporteur said about the relevance of intent was true, it must follow that such acts were objections. Nobody had ever suggested otherwise, nor did the Special Rapporteur show any authority in support of the opposing view.

24. The Committee of Ministers of the Council of Europe had adopted a recommendation on responses to inadmissible reservations to international treaties containing model clauses for responses to non-specific reservations, sweeping reservations that, for example, proclaimed primacy of national law over the treaty. He went on to cite one of the responses set out in a model clause, pointing out that it was worded as an objection and intended as one; indeed, the Committee of Ministers might be surprised to learn that it was something quite different from an objection.

25. Additional aspects of the *dialogue réservataire* showed that even controversial objections were intended as objections, worded as objections and always treated as objections. The Special Rapporteur stated in paragraph 97 that it was contrary to its very essence for an objection to challenge the rule advocated by the reserving State, instead of the position adopted by that State. Such an objection actually consisted of two parts. The first was a reaction to the reserving State’s position: its reservation was contrary to the object and purpose of the treaty, and as such was inadmissible. The second part was the consequences as seen by the objecting State, namely, that the reservation was invalid and the treaty entered into force between the two States, unaffected by the reservation. Many States often made the first point without the second. In cases like that, there would seem to be no problem. The consequences would be those, unclear as they might be, laid out in the 1969 Vienna Convention. Surely, the fact that an objecting State saw particular consequences in its reaction to the reserving State’s position and that those

consequences might be controversial did not nullify or extinguish its reaction. Just as a reservation did not cease to be a reservation even if it was inadmissible, an objection did not cease to be one merely because there was controversy about its legal consequences. A will remained a will under domestic inheritance law even if it was partly invalid because the testator had violated the right of the offspring to a specified portion of the inheritance.

26. He had dwelt on his point extensively for two reasons. First, he did not think that the Special Rapporteur’s ingenious effort to use definitional fiat to avoid dealing with one of the most difficult questions about the *dialogue réservataire* was a successful codification strategy. Perhaps that was not his intention, however. Perhaps, following the practice he had suggested in paragraph 101 of his report, the Special Rapporteur intended to distinguish between objections under articles 20 and 21 of the 1969 Vienna Convention and what he wished to call “opposition”. Even in that case, however, it was hard to see how “opposition” could be defined as anything other than a species in the genus of objection, the type of objection that deemed the reservation invalid and the State bound irrespective of it. Such a redefinition would deal with the substantive problem—perhaps inelegantly, but still clearly—and would be acceptable, but a more economical approach would be to define objections on the basis of the Special Rapporteur’s reasoning in paragraph 101 regarding objections to the late formulation of a reservation. He could propose wording for a new guideline 2.6.1 *bis* to the effect that an objection might also mean a unilateral statement whereby a State or an international organization purported to prevent the application of an inadmissible reservation while holding that the treaty would enter into force between itself and the author of the reservation without the latter benefiting from its reservation. Yet ultimately, the best technique might be to widen the language of guideline 2.6.1 so as to cover all types of unilateral reactions to reservations in which the objecting State put forward its view as to the permissibility and legal effects of the reservation, and then to deal with such effects in a separate provision.

27. The second reason he had emphasized the need to codify aspects of the *dialogue réservataire* was that in State practice a distinction was evolving between various types of treaties and the various ways in which reservations and objections operated in them. In the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, which the Commission had adopted at its forty-ninth session,<sup>11</sup> it had refused to make that distinction or to recognize the *de facto* development of a regime of objections. However, many States now objected to reservations that seemed inadmissible because they went against the fundamental object and purpose of a treaty, holding that such reservations were null and void. In their view, if a State wished to join the treaty community, it must do so on the basis of broad equality of treaty burdens and a good-faith commitment to the realization of the treaty’s aims. No one should be able to pick and choose—not where key aspects of the treaty relationship were at stake, at any rate. To hold such reservations invalid might be controversial, but it was re-

<sup>10</sup> See footnote 3 above.

<sup>11</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

ceiving increasing support from States and international bodies. The argument that that went against the consensual basis of treaty law was weak, for real consent must surely encompass the object of the treaty relationship and entail what ICJ in the *Nuclear Tests* cases had referred to as good faith, trust and confidence in international relations. The Commission could surely do worse than to face up to some of the real difficulties in applying existing law so as to strike a balance between sovereign consent and the effectiveness of treaty regimes. It should be open to the argument that if developments that went beyond the language of the 1969 Vienna Convention were taken into account, the underlying ideas of that instrument would only be better reflected.

28. Mr. MELESCANU thanked the Special Rapporteur for his eighth report and welcomed the efforts he was making to open up a dialogue with other United Nations bodies which were also dealing with reservations, with a view to developing a set of rules that would be general in scope, not reserved to specific domains. He looked forward to the forthcoming dialogue on reservations to human rights treaties with the Committee on the Elimination of Racial Discrimination, *inter alia*.

29. The Special Rapporteur had a judicious position on enlargement of the scope of reservations, namely, that it should be dealt with as a late formulation of a reservation to which the rules in guidelines 2.3.1 to 2.3.3 applied. Mr. Economides' objections on that point were not entirely convincing. The rules were formulated in such a way as to dissuade States from making late reservations, and in practice it would be difficult to distinguish between a late reservation and enlargement of the scope of a reservation. The State practice cited by the Special Rapporteur in paragraph 43 of his report—the Finnish reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1986 (with annexes),<sup>12</sup> and the modification by the Government of the Maldives of its reservations to the Convention on the Elimination of All Forms of Discrimination against Women<sup>13</sup>—while not extensive or decisive, nevertheless supported his approach. He himself endorsed the idea of treating enlargement of the scope of a reservation as late formulation of a reservation, as long as all the restrictions on late formulation applied. He could agree to the adoption of a text like the one proposed for guideline 2.3.5, with the addition of a paragraph to explain the scope of the provision. Putting the explanation in the commentary would not be a good idea, since the staff of ministries of legal affairs worked under time constraints which often prevented them from reading such additional material.

30. The matter of withdrawal and modification of interpretative declarations did not raise major difficulties. The Commission had already decided that a “simple” interpretative declaration could be formulated at any time, and he therefore assumed that it could be withdrawn at any time. Accordingly, guideline 2.5.12 could be accepted with the inclusion of the words in brackets with a view to simplifying the use of the Guide to Practice.

31. Like other members of the Commission, he had some doubts about withdrawal of a conditional interpretative declaration. A final decision should be taken only after the entire subject had been studied. He could go along with guideline 2.5.13, on the understanding that the bracketed words would be retained.

32. Given the lack or even non-existence of State practice, the Special Rapporteur was proposing a logic-based approach to the modification of “simple” interpretative declarations or of conditional interpretative declarations. He endorsed the inclusion of the draft guidelines proposed but felt that the Special Rapporteur had posed a dilemma as to their placement, forcing the Commission to choose between elegance and the legal logic of the Guide. He favoured logic and accordingly endorsed guidelines 2.4.10 and 2.4.9 as proposed in paragraphs 61 and 63 of the report. A final decision on placement should be postponed until the draft was completed, since, if there were other areas where the presentation could be improved, a solution could be applied to the entire draft.

33. The formulation of objections to reservations—the “reservations dialogue”—was of special practical importance to the States. It was an area that involved not codification but progressive development of international law, since objections as such had not yet been clearly defined, not even in the Vienna Convention. In paragraphs 83 *et seq.* and the introductory remarks of his report, the Special Rapporteur had given a good idea of the complexity of the subject, which was to be taken up in earnest next year.

34. He supported the approach proposed by the Special Rapporteur and did not agree with some of his colleagues that the State's objective in formulating an objection should not be included in the definition of an objection. As the court of arbitration in the *Continental Shelf between the United Kingdom and France* case had stated, whether a reaction by a State amounted to a mere comment, a mere reserving of its position, a rejection of a particular reservation or a wholesale rejection of relations with the reserving State depended on the intention of the State concerned. One could not define an objection to a reservation without reference to the State's intention. On the other hand, a practical or useful definition could not be developed without reference to the effects which the act might produce at the international level. The very purpose of the Guide to Practice was to provide States with the requisite tools to make full use of the fundamental institution of the multilateral treaty. For that reason, he favoured including both aspects—intention and effects—either in the definition of the reservation, as proposed by Mr. Gaja, or in some other part of the draft, as Mr. Koskenniemi had suggested. If such elements were added to the definition of the reservation, which was already quite complex, the result might be somewhat cumbersome. A choice would have to be made, and some elements might have to be omitted—for example, the status that the person representing a State or international organization must have in order to formulate a reservation.

35. The discussion launched by Mr. Kolodkin's comments on the recommendation by the Committee of Ministers of the Council of Europe seemed to be based on a misunderstanding. Mr. Kolodkin's reasoning was impec-

<sup>12</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 793.

<sup>13</sup> *Ibid.*, p. 231.

cable, but his premise was false. The Council of Europe had been dealing solely with inadmissible reservations, and the intention of all objections thereto was to prevent the application of such reservations in relations between States. It was thus a very limited and specific instance of reservations. Unlike Mr. Koskenniemi, he thought it was not a good idea to draft special provisions for certain types of objections—to human rights treaties, for example. The main objective should be to find the most general rules possible and then to look at whether exceptions should be envisaged for certain specific cases. The Commission should resist the temptation to do the opposite: to take exceptions as the basis for building rules. If it did so, it might provide arguments to those who thought there were two separate strains in international law: general, relating to inter-State relations, and specific, creating rights and obligations not for States but for individuals. The Commission's main concern should be to develop general rules.

36. Mr. KOSKENNIEMI, responding to Mr. Melescanu, said that, first, he had not formulated his arguments on the basis of the proposition that international law was divided into two parts—general international law and human rights law. He would certainly not wish to endorse such a division. Second, the recommendation by the Committee of Ministers of the Council of Europe was not limited to human rights treaties, as was borne out by its title, which referred to responses to inadmissible reservations to international treaties. Third, it was important to draw a distinction between reservations which were inadmissible and prompted States to raise objections along the lines of Sweden<sup>14</sup> and others which, although admissible, were still subject to the regime of objections for various reasons. If that was a meaningful distinction then it surely must follow that the States concerned would recognize it. He endorsed Mr. Melescanu's suggestion that the definition should be broad enough to encompass the wide variety of statements that might be made, as in the case of Sweden. However, he recognized that, irrespective of whether the objection had the consequences it purported to have, it was controversial, and that controversy should be dealt with separately in the part of the text dealing with effects and not that relating to the definition itself.

37. Mr. MOMTAZ said that, as usual, the Special Rapporteur had submitted a very high-quality report, with ample illustrations of State practice and a very useful analysis of doctrine. Those compliments were not made merely for the sake of it, as he endorsed most of the conclusions and affirmations contained in the report.

38. In general, he failed to understand why the Commission need stick so closely to the 1969 Vienna Convention, especially where its provisions were ambiguous. There was nothing to prevent it from showing some flexibility and disregarding the spirit of Vienna in some cases. Indeed, that was the very purpose of the Guide to Practice and the guidelines on reservations now being drafted. That remark clearly applied to the thrust of guideline 2.6.1 relating to the definition of objections to reservations. If he had understood correctly, the wording proposed departed from the 1969 and 1986 Vienna Conventions, which reserved the right to object to a reservation to the State or

international organization that was already party to the instrument concerned. He believed that such a right should also be granted to the State or international organization which was signatory to the instrument in recognition of the obligation undertaken in signing it.

39. As to the “super-maximum effect” that some writers wished to attribute to an objection to a reservation, he welcomed the example cited in paragraph 96 of the report on Sweden's statement in reaction to Qatar's reservation when acceding to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Yet the Special Rapporteur seemed to adopt a negative position *vis-à-vis* the “super-maximum effect” by subsequently stating (para. 97) that the effect of such a statement was to render the reservation null and void without the consent of the author. Regrettably, he himself had not taken the trouble to examine the contents of Qatar's reservation. However, if it had dealt with a provision of the Optional Protocol that was generally considered as being a well-established customary rule, could it not be deemed as a “super-maximum effect” of the objection to the reservation? Admittedly, it was not possible to enter a reservation relating to a provision that had acquired the status of customary law. Nevertheless, one could imagine a situation in which, although the provision had not been a well-established customary rule at the time the treaty had been drawn up, it had subsequently acquired such status when the reservation in question had been entered. He wondered whether Imbert's view that an expressly authorized reservation could be objected to,<sup>15</sup> mentioned in a footnote in paragraph 94 of the report, referred to that type of situation.

40. It was gratifying to note that special attention would be paid to one of the most notable recent developments in the procedure for formulating reservations, described by the Special Rapporteur as the “reservations dialogue”. The report showed clearly that the treaty-monitoring bodies were already moving in that direction. The Human Rights Committee's General Comment No. 24,<sup>16</sup> which had prompted the drafting of guideline 2.5.X, had caused problems both in the Commission and the Sixth Committee. It seemed to contradict the “reservations dialogue” and was at the opposite extreme of the position adopted by many other treaty bodies, including the Committee on the Elimination of All Forms of Racial Discrimination. He therefore wondered whether it would be wise to revert to the issues raised by proposed guideline 2.5.X.

41. The Special Rapporteur's analysis of recent developments with respect to reservations was very useful in identifying relevant State practice. In that connection, he questioned whether the declaration made by the Republic of Moldova relating to the European Convention on Human Rights,<sup>17</sup> mentioned in paragraph 24 of the report, could be qualified as a reservation. In his view, it was a declaration whereby the Republic of Moldova sought to deny all responsibility for possible violations of the Convention on the part of its territory where it had ceased to have effective control. The Moldovan Government would

<sup>15</sup> See P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 151–152.

<sup>16</sup> See 2780th meeting, footnote 5.

<sup>17</sup> United Nations, *Treaty Series*, vol. 2045, pp. 28 *et seq.*

<sup>14</sup> See footnote 3 above.



nonetheless be held responsible for such violations on that part of the territory over which it had sovereignty, unless the rebel forces managed to overthrow it. That was the concept enshrined in article 8 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>18</sup> He was in favour of the Commission making a recommendation to States and international organizations, inviting them to give reasons for their objections to reservations, as was proposed in the report (para. 106), since such an approach would undeniably encourage and facilitate the “reservations dialogue”.

42. Finally, he endorsed the Special Rapporteur’s proposal to deal with enlargement of the scope of reservations in the same way as late formulation of reservations. The cases cited by Mr. Economides at an earlier meeting were very exceptional and would be more appropriately termed “forgotten” reservations.

43. Mr. PELLET (Special Rapporteur) said he totally disagreed with the remark by Mr. Momtaz that it was not possible to object to a reservation to a treaty provision based on a customary rule. It was indeed perfectly possible to enter such a reservation. The rule could not become treaty law, but its customary nature was in no way undermined.

44. Ms. XUE thanked the Special Rapporteur for his eighth report, which provided an in-depth analysis of the practice of States and international organizations and useful information on new approaches. The Special Rapporteur had likened late formulation of reservations to enlargement of the scope of reservations. Logically that was acceptable, since the two forms of reservations produced the same legal effects. However, some members held that late formulation of reservations was not acceptable unless the reserving State could fully demonstrate that the reservation had been made at an earlier stage. Although in theory such a strict approach was conducive to maintaining treaty regimes, in practice it was excessively rigid. As long as its object and purpose were upheld, a treaty’s implementation would be ensured if no other contracting parties objected to it. Thus a degree of flexibility could be allowed. A good illustration was the reservation by Finland in acceding to the Protocol on Road Markings Additional to the European Agreement Supplementing the Convention on Road Signs and Signals.<sup>19</sup> The highly technical nature of such treaties was likely to give rise to reservations, but it was not appropriate to impose universally the practice followed in one particular region. Her conclusion was that guideline 2.3.5, on enlargement of the scope of a reservation, should be referred to the Drafting Committee.

45. The withdrawal of an interpretative declaration had little impact on a treaty, so there was no need to be particularly demanding about the form that guideline 2.2.12 should take. She could agree to including the additional phrase in square brackets for the sake of consistency with the rest of the guidelines. The modification of interpretative declarations was a common occurrence in international diplomacy. As the report explained, some modifications

were straightforward, but other, more complicated situations occurred. For instance, if one contracting party attached the condition of continuously honouring the treaty and another party opposed that condition, the State party concerned would have no choice but to withdraw from the treaty, which was clearly not in the interests of the international community. Such conditional interpretative declarations did not necessarily deal with provisions of the treaty, but could take the form of a political statement. She hoped that the Commission might consider the matter of whether it was necessary to impose strict conditions. Views still diverged on whether such statements should be divided into two categories—simple interpretative declarations and conditional interpretative declarations. Once that matter was resolved, then perhaps the Commission could accommodate her concern. With the exception of that point, she endorsed the report for referral to the Drafting Committee.

46. The addendum provided a brief outline of matters pertaining to the formulation of objections (para. 73 of the report) and five elements on the definition of objection (para. 75) as contained in the 1969 and 1986 Vienna Conventions. The Special Rapporteur correctly observed that the most important aspect of objection was intention. Information was also provided on significant developments in State practice, particularly in the field of human rights. Behind the “reservations dialogue” was a political dialogue on human rights. Objections to reservations might not always be accompanied by explanatory statements, but even when they were, they would not necessarily have any legal force. In practice, the State could object to the reservation of another State but not to the entry into force of a specific treaty or article thereof. The State concerned must explicitly express its intention in the declaration. She endorsed the Special Rapporteur’s explanation regarding Sweden’s statement in reaction to the reservation by Qatar (paras. 97 and 98) and consequently the proposed text for guideline 2.6.1, on the definition of objections. Nevertheless, there was still cause for concern. In paragraph 100 the Special Rapporteur implied that article 2, subparagraph (f), of the 1986 Vienna Convention was not made use of and in fact enlarged the scope of objections to reservations. That did not make any legal sense. Perhaps what was being referred to was the inclusion of signatory States. According to article 18 of the 1969 and 1986 Vienna Conventions, if the signatory State agreed to be bound by a treaty, it would also be a State within the meaning of article 2, subparagraph (f). Moreover, the State as referred to under article 20, paragraph 4 (b), would make legal sense only if the State was a contracting party.

47. She had no strong views on the question raised in paragraph 101 of the report. Drawing a distinction between an objection to a reservation and an objection to a late formulation was difficult in the Chinese language and in practice would make only a minor difference in legal effects. Thus, any of the formulations proposed could be referred to the Drafting Committee.

48. With reference to paragraph 106 of the report, it was not necessary for the Commission to invite States and international organizations to explain to reserving States the reasons for their objections to a reservation. Such matters should be decided among the parties concerned. It was well known that in the field of human rights such dia-

<sup>18</sup> See 2751st meeting, footnote 3.

<sup>19</sup> See footnote 12 above.

logue often took the form of criticism rather than positive assessment, even though the explanatory statement had been submitted in good faith.

49. The views of many members of the Commission seemed to be based on the practice of member States of the Council of Europe. She wondered, however, how far such practice really reflected the situation at the global level. It would be very interesting to hear in more detail about the 35 cases, referred to earlier, that were based on studies by the Finnish Ministry for Foreign Affairs. In that context, she questioned the force of the statement, quoted in paragraph 96 of the report, that Qatar would not benefit from its reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography *vis-à-vis* Sweden, which had objected to the reservation. The reserving State was surely not expected to amend its own law or practice; if not impossible, such a course of action would be by no means easy. Once a State had made a reservation, it was acting in bad faith or saying that it was unwilling to assume its obligations; it was hardly likely to change in response to an objection. To assume otherwise was a simplistic approach that did not bode well for dialogue between States, since it was for the reserving State itself to decide whether or when to withdraw its reservation. If the objecting State was merely making its position clear, its objection had no legal effect. Although that position should be respected, the law of treaties should not apply to an objection to which the State concerned had no intention of giving legal effect, since that would mean reopening negotiations. Further serious thought should also be given to the question of whether a definition of the effect of objections to reservations was required. In any case, any action should be taken not through the law of treaties but through treaty negotiation.

50. All in all, the report comprehensively reflected the practice of States and the proposed texts should be referred to the Drafting Committee. As for objections to reservations, guideline 2.6.1 could form the basis of discussion.

51. Mr. AL-BAHARNA, after commending the Special Rapporteur on a thorough and well-researched report, recalled that, although the progress achieved to date had been generally welcomed by the Sixth Committee, many delegations had expressed the hope that the project would be completed during the current quinquennium. It had also been suggested that the commentaries should be shortened, since lengthy commentaries on non-controversial matters might give the impression that the law was less clear or more complex than it really was.

52. He welcomed the account, in section B of the report, of the contacts and exchanges of views between the Commission and the human rights bodies but regretted that those contacts had been unjustifiably slow and few in number, as was stated in a footnote in paragraph 17 of the report and in paragraph 18. He requested the Special Rapporteur to keep the Commission informed of any progress and, in particular, how many of the human rights bodies had so far responded positively to the request contained in the model letter appearing in the annex to the report.

53. As for the draft guidelines themselves, the Special Rapporteur seemed to equate the enlargement of the scope of reservations, as far as its legal effects were concerned, with the late formulation of reservations and, on that basis, proposed a text for guideline 2.3.5. However, even with the suggested addition of paragraph 2 of the draft guideline as contained in paragraph 48 of the report, the proposed guideline did not provide a sufficient solution to the question of enlargement of the scope of a reservation, which called for separate, independent treatment. Modifications of reservations fell into two categories: in some cases they were intended to lessen and in others to enlarge—and not merely to strengthen—the scope of the reservation. There might be no problem in principle with regard to the first category, as was stated in paragraph 34 of the report. On the other hand, it could not be said with certainty that guideline 2.3.1, 2.3.2 or 2.3.3 could be applicable to a situation which amounted to limiting the legal effect of the modified reservation with a view to ensuring more completely the application of the provisions of the treaty to the reserving State. In such a case, guideline 2.5.11 should be applicable, but it should be redrafted in a manner that emphasized the limitation of the legal effect of the initial reservation—for example, by stating that modification of a reservation for the purpose of limiting its legal effect amounted to partial withdrawal of that reservation.

54. As for cases in which the purpose of the modification was to enlarge and strengthen the legal effect of the treaty in favour of the reserving State, it might not be accurate to equate such a situation with late formulation of a reservation. Clarification was required, and indeed the permissibility of modifying the reservation should be considered. Article 39 of the 1969 Vienna Convention concerned amendments to treaties, which was quite different from going to the lengths of authorizing one of the parties to modify the treaty using the unwarranted process of an enlarged reservation. Yet, despite the practice and literature he himself quoted, the Special Rapporteur called objections to the process “too rigid”. Invoking the practice of depositaries, the Special Rapporteur called for an alignment of practice in the matter of enlarging the scope of reservation with that regarding late formulation of reservations. State practice, however, was varied and hardly consistent. The issue should be treated on its own. The definition contained in paragraph 48 could be adopted as a starting point for the proposed guideline 2.3.5, but it should contain another provision that would treat enlarged reservations as impermissible.

55. Guideline 2.2.12, on withdrawal of an interpretative declaration, seemed simple and logical, and it would be useful to retain the last phrase, currently appearing in square brackets, for it provided added clarity. As for conditional interpretative declarations, the Special Rapporteur accepted the principle that the rules were necessarily identical with those applying to reservations, thus supporting the view of several delegations to the Sixth Committee and some members of the Commission that conditional interpretative declarations should not be treated as a separate category and should be equated with reservations. In paragraph 16 he nonetheless stated that a final decision should be taken after the Commission had decided on the permissibility of reservations and interpre-

tative declarations and their effects. There was no need to hurry to reverse the order of the draft guidelines adopted on first reading. The Special Rapporteur should maintain his present practice of developing the rules for conditional interpretative declarations separately from the legal regime of reservations. In that regard, draft guideline 2.5.13 was acceptable, as long as the last phrase, contained in square brackets, was retained.

56. The Special Rapporteur's position on the modification of interpretative declarations, whether conditional or not, was confusing. On the one hand, he held that modification amounted to withdrawal, to which guideline 2.5.13 should apply. On the other hand, in paragraph 59 of the report he stated that there was no question that an interpretative declaration might be modified, despite admitting that some declarations could be deemed more restrictive than others or, on the contrary, could be enlarged. At the same time, he saw no need to distinguish between those two possibilities. Since, however, he stated that conditional interpretative declarations could not be modified at will, there appeared to be a need to formulate a rule restricting, in particular, modifications of declarations that amounted to enlargement of their scope. Proposed guideline 2.4.10 did not seem sufficient. There should be a separate rule restricting the right of a State to enlarge the scope of its initial conditional interpretative declaration. If, however, the draft guideline proved acceptable to the Commission, it should remain as it was, without being combined with guideline 2.4.8—it would be unnecessary and cumbersome to revise a guideline that had already been adopted. Moreover, to retain separate guidelines for the late formulation of declarations and the modification of such declarations would be more convenient for reference and classification purposes.

57. While guideline 2.4.9 was acceptable in itself, he did not agree with the principle of modifying an interpretative declaration that had been made at the time the author expressed its consent to be bound by the treaty. Such a practice was uncommon and, in any case, should not be encouraged. If accepted, however, the guideline should not be amalgamated with guidelines 2.4.3 and 2.4.6, for the reasons he had given in respect of guideline 2.4.10.

58. Mr. MATHESON said that, if his understanding was correct, the Special Rapporteur was proposing stricter rules for conditional interpretative declarations than for reservations: the former could be modified only if no objection was made by any of the other contracting parties, whereas that was true of reservations only if the modification enlarged the scope of the reservation.

59. The definition of an objection would present difficulties if the underlying question of the consequences had not been dealt with. Indeed, as paragraph 96 of the report showed, an objecting State could not bind a reserving State in a manner contrary to the expressed terms of the reservation. The Commission had not yet reached the point of considering what the consequences of an objection would be, but he suspected that it might prove difficult. He therefore agreed with Mr. Kolodkin that, if it intended to pursue such a definition, the Commission should perhaps defer the discussion to a later stage, when it would consider the question of the consequences of a reservation. Indeed, he was not convinced that an elabo-

rate definition was required at all, as long as the State in question was clear that it was objecting.

60. Mr. PELLET (Special Rapporteur) said that, following the statements by Mr. Kolodkin, Mr. Al-Baharna and Mr. Matheson, he had to concede that paragraph 57 of his report was slightly obscure. His point had been that, once a declaration had been made, it was difficult to see how the interpretation could be "enlarged". He had made every effort to look for examples but had succeeded in finding only modifications. If any member of the Commission could point to an example of enlargement, he would gladly withdraw the paragraph.

*The meeting rose at 1 p.m.*

## 2782nd MEETING

*Wednesday, 30 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*later:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escrameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI said that the eighth report of the Special Rapporteur on reservations to treaties (A/CN.4/535 and Add.1) contained draft guidelines dealing with two items that were not directly connected. The first part of the report wrapped up the "leftovers" from the seventh report<sup>3</sup> that had been discussed the year before, dealing in general with the withdrawal and modification of reserva-

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> See 2780th meeting, footnote 3.



tions and interpretative declarations. In that connection, the only item left for the eighth report was the enlargement of the scope of a reservation. There was some lack of logic, however, in having the subsection on enlargement designated with the letter A, whereas, according to the seventh report, it was to have been treated as a second part, designated as “2”, of subsection B (Modification of reservations), to follow the first part contained in the seventh report and entitled “Reduction of the scope of reservations (partial withdrawal)”. Consequently, the part of the eighth report entitled “Withdrawal and modification of interpretative declarations” should be designated not as part B but as part C.

2. The addendum to the eighth report marked the start of the consideration of a new set of problems connected in general with the formulation of objections to reservations and interpretative declarations, although it was actually limited to the definition of objections to reservations based on the content of objections. Once again, the system adopted by the Special Rapporteur did not seem to be entirely clear or fully convincing. Since the analysis of the problems relating to objections had not been completed in the eighth report, the members of the Commission had only half the picture, especially with regard to the very important and interesting question of the “reservations dialogue”, which was introduced only in a very general way in paragraph 70 of the report, with a promise from the Special Rapporteur that it would be developed later. The Special Rapporteur also indicated that section 3 would deal with the withdrawal of objections to reservations, whereas the entire part II, to consist of four sections, was entitled “Formulation of objections”. The Special Rapporteur should pay more attention to the coherent systematization of his reports in order to make them more transparent and accessible.

3. Those remarks did not in any way diminish a positive evaluation of the substantial work done by the Special Rapporteur. His consideration of the enlargement of the scope of reservations was based on well-chosen examples of State practice. He agreed with him that, based on that practice, “enlarging modifications” should be treated in the same way as late reservations. Consequently, new draft guideline 2.3.5, which confirmed that analogy, seemed acceptable, perhaps with one exception. It seemed that draft guideline 2.3.3, which dealt with an objection to the late formulation of a reservation, was not to apply to the enlargement of the scope of a reservation that had already been made. An objection to such enlargement should not lead to the results provided for in that guideline, namely, that the treaty remained in force “without the reservation being established”. Although such a result might derive from an objection to the late formulation of a reservation, in the case of an objection to the enlargement of the scope of a reservation, it seemed more appropriate to retain the reservation in its original form. Its total elimination might be contrary to the intentions of both the reserving State and the objecting State.

4. With regard to “objections” to the late formulation of a reservation and, as a consequence of the proposed analogy, of the enlargement of the scope of a reservation, he fully shared the Special Rapporteur’s doubts, expressed in paragraph 45 of the report, “as to the advisability of using the term ‘objection’ to refer to the opposition of States to

the late modification of reservations” and, consequently, to opposition to “enlarging modifications”. He shared his opinion that the Commission’s earlier decision to retain the word “objection” to refer to the opposition of States to the late formulation of reservations in draft guidelines 2.3.2 and 2.3.3 was not the best of its decisions. It was never too late to make appropriate corrections to the text of the guidelines in question, where the word “objection” could be replaced by the word “opposition”, for example. The definition of objections proposed by the Special Rapporteur made that correction all the more desirable.

5. Turning to objections to reservations, the proposed definition contained in draft guideline 2.6.1 seemed acceptable and reflected the practice of States in that field. It should exclude “quasi-objections”, namely, various forms of opposition to the late formulation or modification of reservations. On the other hand, it might be considered whether the definition should be limited, as it concerned the purpose of objections, to the prevention of the application of the provisions of the treaty to which the reservation related or of the treaty as a whole. It seemed possible to include the possibility of a “modifying effect” in the definition when an objection might suggest changes in the reservation without requiring its total withdrawal or making it fully inoperative.

6. State practice showed that the institution of objections to reservations was of rather limited application and that a majority of States had no means to use it in their everyday treaty practice. Even when they were made, objections did not always follow the rules laid down in the 1969 Vienna Convention, in particular with regard to the purpose for which they should be made and the effects they could cause. As a result, as the Special Rapporteur correctly showed, there were numerous examples of uncertain situations relating to the validity of such objections and their real meaning and extent. In many cases, moreover, objections were used not for the purposes set out in their definition, but simply to force the reserving State to withdraw its reservations.

7. It therefore seemed appropriate to adopt a rather narrow definition of “objections to reservations” in order to avoid misinterpretations. It would, however, be important and helpful to identify and analyse the various forms of the “reservations dialogue”, which, as the Special Rapporteur stated in paragraph 70 of his report, “is probably the most striking innovation of modern procedure for the formulation of reservations”. He looked forward with interest to the Special Rapporteur’s next report, which was to be devoted to that subject.

8. Mr. FOMBA, referring to chapter I, section A, of the Special Rapporteur’s eighth report on “Enlargement of the scope of reservations”, said that, as was logical, he agreed with the premise stated by the Special Rapporteur in paragraph 34 that, if the effect of the modification was to strengthen an existing reservation, it would seem logical to start from the notion that one was dealing with is the late formulation of a reservation and to apply to it the rules applicable in this regard, namely, those contained in draft guidelines 2.3.1 to 2.3.3, which the Commission had adopted at its fifty-third session, in 2001.<sup>4</sup> The reasons

<sup>4</sup> *Ibid.*, footnote 8.

for that position, which were given in paragraphs 36 *et seq.*, were correct and acceptable, despite the scantness of practice, which should be further investigated.

9. The doubts the Special Rapporteur expressed in paragraph 45 of his report with regard to the advisability of using the term “objection” to refer to opposition to the late modification of reservations prompted reflection about the definition and scope of that term. Since the Commission had, however, already retained the words “objections” or “objects” in draft guidelines 2.3.2 and 2.3.3, the Special Rapporteur had wisely refrained from suggesting different terminology.

10. As to the Special Rapporteur’s conclusions and proposals contained in paragraphs 46 to 48, he agreed with the conclusion in paragraph 46 that, since enlargement of the scope of a reservation could be viewed as late formulation of a reservation, it seems inevitable that the same rules should apply. Accordingly, the Special Rapporteur suggested that reference should be made to the relevant guidelines already adopted by the Commission, hence draft guideline 2.3.5, whose wording seemed acceptable. The explanation in square brackets would not be essential if the draft guideline in question was placed in section 2.3 of the Guide to Practice, entitled “Late formulation of a reservation”. The term “enlargement” needed to be defined for at least two reasons: first, because it played an important role in the general context of reservations and, second, because of the practical and utilitarian nature of the Guide to Practice. There were two methods or options for doing so. Either the meaning of “enlargement” could be explained in the commentary or a second paragraph providing a definition could be added to draft guideline 2.3.5. The latter solution was preferable and, if it was chosen, the draft guideline should be referred to the Drafting Committee for critical analysis and possibly improvement.

11. The Special Rapporteur rightly emphasized in paragraph 49 of his report that the questions which arose in connection with the withdrawal of interpretative declarations had to be framed differently depending on whether the declaration in question was “conditional” or “simple”. As far as the latter was concerned, draft guideline 2.5.12 did not give rise to any particular problems. The words in square brackets could be retained in the article or moved to the commentary, provided that care was taken to harmonize the whole text and ensure that it was not unwieldy. The Special Rapporteur seemed to conclude, at least provisionally, that, pending a final decision on conditional interpretative declarations, a parallel should be drawn between those declarations and reservations and it should be assumed that the same legal regime applied. That might be so, but caution was required until such time as that “intuition” had been scientifically corroborated. Draft guideline 2.5.13 therefore seemed to be acceptable as a provisional draft guideline.

12. In paragraph 57, the Special Rapporteur commented that there would be little point in extending to interpretative declarations the rules applying to the partial withdrawal of reservations and that, by definition, an interpretative declaration could not be partially withdrawn; the author could, at the very most, modify it or cease to make it a condition for the entry into force of the treaty.

As the question of partial withdrawal might give rise to some doubts or even be somewhat baffling, it should be given further thought. That being so, everything in fact depended on the actual, rather than the theoretical, deciphering of the purpose of the interpretative declaration—the process of specifying or clarifying the meaning or scope of all or part of the treaty. Practice alone could enlighten the Commission on that point. In that connection, the academic hypothesis mentioned by the Special Rapporteur in paragraph 58 of his report was interesting and showed how subtle the question was. In paragraph 59, the Special Rapporteur noted that an interpretative declaration, whether conditional or not, might be modified, but that it was virtually impossible to ascertain if such modification constituted a partial withdrawal or the enlargement of the scope of the declaration. At the same time, the Special Rapporteur acknowledged that some declarations might be deemed more restrictive than others, but he emphasized that that was a very subjective assessment and concluded that it would be inappropriate to adopt a draft guideline which would transpose to interpretative declarations draft guideline 2.3.5 concerning the enlargement of the scope of reservations. While it was not necessarily a contradiction, that choice obviously reflected the problems and doubts involved in the conclusions to be drawn.

13. As for the moment, or rather the date, on which a modification could be made, the Special Rapporteur drew a distinction between conditional interpretative declarations and “simple” interpretative declarations. With regard to the former, he supported the arguments contained in paragraph 61 of the report; in that respect, draft guideline 2.4.10 did not give rise to any difficulties. As for the solution which the Special Rapporteur considered more elegant—that of amalgamating draft guidelines 2.5.10 and 2.4.8—that seemed, on the face of it, more logical and rational. With regard to “simple” interpretative declarations, draft guideline 2.4.9 also presented no difficulties. As far as the words in square brackets were concerned, of which the Special Rapporteur had given an explanation in paragraph 64 of the report, concern for the sovereignty and free will of States clearly called for caution, but, to the extent that the scenario envisaged was highly unlikely, a mention in the commentary should be sufficient. As for the option of recasting draft guidelines 2.4.3 and 2.4.6 [2.4.7], so as to accommodate modification alongside the formulation of interpretative declarations, that seemed simpler, more logical and more rational.

14. Paragraph 66 of the report stated that there were few clear examples illustrating the draft guidelines in question and that, despite the paucity of convincing examples, the proposed draft guidelines seemed to flow logically from the very definition of interpretative declarations. Despite that acknowledgement and the difficulty itself, he believed that the Special Rapporteur’s approach and the results obtained had considerable merit. He therefore considered that the draft guidelines proposed in the first part of the eighth report should be referred to the Drafting Committee.

15. Turning to chapter II of the eighth report, which was concerned with the formulation of objections to reservations and interpretative declarations—the “reservations dialogue”, he said that the order of priority in presenting the questions of acceptance of reservations and objections

to reservations proposed by the Special Rapporteur was acceptable because it was logical. The same applied to the overall scientific approach outlined by the Special Rapporteur in paragraphs 70 to 72. With regard to the second footnote corresponding to the second subparagraph of paragraph 71, even if the Special Rapporteur claimed to have resigned himself to proceeding in a less exhaustive manner than previously, overall his approach remained satisfactory, because it was cautious and reasonable.

16. With regard to the formulation of objections to reservations, it was worth bearing in mind, as the Special Rapporteur had done, the applicable positive international law, namely, the regime of the 1969 and 1986 Vienna Conventions. In paragraph 74, the Special Rapporteur pointed out—and rightly emphasized—the significant gap in the Conventions and, so far, the Guide to Practice: the fact that, unlike reservations, objections as such were not defined. It was therefore perfectly logical that he should propose to fill the gap, and extensively so, by including comments on the author and the content of objections. In paragraph 75, the Special Rapporteur listed the elements making up a reservation, reproduced in the Guide to Practice, and signalled his intention to adopt a similar approach to the definition of objections, although there was no mention of the time at which an objection could be made, a matter that might form the subject of a separate guideline. In that regard, he fully supported the Special Rapporteur, who believed that, in elaborating the definition of an objection, two elements of the definition of a reservation—the nature of the act and its name—should be reproduced, rightly, in his own view. He also supported the Special Rapporteur's proposal that the possibility of the joint formulation of an objection should be considered at the same time as the more general question of the author of the objection, as well as his idea that the question of the nature of the intention and its author should be considered at a later stage.

17. With regard to the content of objections, paragraph 80 of the report contained a useful reminder of the common meaning of the word “objection” and its meaning in terms of the 1969 and 1986 Vienna Conventions, according to the *Dictionnaire de droit international public*.<sup>5</sup> The Special Rapporteur then, in paragraph 82, characterized the “generic” object of objections as comprising two elements, namely, opposition and intention, pointing out, on the basis of case law and State practice, that any negative reaction was not necessarily an objection. Paragraph 87 drew attention to the growing proliferation of what the Special Rapporteur called “quasi-objections”, which would be considered in the chapters relating to the “reservations dialogue”. He looked forward to hearing more about such developments. The Special Rapporteur also used other expressions, such as “waiting stance” or “notifications of provisional non-acceptance”, and even “other reactions”, about which he expressed both certainty and doubt: the certainty was that such reactions were not objections in the sense of the Conventions, while the doubt was that he was uncertain about their impermissibility and their legal effects. Such a position was not surprising in a Special Rapporteur who always sought to establish scientific truth. By the same token, paragraph 92 of the

report emphasized the need for precise and unambiguous terminology in describing the reactions to a reservation and the wording and scope of the objection. With regard to the reactions, the Special Rapporteur believed that the most cautious solution was to use the noun “objection” or the verb “object”; and that seemed the right approach. At the same time, however, he mentioned a whole range of other terms or expressions, which should also be carefully considered. The “Model response clauses to reservations” annexed to Recommendation No. R (99) 13 of the Council of Europe were extremely interesting in that regard.

18. With regard to the reasons for objections, paragraph 94 of the report pointed out that there was no rule of international law requiring the author to state such reasons. That point of view could be argued, but the Special Rapporteur himself noted a recent tendency—a positive one, which should be encouraged in the context of the “reservations dialogue”—to explain and justify objections. As to the effect of an objection, paragraph 95 indicated that it was apparent from established practice that there was an intermediate stage between the “minimum” effect and the “maximum” effect and that it was important to indicate those effects clearly in the text of the objection itself; that proposal seemed to be along the right lines.

19. With regard to the definition of an objection, it was logical that the relevant draft guideline should be placed at the head of section 2.6 of the Guide to Practice. The definition proposed was modelled on the definition of reservations and reproduced all its elements, with the exception of the time element. The Special Rapporteur was not suggesting the inclusion of a detail found in the 1986 Vienna Convention, which referred to a “contracting State” and a “contracting international organization”. There were two reasons for that: first, the Convention did not deal with the question whether it was possible for a State or an international organization which was not a contracting party to make an objection; and, second, there was no information in the definition of the reservation itself regarding the status of the State or the international organization empowered to do so. In his view, it would be a mistake and even a serious one for the proper functioning of treaties to eliminate that category of States or international organizations.

20. In paragraph 101 of his report, the Special Rapporteur underlined the need to clarify the expression “in response to a reservation” or, more precisely, the distinction between the two meanings of the word “objection”, particularly since he persisted in his view that the word “objection” should be replaced by the word “opposition” in draft guidelines 2.3.1 to 2.3.3. He accepted the reasoning and logic of that proposal. As for the two alternative methods proposed, he was in favour of a separate draft guideline or, failing that, the addition of a second paragraph to draft guideline 2.6.1. He shared the view expressed by the Special Rapporteur in paragraph 102 that the objective sought by the author of an objection was at the very heart of the definition of objections proposed and that the objective could be “minimum” or “maximum”. Also important was the comment made by the Special Rapporteur in paragraph 104 that the proposed definition should only take into account the usual objective of reservations, which related to certain provisions of the treaty, and that there was thus a problem concerning “across-the-board”

<sup>5</sup> J. J. A. Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), pp. 763–764.



reservations, which were also open to objection. It was therefore logical for the Special Rapporteur to suggest the clarification of the point, whether in the commentary to draft guideline 2.6.1 or in a separate draft guideline 2.6.1 *ter* or else in draft guideline 2.6.1 itself—a solution which the Special Rapporteur considered the most “economical”, but which had the disadvantage of being very unwieldy. For that reason, he preferred the second solution proposed—in other words, a separate draft guideline 2.6.1 *ter*.

21. The last problem taken up by the Special Rapporteur in paragraph 106 of his report was that of giving reasons for an objection, in connection with which he made two points: firstly, it was purely a question of judgement; second, it was not a legal obligation, at least not at present. However, he counterbalanced his comments by saying that it was probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wished to persuade it to review its position, and also by asking whether the Commission should make a recommendation to that effect to States and international organizations, suggesting further that the matter be revisited in connection with the “reservations dialogue”. That dialogue was very important and should be encouraged by all appropriate means, including legal ones.

22. In conclusion, he considered that the current text for the definition of objections was a good basis for discussion and that it was rather too early to say whether it should be made narrow or broad in scope. However, one general comment must be made: it was necessary to strike a balance between strictness and flexibility and not to sacrifice one to the other. A marked imbalance between the study of reservations and that of objections must also be avoided. The draft guidelines contained in chapter II of the eighth report should be referred to the Drafting Committee.

23. Mr. ADDO commended the Special Rapporteur on the excellent quality of his work. However, he was troubled by the idea in paragraph 36 of the Special Rapporteur’s report that, after expressing its consent to be bound, along with a reservation, a State or international organization had the possibility of “enlarging” the reservation or, in other words, modifying in its favour the legal effect of the provisions of the treaty to which the reservation referred. He doubted whether such an “enlarged reservation” had any legal validity. A reservation could be made by a State only when it expressed its consent to be bound. Article 2, paragraph 1 (*d*), and article 19 of the 1969 Vienna Convention were very clear on that point. Consequently, a reservation made outside the regime provided for in the Convention was not acceptable. It had been said that the Commission must show flexibility; that was true, but on condition that it did not derogate from what was laid down by the Vienna.

24. He also did not believe that the rules governing the late formulation of a reservation could apply to an enlarged reservation. The late formulation of a reservation was a situation in which a State had the sovereign right to express a reservation, but had neglected to do so when expressing its consent to be bound. Such a situation was excusable, but, in the case of an enlarged reservation, the

State concerned had expressed an initial reservation and wished to go back on it to modify it to its advantage. That was an abuse of rights which should not be permitted.

25. The Special Rapporteur rightly said in paragraph 36 of his report that it was essential not to encourage the late formulation of limitations on the application of the treaty. He nonetheless added that there might be legitimate reasons why a State or an international organization would wish to modify an earlier reservation. He could not see what those legitimate reasons might be, although that did not mean they did not exist, but the Special Rapporteur himself had not given any and had recognized that such cases were rare. In that connection, he had cited only two examples, those of Finland<sup>6</sup> and Maldives.<sup>7</sup> The practice in those two States could not serve as a basis for developing a rule. Similarly, all the doctrine cited by the Special Rapporteur considered that a modification of a reservation with a view to enlarging its scope was not lawful. The Commission should follow the example of the Treaty Office of the Council of Europe, which averred that extending the scope of an existing reservation was not acceptable. Allowing such modifications would create a dangerous precedent, which might jeopardize legal certainty and impair the uniform implementation of European treaties.

26. For the Special Rapporteur, that position was too rigid on the international plane, but he himself would prefer rigidity in order to maintain the integrity of the treaty rather than too much flexibility that would lead to nothing but a fragmentation of the treaty relationship. As it stood, the regime of reservations could give rise to a great many bilateral relationships that might negate the very object and purpose of the convention or treaty in question. Like Ms. Escameia, he thought that draft guideline 2.3.5 should be deleted. The best solution would be to indicate in the commentary that only a few States had followed that practice, that its legal validity was doubtful and that it must not be encouraged. His question for the Special Rapporteur was how many times a State could be allowed to enlarge a reservation. If a State was allowed to enlarge an existing reservation, what would prevent it from asking, 10 or 20 years later, when the treaty was in force, for an enlargement of an already enlarged reservation? Where should the line be drawn?

27. With regard to addendum 1 to the eighth report, he was in agreement with much of what Mr. Koskenniemi, Mr. Kolodkin and Mr. Matheson had said with regard to objections and the definition of objections.

*Mr. Melescanu (Vice-Chair) took the Chair.*

28. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on breaking steep new ground by taking up the question of objections, or reservations to reservations. He also welcomed the Special Rapporteur’s caution in deciphering the term “objections”, which the 1969 Vienna Convention had not defined.

29. Referring to the enlargement of the scope of reservations to treaties, he said that he agreed with some of the

<sup>6</sup> See 2781st meeting, footnote 12.

<sup>7</sup> *Ibid.*, footnote 13.

proposals contained in paragraphs 46 and 47 of the report. He endorsed the Special Rapporteur's idea that a definition of what was meant by "enlargement" should come before the draft rule on the enlargement of the scope of a reservation based on "the rules applicable to the late formulation of a reservation". In order to show how relevant that definition was, it should be included in the first paragraph of draft guideline 2.3.5 rather than in the second. Although he agreed with the proposed definition that enlargement meant the modification of the treaty "in a broader manner than the initial reservation" (para. 48), a key element was missing, namely, an indication of the time when the enlarging declaration was made. That time could be guessed at: it followed the time of the expression of the consent of the State or international organization to be bound. The relevant criterion of the concept of a reservation and, in particular, a late reservation was the exception to the Vienna regime rule. However, the absence of any criterion concerning the time of the formulation of the enlarging reservation made the reservation meaningless.

30. With regard to the regime, he was aware that the Special Rapporteur had wanted to include State practice in his draft and that might explain why he had deliberately tried to avoid such an indication. He nevertheless considered that, unless the Special Rapporteur had included a specific indication of the time of the enlarging declaration, he could not propose an enlargement regime based on that of late reservations, as he suggested in paragraph 46 of his report. That was a question that the Commission would not be able to dispatch quickly by referring draft guideline 2.3.5 to the Drafting Committee.

31. As to the question of objections to reservations and their definition, in particular, he said that the Special Rapporteur was right to use the Vienna regime, if only to point out that it did not define the concept of an objection and that it was Janus's other face. Everything should therefore be based on Janus's visible face, namely the reservation, something the Special Rapporteur was determined to do when he stated that it seemed reasonable to start with these elements in developing a definition of objections to reservations.

32. He personally was not convinced that the game was worth the candle. In his opinion, the Commission had to avoid two wrong tracks so that it would not get trapped. The first was that of quasi-objections, even though they had been on the increase in the last few years. In that connection, he was of the opinion that the fact of informing the author of a reservation of the reasons why the reservation should be withdrawn, explained or modified was definitely part of the reservations dialogue, but it was never an objection to a reservation. The second wrong track was that of a waiting stance. There was a close connection between that type of stance and an objection, since, according to paragraph 89 of the report, a State or an international organization "reserve[d] its position" regarding the validity of a reservation made by another party. He compared the reservations dialogue to a road network in which the roads were not the same, but all led to the same place. Distinctions therefore had to be drawn according to the size of the roads, their role, their functions and their levels. The purpose of an objection to the validity of a reservation was not the same as that of an objection to a reservation, even though those two types of

objections could both create a relationship of dependency or conditionality.

33. Distinctions could be drawn, as in the case of reservations, between conditional objections and ordinary objections or between permissible and impermissible objections, but they shed much more light on the regime than on the nature of objections. As far as the nature of objections was concerned, the discussions should focus on what the Special Rapporteur called "the generic object of the objection": the author of the objection was opposed to the fact that a reservation by the other party excluded or modified the legal effects of some provisions of the treaty in respect of it. An objection was thus a means of preventing the application of a reservation. However, an objection was applicable because it was admissible—in other words, permissible. The way in which an objection to a reservation was characterized thus depended less on whether it was permissible than on whether it was opposable. In those conditions, the relevant criterion for the characterization of the objection was its objective, which derived from the purpose clearly expressed by the author of the objection, and not just from the intention behind it. The claim by the author of the objection that the reservation was impermissible might well be a ground for the objection, but it would at most be a preliminary issue that would not have much of an impact on the nature of the objection and would thus never be anything more than one ground among many. He therefore agreed with the view expressed by Imbert, referred to in paragraph 97 of the report, which read: "Unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State."<sup>8</sup> The attitude or position in question could also be that of an international organization.

34. In conclusion, he supported the draft definition of objections to reservations proposed by the Special Rapporteur in paragraph 105 of the report and was in favour of referring it to the Drafting Committee.

35. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his excellent eighth report on reservations to treaties. The very interesting first part drew attention to the positions adopted in 2002 by Governments and international human rights treaty bodies, with which a very useful dialogue could be established, and thus shed light on the report as a whole. With regard to the modification of reservations and interpretative declarations, it should be borne in mind that States could modify their treaty relations at any time. Provided that the parties to the treaty so agreed in advance and that it was in keeping with international law, the treaty could be modified by various means and not only by formal revision during new negotiations. It could also be modified by the acceptance of the formulation of a reservation or the acceptance of the modification of a reservation, even if that was likely to enlarge the scope of the reservation. A modification of a reservation that lessened its scope did not require the consent of the other contracting parties, but those parties might have to complete some formalities. However, if the modification went beyond the initial reservation, the prior consent of the contracting parties was necessary, unless the treaty provided otherwise or the parties so agreed after

<sup>8</sup> Imbert, *op. cit.* (2781st meeting, footnote 15), p. 419.

the fact or remained silent. If “enlargement of the scope of the reservation” was understood according to the meaning indicated by the Special Rapporteur in paragraph 48 of the report, it could be equated with a late reservation, and it was quite normal for the applicable rules to be similar. Draft guideline 2.3.5, which had been submitted by the Special Rapporteur and which equated the enlargement of the scope of a reservation with late formulation, was thus acceptable, although the reference to draft guidelines 2.3.1, 2.3.2 and 2.3.3 was not necessary. It was also not certain that a specific guideline on the definition of enlargement was necessary; perhaps it could simply be referred to in the commentary to draft guideline 2.3.5.

36. With regard to the withdrawal and modification of interpretative declarations, a simple declaration could be formulated at any time and so could its withdrawal, which did not require any particular formality. It did not impose obligations on the other parties to the treaty, but it was designed to harmonize legal relations among them, and it must therefore be accepted. Draft guideline 2.5.12 proposed in paragraph 52 was acceptable, except that the words “Unless the treaty provides otherwise” were superfluous, but that was only a drafting question. Conditional interpretative declarations must be treated in the same way as reservations. They could be made when the State expressed its consent to be bound by the treaty, and their withdrawal must be done in the same conditions as reservations—in other words, in accordance with guidelines 2.5.1 to 2.5.9. That was why draft guideline 2.5.13, submitted in paragraph 56, was also acceptable. Diverging views had been expressed in the Commission on the partial withdrawal of an interpretative declaration, which could apparently not be partially withdrawn because that would be contrary to its very nature. Conditional interpretative declarations could, in principle, not be modified, but that, of course, depended on the will of the other parties, which was reflected in the treaty, as indicated in draft guideline 2.4.10, which was also acceptable. Interpretative declarations could be formulated at any time, unless the parties to the treaties decided otherwise.

37. As to the formulation and acceptance of objections to reservations and interpretative declarations, the meaning of the objection must be understood very broadly so that it related not only to the applicability of the treaties to the parties but also to the possibility of preserving its integrity. The purpose of the objection was simply that all or part of a treaty should enter into force as between the parties. By means of its objection, the objecting State’s aim was the withdrawal or modification of the reservation primarily in order to preserve the integrity of the treaty. As the Special Rapporteur had done, a distinction must be drawn between the objection itself and any reaction that might have other purposes. The intention was what counted in qualifying the act in a particular case and determining whether its purpose was the entry into force of part of the treaty in respect of the parties concerned. Not every reaction led to the same result as an objection *stricto sensu*, and it could be a declaration interpreting the reservation. Many terms could be used, such as rejection, challenge, opposition, and the like. Quite apart from terminology, the context determined whether what was involved was an objection *stricto sensu* or a reaction of another kind to ensure that the reserving State withdrew

its reservation for the sake of the integrity of the treaty and not only to prohibit its application in whole or in part in respect of the parties concerned. Even though there was little or no practice of arguments in respect of objections, the objecting State should be encouraged to justify its position as the only way of opening the “reservations dialogue” to which the Special Rapporteur drew attention and which was a key element of relations between the parties to the treaty, particularly with a view to maintaining the integrity of human rights instruments.

*Mr. Candioti resumed the Chair.*

38. Mr. CHEE congratulated the Special Rapporteur on his eighth report, which was just as remarkable as the preceding ones. In paragraph 36 the Special Rapporteur argued in favour of the possibility of modifying reservations, but in paragraph 37 he indicated that State practice was rare. In the third subparagraph of paragraph 36, the Special Rapporteur stated that it was always possible for the parties to a treaty to modify it anytime by unanimous agreement, and, in support of that statement, he referred to article 39 of the 1969 and 1986 Vienna Conventions. However, article 39 dealt with the amendment of treaties, not with their modification. When it had proposed articles 39 to 41 of the Conventions, the Commission had made a clear-cut distinction between the “amendment” of a treaty to alter its provisions with respect to all the parties and the “modification” of a treaty, which referred to an *inter se* agreement concluded between certain of the parties only and intended to vary provisions of the treaty between themselves alone. It was therefore questionable whether the reference in the footnote corresponding to paragraph 36 of the report in support of the modification of the reservation was warranted. The modification of a late reservation on a matter of substance or a matter relating to the existence of the treaty should not be permitted, for the reasons given by the Special Rapporteur in paragraphs 38 and 39, namely, that that would create a dangerous precedent that would jeopardize legal certainty and impair the uniform implementation of treaties. Article 19 of the Conventions did not refer to any late modification or enlargement of the scope of a reservation. However, if all the contracting parties expressed their consent to the enlargement of the scope of the treaty, such a modification might be permitted without affecting the substance of the treaty. That meant that, if a modification of a reservation was only of minor importance, it might be acceptable under the guidelines.

39. With regard to the modification or the late formulation of a conditional interpretative declaration, McRae had stated in an article published in 1978 in the *British Year Book of International Law*—and his wisdom had been adopted by the European Court of Human Rights in the *Belilos* case—that a qualified interpretative declaration which was a conditional interpretative declaration must be assimilated to a reservation.<sup>9</sup> The legal consequences that attached to reservations should therefore apply to qualified interpretative declarations. In his standard work on the 1969 Vienna Convention, Sinclair had pointed out that most reservations were of a minor nature and that there had not been a startling increase in the number of

<sup>9</sup> See D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, 1978, pp. 155 *et seq.*, especially p. 172.



reservations in the post-war period, taking account of the tremendous expansion and diversity of the international community.<sup>10</sup> There thus did not seem to be any reason to fear an enlargement of the scope of reservations.

40. He had difficulty understanding the distinction made in the Guide to Practice between “objections” and “opposition” to reservations. In the example relating to the United States given by the Special Rapporteur in paragraph 86 of addendum 1 to his eighth report, the interpretation of the word “objection” as a “conditional acceptance” rather than as an objection strictly speaking seemed to be contrary to the dictum of ICJ in the *Temple of Preah Vihear* case that words were to be interpreted according to their natural and ordinary meaning in the context in which they occurred. In stressing the need to use unambiguous terminology in the description of reactions to a reservation, the Special Rapporteur had suggested the use of the words “objection” and “object to”, but he had interpreted the words “object to” as a “conditional acceptance”.

41. He had three comments to make on the guidelines. First, it should be recalled that reservations to treaties already restricted the scope of treaties. If a reservation was modified, a reservation was made to a reservation. To the extent that a reservation was modified, either to narrow the commitment made by the State or to enlarge the scope of the treaty, the integrity of the treaty as a whole was jeopardized. The guidelines must therefore all be drafted in such a way as to remain within the limits of the treaty as a whole. Second, if the guidelines on the use of a reservation conflicted with the treaty regime in force, such as the 1969 Vienna Convention, there was a danger that the treaty might become inoperative. That should be avoided. Third, the technique of guidelines was frequently used when States could not secure the necessary majority in support of a treaty, in order to achieve certain objectives. However, the guidelines should not, for the sake of convenience, depart too much from the fundamental principles of treaty law.

42. Mr. AL-MARRI said he agreed with the members who had said that the Commission should not move too far away from the law of treaties, particularly the Vienna Conventions. Provided that a signatory State was acting in good faith, the law of treaties should be relied on, and it should be ensured that negotiations on the reservation could be held in order to find a solution. He was also in favour of merging draft guidelines 2.5.4 and 2.5.11 *bis* as a single draft guideline stating that the finding that a reservation was impermissible did not constitute the withdrawal of a reservation.

43. Mr. KEMICHA paid tribute to the Special Rapporteur for his excellent eighth report, in which he considered the assumption that the modification of a reservation had the effect of enlarging the reservation and then proposed that the rules relating to the late formulation of a reservation, as contained in draft guidelines 2.3.1 to 2.3.3, should apply to it. Not only was such an approach logical, but it was also based on instructive examples of practice. He therefore endorsed that approach and recommended that draft guideline 2.3.5 should be referred to the

Drafting Committee. However, the addition of a second subparagraph indicating what was meant by the “enlargement of the scope of a reservation” was superfluous. The proposed provision could quite naturally be included in the commentary.

44. With regard to the withdrawal of interpretative declarations, the Special Rapporteur was proposing a separate regime depending on whether such declarations were conditional or not. The withdrawal of a simple interpretative declaration could be done “at any time following the same procedure as that applicable to its formulation”. That was the meaning of draft guideline 2.5.12, which did not give rise to any problem, and draft guideline 2.5.13, according to which the withdrawal of a conditional interpretative declaration followed the regime applicable to reservations themselves.

45. Draft guidelines 2.4.9 and 2.4.10 on the modification of interpretative declarations were acceptable as they stood, despite the Special Rapporteur’s proposal that they should be combined with the provisions relating to late formulation; that proposal was appealing but, for the time being, premature.

46. The approach taken by the Special Rapporteur in the addendum to the eighth report for the preparation of a definition of objections to reservations, as contained in draft guideline 2.6.1, was exemplary in more than one respect. The Special Rapporteur had taken care to list the five relevant provisions of the 1969 and 1986 Vienna Conventions and then to include the five elements in the definition of reservations contained in draft guideline 1.1 of the Guide to Practice. The proposed definition had the advantage of covering all the elements of which the objection was composed and was a good starting point for a helpful discussion. He agreed with the Special Rapporteur on three points. First, the author of an objection to a reservation had to express its intention to prevent the reservation from being opposable to it. The examples taken from practice were significant. The inclusion of the element of intention would show whether the objective of the author of the objection was to get the reserving State to waive its reservation (case where a State reserved its position) or whether it was adopting a formal position intended to prevent the application of the provisions to which the reservation related, in accordance with article 21, paragraph 3, of the 1986 Vienna Convention. Second, although the reasons for an objection to a reservation were not required by any rule of international law, they were desirable because they promoted the “reservations dialogue”. Third, the “super-maximum” effect, which was described in paragraph 96 and involved considering not only that the reservation was not valid, but also that the treaty in question applied as a whole, rendered “the reservation null and void without the consent of its author”, as the Special Rapporteur stated in paragraph 97, and that was entirely unacceptable. Consequently, draft guideline 2.6.1, as submitted in its long version in paragraph 105, appeared to be a working basis that could be referred to the Drafting Committee.

47. Mr. MANSFIELD said that the part of the introduction to the eighth report on recent developments with regard to reservations to treaties was very useful. In chapter I, the analysis of the question of the enlargement of the scope of reservations was correct and the corresponding

<sup>10</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 77–78.

draft guideline 2.3.5 acceptable, provided that it was left to the Drafting Committee to decide whether what was meant by “enlargement of the scope” should be explained in the draft guideline itself or in the commentary. In the light of the comments by several members of the Commission, however, it might be wiser to delete the draft guideline if that turned out to be the best way of discouraging that practice. Draft guideline 2.5.12 on the withdrawal of simple interpretative declarations did not give rise to any problems. With regard to conditional interpretative declarations, which should be assimilated to reservations, draft guideline 2.5.13 was acceptable, but only provisionally, as the Special Rapporteur had proposed.

48. Chapter II on objections to reservations led straight to the interesting, difficult and important question of the effects of reservations. The introduction on the “reservations dialogue” was an interesting analysis of an important aspect of recent treaty practice, but its key element was that of the definition of objections to reservations. The Special Rapporteur gave many examples which showed that, in recent practice, a declaration could be made to a reservation without the legal effect expected of that declaration having been clearly expressed. From the viewpoint of the definition, however, if a declaration was expressly presented as an objection and intended as such, it could not be denied that qualification merely on the grounds that the expected effect went beyond that provided for in the 1969 and 1986 Vienna Conventions. Perhaps, as other members had suggested, the consideration of the definition should be postponed until after that of legal effects or the question whether a definition was necessary should be left open. In any event, the Special Rapporteur was right to think that States which formulated an objection should be encouraged to indicate the reasons for the objection, even if that could not be an obligation.

49. Mr. OPERTTI BADAN drew the Special Rapporteur’s attention to a particular problem relating to objections to interpretative declarations. At the preceding meeting, Ms. Xue had rightly pointed out that a distinction should be drawn between matters relating to the negotiation of the treaty and those relating to reservations to the treaty. An interpretative declaration could be formulated at any time, as the Special Rapporteur recalled in paragraph 50 of his report, and that included the time of the ratification of the treaty. In that case, the ratification and its content constituted one single act, and the interpretative declaration must then be considered not only from the point of view of international law but also from that of constitutional law. It could thus be asked whether some interpretative declarations were typical and others were atypical. The second question was what the procedure for objecting to those interpretative declarations was. In some cases the objection involved formulating observations, comments or explanations, and in other cases there was a much more categorical qualification equating the interpretative declaration with a reservation. That question was important in the light of section 2.6 of the Guide to Practice, in which objections to reservations were defined as unilateral statements, however phrased or named. Consequently, it could be asked whether objections related only to reservations or could also be made to interpretative declarations in general and to interpretative declarations forming part of the act of ratification in particular. If an objection was

given the power to turn an interpretative declaration into a reservation, although the treaty in question did not allow reservations, the constitutional competence of the branch of government which adopted treaties would be severely restricted. It could be considered that practical problems involving conflicts between the executive and legislative branches were governed by a country’s constitution and that the 1969 and 1986 Vienna Conventions clearly provided that rules of internal law must take account of rules of international law, but the Commission must be careful not to adopt a very strict approach to the question of objections and their legal effects in order not to jeopardize the process of ratification of some conventions if a mere objection by one or more States to a legislative interpretation could invalidate the application of the treaty.

50. Mr. KATEKA, referring to the question of conditional interpretative declarations, said he hoped that the Commission would not have to give up provisions it had spent a great deal of time drafting because the consideration of the legal effects of reservations and interpretative declarations led to the conclusion that it should do so. He agreed with the Special Rapporteur’s reasonable point of view that the dialogue between reserving States and human rights treaty-monitoring bodies should be encouraged. It was to be hoped that the Special Rapporteur would prepare specific provisions to supplement the preliminary conclusions reached in that regard.<sup>11</sup> With regard to the enlargement of the scope of reservations, he agreed with Mr. Addo that draft guideline 2.3.5 should be deleted. He would prefer more flexibility in the definition of objections contained in draft guideline 2.6.1.

51. Mr. DAOUDI said that the eighth report of the Special Rapporteur on reservations to treaties had led to an interesting discussion because it dealt with sensitive issues and also because the Special Rapporteur requested the opinion of the members of the Commission on a number of points. With regard to the problem of the enlargement of the scope of reservations, State practice was not consistent and was even contradictory, as other members had pointed out. It was therefore surprising that it could form the basis of an established principle or rule. Since an objection by only one of the States to which the modification of a reservation was communicated could lead to the rejection of the modification, moreover, it could be asked whether the context was not an offer of new negotiations rather than the reservations regime. The Special Rapporteur nevertheless considered that that type of modification should be equated with the late formulation of a reservation and, to that end, proposed a draft guideline 2.3.5 referring to guidelines 2.3.1 to 2.3.3, as already adopted by the Commission. That provision would be entirely acceptable if the square brackets were removed.

52. With regard to the withdrawal of interpretative declarations, draft guideline 2.5.12 on simple interpretative declarations would also be acceptable if the square brackets were removed. As to conditional interpretative declarations, the Special Rapporteur proposed a draft guideline 2.5.13 pending a decision by the Commission on whether that second category of declarations should be mentioned in the Guide to Practice. In his own opinion, it should not be included, but he supported the Special

<sup>11</sup> See 2781st meeting, footnote 11.

Rapporteur's proposal on that point for the reasons given in paragraph 55 of his report. With regard to the modification of interpretative declarations, since the modification of conditional interpretative declarations was equated with the late modification of reservations, draft guideline 2.4.10 proposed by the Special Rapporteur was practically based on draft guideline 2.4.8 adopted by the Commission at its fifty-third session, in 2001,<sup>12</sup> and relating to the late formulation of those declarations. In paragraph 62 of his report, the Special Rapporteur submitted a revised text of guideline 2.4.8 which would obviate the need for the proposed new provision, which should perhaps be retained until the Commission had resumed its consideration of the draft Guide to Practice as a whole when it completed its work on the topic.

53. The addendum to the eighth report, in which the Special Rapporteur began to consider the formulation of objections to reservations and interpretative declarations, gave rise to three questions. First, the element of intention was essential and must therefore be included in a definition of objections, particularly as the 1969 Vienna Convention expressly referred to intention in article 20, paragraph 4 (b). Second, the definition of objections must reflect State practice, and, if the consideration of State practice showed that the definition contained in the Convention should be departed from, that could be done, provided that care was taken not to generalize a regional practice or the practice of a particular small political group of States. The "reservations dialogue" which the Special Rapporteur intended to study in greater depth in chapter II, section 2, was a useful tool because it would help make the position of the reserving State or the objecting State more flexible, but it would have no legal effect and might sometimes be a dialogue of the deaf, particularly when the reservation related to religion or ideology. The recommendation made by the Special Rapporteur in paragraph 106 of his report was intended to promote the reservations dialogue and could only be endorsed. The draft guideline could therefore be referred to the Drafting Committee, which would certainly ensure that the content of the discussion was taken into account.

*The meeting rose at 12.30 p.m.*

<sup>12</sup> See 2780th meeting, footnote 8.

## 2783rd MEETING

*Thursday, 31 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr.

Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*concluded*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>2</sup> A/CN.4/L.630 and Corr.2)

[Agenda item 4]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. PELLET (Special Rapporteur), summing up the debate on his eighth report (A/CN.4/535 and Add.1), said that the discussion had been interesting and often fruitful; 22 members had participated, and he trusted that for the others silence indicated agreement.

2. Some speakers, including Mr. Kolodkin, Mr. Al-Baharna, Mr. Rodríguez Cedeño, and Mr. Matheson, had found fault with paragraphs 57 and 59 of the report—which he himself had come to consider clumsy—concerning the difficulty of determining whether, when a State returned to an interpretative declaration, whether conditional or not, it intended to lessen or enlarge its scope. He had therefore not pursued the suggested distinction between the partial withdrawal and the enlargement of an interpretative declaration. He had, however, called on his critics to provide examples of practice that would contradict his position, and, to his disappointment, none had been forthcoming. He therefore took it that his position, however hesitant, had been accepted: Mr. Chee, Mr. Al-Marri, Mr. Daoudi and Mr. Melescanu had all recommended that draft guidelines 2.4.9 and 2.4.10 should be referred to the Drafting Committee.

3. Of far greater importance was what had occurred following Mr. Economides' statement at the 2780th meeting (paras. 24–26): Mr. Al-Baharna and, to a lesser extent, Ms. Escameia, Mr. Pambou-Tchivounda and Mr. Chee had vigorously contested draft guideline 2.3.5. He had been astounded—not because the content was beyond dispute but because his colleagues had not conformed to the unwritten rule that, in discussing one guideline, another that had already been adopted should not be called into question. Yet that was what had happened in connection with draft guidelines 2.3.1 to 2.3.3, concerning late formulation of reservations. Mr. Economides, Ms. Escameia and Mr. Addo had taken pains to stress the difference between such late reservations, which could be made in good faith, and late enlargement of the scope of reservations. When considering the draft guidelines on late formulation of reservations, however, the Commission had determined that a State might decide that circumstances had changed and that it could no longer accept a specific provision of a treaty that was not essential to the purpose

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).



of that treaty. Moreover, States should not be lightly accused of acting in bad faith. Mr. Addo had challenged him to provide an example of such a change of circumstances, and in that regard he would refer Mr. Addo to paragraphs 43 and 44 of the report. The enlarged scope of the reservation by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women<sup>3</sup> might, as Germany had claimed,<sup>4</sup> have been questionable—as might have been that of Finland in enlarging the scope of its reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1968 (with annexes)<sup>5</sup>—but neither could be accused of acting in bad faith. Both countries had considered that their initial reservation had created too many problems. Moreover, it was surely unreasonable to require a State to denounce a treaty and then to ratify it again with new reservations. That had been the Commission's position regarding late formulation of reservations.

4. He put forward a hypothetical case in which Ghana, where cars drove on the left, decided, as Sweden had done in the 1960s, to change to driving on the right. The country would need to make temporary reservations to road traffic agreements, but it would be unreasonable to ask it to denounce such agreements as a whole. He urged those of his colleagues who had taken up a rigid stance on draft guideline 2.3.5 to reread paragraphs 279–332 of his fifth report,<sup>6</sup> from which it would be clear that late formulation of reservations did not constitute an example of good or bad faith. Although negligence might be involved, more often it was due to a country's subsequent reassessment of its circumstances, and the same applied in every way to enlargement of the scope of existing reservations. States should be allowed some leeway, if the rights and interests of other States were not affected. Yet, as matters stood, an objection by just one State or international organization would prevent a late reservation from producing an effect.

5. Some opponents of his approach had cited an official of the Council of Europe, who had stated that the Council was opposed to late enlargement of the scope of reservations of which the Council Secretary-General was the depositary. In that connection, Mr. Addo had said that if the procedure was not good for Europeans, it was not good for the rest of the world. That sentiment should be turned on its head, however; if the procedure was good for the rest of the world, as attested to by the practice of the United Nations Secretary-General as depositary, why should it not be good for Europe? In his view, which had been upheld by Mr. Momtaz and Ms. Xue, draft guideline 2.3.2 fully and expressly preserved the possibility of a more restrictive practice at the regional level. In fact, the practice of the Council of Europe was less rigid than the official concerned had claimed: as recently as June 2003, South Africa had been allowed to make a reservation to the European Convention on Extradition<sup>7</sup> after it had de-

posited its instrument of accession with the Secretary-General of the Council. Moreover, the approach adopted by the Council of Europe in relation to the late formulation of reservations had not prevented the Commission from adopting a more flexible provision in that regard. It was therefore difficult to see why the same should not apply to the enlargement of the scope of reservations.

6. Apart from the specific issue, he strongly felt that a question of principle was involved; the Commission simply could not function if, in discussing one draft text, it called into question a provision that had already been adopted. He himself was not wholly in favour of all previous decisions, but he put up with them. Thus, although he had been firmly opposed to the distinction drawn between objections to reservations and opposition to the formulation of late reservations, not only had he resisted any temptation to use the eighth report as a means of reviewing what he considered an unfortunate decision, but he had drafted a guideline—2.6.1 *bis*—which followed logically on that decision. Some members of the Commission, including Ms. Escarameia, Mr. Galicki and Mr. Fomba, had supported his position, but he had not suggested going back on what had been decided. For the same reason, he would not press for the amalgamation of draft guidelines 2.4.9 and 2.4.3 or of draft guidelines 2.4.10 and 2.4.8, despite support from Mr. Kolodkin and others. On the contrary, having listened to the comments made by Mr. Gaja and Mr. Al-Baharna, he had proposed a wording for draft guidelines 2.4.9 and 2.4.10, to which he had heard no opposition. As for draft guideline 2.3.5, he urged that the text should be sent to the Drafting Committee. Failure to do so would betray a lack of rigour and of continuity. Ms. Xue, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Gaja, Mr. Fomba, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Mansfield, Mr. Kemicha and Mr. Daoudi had spoken in favour of that course of action. Mr. Gaja, Mr. Koskenniemi, Mr. Matheson and Mr. Operti Badan had not spoken on the issue at all. The Drafting Committee might well make improvements, but he hoped that it would bear in mind the need for overall consistency in the Guide to Practice. A decision would be needed on whether to retain the square brackets, on which there had been conflicting views, and a number of useful suggestions should be considered, such as Mr. Rodríguez Cedeño's preference for the word *ampliación* over the word *agravación* to convey the meaning of "enlargement". Another suggestion, by Mr. Galicki, had been that guideline 2.3.3 could simply be transposed to the question of enlargement of the scope of a reservation; and the question was whether such a transposition should appear in draft guideline 2.3.5 itself or in the commentary.

7. Dissension of a quite different kind had arisen in the case of draft guideline 2.6.1. Although the Commission had been polarized, no issues of principle or methodology had been at stake, and he had therefore been anxious to listen and to accommodate as many opinions as possible, always in the hope that, once a decision had been reached, all would abide by it.

8. There had been some support for the draft guideline on the definition of an objection; Mr. Melescanu, Mr. Galicki, Mr. Fomba, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Kemicha, Mr. Daoudi and Ms. Xue had recommended that it

<sup>3</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 231.

<sup>4</sup> *Ibid.*, p. 240.

<sup>5</sup> *Ibid.* See 2781st meeting, footnote 12.

<sup>6</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

<sup>7</sup> United Nations, *Treaty Series*, vol. 2223, p. 193.

should be referred to the Drafting Committee, whereas Mr. Gaja, Mr. Kolodkin, Ms. Escameia, Mr. Koskenniemi, Mr. Addo, Mr. Mansfield, Mr. Kateka and—if he understood correctly—Mr. Momtaz and Mr. Chee had opposed that course of action. Although the reasons put forward by opponents of the draft guideline were diverse, he had given them considerable thought. He wished to express his disagreement with one particular aspect of the criticism: Mr. Kolodkin and Mr. Koskenniemi had criticized the analysis of negative reactions to reservations appearing in paragraphs 88, 89 and 91 of the report, which could involve a temporizing approach, a conditional objection or a *minima* interpretations. However, the “Model response clauses to reservations” appended to Recommendation No. R (99) 13 of the Council of Europe (which was not, of course, a global legislator) invariably contained the word “objection”, which was not true of the cases cited in paragraphs 88, 89 and 91. Incidentally, the wording of the Finnish statement<sup>8</sup> cited in paragraph 87 of the report left the reader in no doubt that it involved a genuine objection. It would nonetheless be a mistake to regard any negative reaction as being an objection, even if the author used vague or ambiguous language, as was shown by the 1977 Franco-British Arbitral Award in the *Continental Shelf between the United Kingdom and France* case. A State might consider that its purpose might not be best served by objecting to a reservation; withdrawal or modification of the reservation in question might be more successfully achieved by a “softly, softly” approach. The word “objection” need not be used, therefore, but the meaning must be clear. If the State had been deliberately vague, it did a disservice to legal security and honesty between States. One State should not seek to deliberately mislead another.

9. In drafting guideline 2.6.1, he had followed the letter and the spirit of the 1969 and 1986 Vienna Conventions, not out of any fetishistic respect but because the Commission and the Sixth Committee had always emphasized the need not to call into question the Vienna regime. On one point, at least, there had been fairly wide agreement: most speakers had agreed that the State’s intention was what really counted. The divergences had related to what that intention applied to. Mr. Gaja, supported by Mr. Kolodkin, Ms. Escameia, Mr. Matheson, Mr. Addo and Mr. Kateka, had said that the effect of an objection was obscure and uncertain; however, that was no reason to reject the draft text. Even if it was ambiguous, such effects were provided for under the Conventions, so there was no reason not to take account of them in the definition of an objection, as long as the Commission specified such effects at a later stage.

10. He was more shaken by another argument: Mr. Koskenniemi had referred to objections with “super-maximum” effects, consisting of statements whereby some States—very few, and only recently—assumed the right to set aside a reservation and to decide that the reserving State was bound by the treaty concerned in its entirety. Although he persisted in doubting the validity of that approach, he acknowledged that he had not been sufficiently rigorous when he had stated, in paragraph 97

of the report, that such statements were not objections, on the grounds that the authors’ clear intention had been to go beyond the effects provided for by the 1969 and 1986 Vienna Conventions. In striving not to confuse the definition of reservations with that of their permissibility, he had, it seemed, fallen into the same error where objections were concerned. What was to be done to ensure that such statements were not ignored or excluded from the definition of objections? The wait-and-see attitude preferred by some speakers was ill-advised, if only because it would be impossible to discern the effects of an institution unless the Commission plainly identified the institution in question beforehand. In fact, that overcautious stance was rather like quibbling about what came first, the chicken or the egg. Moreover, procrastination was not a good idea, and indeed another solution was possible.

11. Several members who had categorically rejected his definition had advocated a wider and more flexible definition that took account of common tendencies. The perspicacious comments of Mr. Kolodkin and Mr. Pambou-Tchivounda had helped him to identify such a tendency. Mr. Kolodkin had rightly contended that the basic criterion for an objection was the intention of its author to ensure that the reservation could not be applied to it in the future, while Mr. Pambou-Tchivounda had defined objections as reservations to reservations, or barriers to reservations. It therefore seemed that many difficulties might well be resolved by a generally acceptable definition stating: “Objection means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects.”

12. The wording would have to be discussed in detail, and some improvements might be needed, but it should answer most of the concerns and objections to his initial proposal, which admittedly had invited criticism. Since some measure of agreement did exist, it might prove possible to refer guideline 2.6.1 to the Drafting Committee, which could be instructed to direct its thoughts along the path he had just indicated. If that course of action appeared to be premature, he was prepared to give a more detailed presentation of the amended draft guideline at the next session. At all events, the fate of guidelines 2.6.1 *bis* and 2.6.1 *ter* depended on that of 2.6.1.

13. No general criticism had been levelled against the other draft guidelines, but he had noted the various improvements that had been suggested, including the inclusion in guideline 2.3.5, or in the commentary thereto, of a definition of “enlargement of a reservation”.

14. As far as conditional interpretative declarations were concerned, although Mr. Mansfield had said that if an animal looked like a horse it must be a horse, he had not yet seen the whole animal and should therefore wait before he adopted a final position. Mr. Melescanu’s qualms about conditional interpretative declarations as a legal institution were misplaced in view of guideline 1.2.1. Perusal of that guideline made it clear that the definition of conditional interpretative declarations was quite different from that of reservations. The animal in question was not a horse, but it could be treated as a horse.

<sup>8</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 557–558.

15. He did not interpret consensus within the Commission as denial of the fact that, in addition to reservations, there were declarations whereby a State or international organization subordinated its consent to be bound by a treaty to a specific interpretation thereof. On the contrary, that consensus signified that, if the Commission found that a certain legal institution was subject to the same legal regime as reservations, which was quite probable, it was unnecessary to devote specific draft guidelines to the legal regime governing that institution; reference could simply be made to the guidelines applicable to reservations. Such a finding presupposed, however, that all the requisite groundwork had been done in order to determine that the two regimes were identical.

16. His suggestion in paragraph 106 of the report that the Commission should recommend that States and international organizations should state the reasons for their objections had received strong support, and he would thus propose a draft guideline to that effect next year. He suggested that all the draft guidelines in his eighth report should be referred to the Drafting Committee, it being understood that, if the Commission so wished, he was prepared to give a more detailed presentation of his proposal for guideline 2.6.1 at the next session, in which case referral of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* could be deferred.

17. Mr. ECONOMIDES said that, while he had great respect for the patience of Penelope, he was wary of Pandora's box. He disagreed with the substance of guideline 2.3.5 because it manifestly infringed article 19 and article 2, paragraph 1 (*d*), of the 1969 Vienna Convention and he was therefore against including it in the Guide to Practice.

18. In his opinion, the Commission had made a mistake with respect to late reservations, one that should be rectified during the second reading by limiting the scope of the application of such reservations, which should be permitted only before the instrument of ratification or acceptance had been sent to the depositary.

19. Guideline 2.3.5 should not be referred to the Drafting Committee until it had been considered by the Sixth Committee.

20. Ms. ESCARAMEIA said that she agreed with Mr. Economides. The Special Rapporteur had expressed shock over the position adopted on guideline 2.3.5 by eight members of the Commission. Those members nevertheless maintained that it was a matter of principle that the 1969 Vienna Convention should be followed, especially when practice was contradictory. Why should priority be given to the practice adopted by only a few depositaries?

21. What made the Special Rapporteur's attitude all the more inconsistent was the fact that, as far as objections were concerned, he was adamantly opposed to departing from the 1969 Vienna Convention or to retracting the Commission's previous decisions. In her opinion, the issue at stake could not be treated in the same way as late reservations and should be dealt with by analogy to guideline 2.3.4, which made it clear that an earlier reservation could not be interpreted in such a way as to exclude or modify the legal effects of provisions of the treaty con-

cerned. The Special Rapporteur's proposal, by permitting enlargement of the scope of a reservation, would exclude or modify some legal effects, and hence it conflicted with guideline 2.3.4. She therefore advised against referring guideline 2.3.5 to the Drafting Committee before the guidance of States had been sought.

22. Mr. KATEKA said he trusted that the Special Rapporteur did not regard the members who were speaking after Mr. Economides as weathervanes that constantly changed direction. On the contrary, they had their principles, and their position had been one of consistent opposition to late reservations. It therefore followed that he was against the enlargement of reservations.

23. He hoped that the Special Rapporteur would show the same flexibility with regard to guideline 2.3.5 as he had displayed in respect of draft guideline 2.6.1. The views of the Sixth Committee and Member States on enlargement of the scope of a reservation should first be obtained and then the Commission should reconsider the draft guideline next year.

24. Mr. GAJA said that he was in favour of guideline 2.3.5. While guideline 2.6.1 as proposed during the present meeting went in the right direction, it might be wise to reflect further on it before it was referred to the Drafting Committee.

25. The text of the 1969 Vienna Convention made no provision for the intention to which the Special Rapporteur referred. The proposal, which had been read out, had not completely resolved the problem of defining objections. For instance, the purpose of some objections might be to exclude the application of a whole section of a treaty, as was done with regard to some reservations that had been entered to article 66 of the Convention. Since the Special Rapporteur intended to submit the question to the Sixth Committee, it would be advisable to wait and see how States reacted. It might then be possible to produce a text which might not be very different from that proposed by the Special Rapporteur, but which would not attempt to establish a formal link between intention and the effects provided for in the Convention in order to turn an objection into a unilateral act *stricto sensu*. The debate had shown that objections could be prompted by a wide variety of intentions. He therefore proposed that more information should be gathered and that the Special Rapporteur should study the question in greater depth before guideline 2.6.1 was referred to the Drafting Committee.

26. Mr. ADDO said that he stood by the position he had adopted earlier and that he endorsed the comments made by Mr. Economides.

27. Mr. CHEE said that while, on the whole, he supported the Special Rapporteur's brilliant study, he wished to take issue with just three points. In his opinion, a revision that would change the character or scope of the original reservation would not be permissible.

28. As to paragraph 86 of the report, the Commission was not engaging in an academic exercise, but was striving to codify and progressively develop international law so that it could be used by States in their diplomatic relations. The assertion that an objection to a reservation was a conditional acceptance would baffle practitioners. As



for conditional interpretative declarations, he still upheld the view he had already expressed and which was based on the decision of the European Court of Human Rights in the *Belilos* case.

29. Ms. XUE said that she fully agreed with the Special Rapporteur's summary. If he intended to amend his proposal for guideline 2.6.1 in the way he had suggested, which would make an objection a means for preventing the effect of a reservation, the Commission should postpone its discussion of the effects of an objection to a reservation until it held its substantive debate on the admissibility of reservations. When she had read the report, she had gained the impression that the Special Rapporteur intended to address the questions of form and procedure. The original draft guideline 2.6.1 had, however, touched on a fundamental element, to wit, the intentions of both parties in terms of the legal effects in their contractual relations.

30. The proposal the Special Rapporteur had just made might cause major difficulties in that such an objection would affect the contractual relations between the parties. Under international law neither the reserving State nor the objecting State was permitted to alter the terms of the treaty by a unilateral act, yet, as the new proposal stood, the objecting State, by its unilateral act, would be doing just that. She was therefore in favour of retaining the original draft and discussing the substantive issue later.

31. Mr. MANSFIELD said his main concern had been to ensure that statements like that of Sweden in reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,<sup>9</sup> referred to in paragraph 96 of the report, would not be excluded from the definition of objections. On the face of it, it was an objection, and indeed that was its purpose. That had been the point of his horse analogy. He welcomed the Special Rapporteur's redrafting because it broadened the definition appropriately. It might, however, be advisable to study it more closely before it was referred to the Drafting Committee. Formulating a definition before the Commission had scrutinized the effects of an objection was tantamount to putting the cart before the horse.

32. Mr. KOLODKIN said that he was grateful to the Special Rapporteur for his thought-provoking summary. He still failed to understand the reasoning in paragraph 57 of the report, but perhaps the difficulty lay in the Russian text, which was muddled. In any case, paragraph 59 covered and enlarged upon paragraph 57.

33. More importantly, he agreed with proposed guideline 2.4.9, which could be referred to the Drafting Committee. The new definition of an objection to a reservation that had just been proposed by the Special Rapporteur was on the right tack, but the Commission should give itself and the Special Rapporteur plenty of time to reconsider the definition and ascertain States' reaction to it in the Sixth Committee.

34. Mr. GALICKI said that, although he found some fault with specific aspects of guideline 2.3.5, he was gen-

erally in favour of including it in the Guide to Practice. During the discussion of the seventh report on the topic,<sup>10</sup> modifications which reduced the scope of the reservation had been addressed, and it was only logical now to take a position on those which enlarged the scope, especially since there was some State practice, even though it was not homogeneous. Enough analysis and information on draft guideline 2.3.5 was provided for it to be referred to the Drafting Committee, although that did not preclude addressing questions to States if the Commission so desired.

35. The rule on enlargement of the scope of reservations was closely bound up with the guidelines adopted previously on late formulation of reservations. As the Special Rapporteur had pointed out, guideline 2.3.3 was not fully applicable to enlargement, but guidelines 2.3.1 and 2.3.2 were formulated in such a way that they could be applied with no detrimental effect.

36. The definition of objections to reservations in guideline 2.6.1 was incomplete, and he therefore agreed with those who wished to postpone a final decision pending additional material from the Special Rapporteur on the effects of objections. Unlike Ms. Xue, he did not believe that the definition of an objection should be purely formal. A comprehensive definition should be developed, by analogy with the definition of a reservation in the 1969 Vienna Convention and addressing substantive aspects, particularly the question of purpose. The guideline should thus be elaborated further on the basis of all the comments made and of the next report to be submitted by the Special Rapporteur.

37. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on an excellent analysis and on his considerable efforts to offer an alternative to guideline 2.6.1. The new version added to the merits of the first by taking account of the comments made in plenary, and he would be hard put to choose between the two versions.

38. The Special Rapporteur was refusing with some obstinacy to reopen debate on guidelines 2.3.1 to 2.3.3 on late formulation of a reservation, but the fact remained that guideline 2.3.5 raised problems, as those who had spoken out against its referral to the Drafting Committee had indicated. The provision contained two elements that had to remain separate, the late formulation of a reservation and the enlargement of the scope of an earlier reservation, and it was the latter that was problematic. A late reservation could enlarge the scope of a late reservation made earlier, but who was to say that yet another late reservation might not be formulated, enlarging the scope of the former? Where would it all end? And who was entitled to enlarge the scope of a reservation? Perhaps a provision could be included indicating that a late reservation that enlarged the scope of an earlier one could not be supplemented by additional late reservations that likewise enlarged the scope, or else time limits could be envisaged instead of quantitative limits.

39. The Special Rapporteur's remark that sovereign States were incapable of acting in bad faith was faintly amusing. Alas, since time immemorial, sovereign States

<sup>9</sup> See 2781st meeting, footnote 3.

<sup>10</sup> See 2780th meeting, footnote 3.

had acted in bad faith, precisely because they were sovereign.

40. Mr. KOSKENNIEMI said he could agree with everything said by the Special Rapporteur in his summary and found his proposed reformulation of guideline 2.6.1 to be a welcome step showing remarkable flexibility. He might have been inclined to recommend that it be referred to the Drafting Committee but now agreed that the Commission needed to reflect more on the issue. It would indeed be useful to have the comments of delegations in the Sixth Committee, and the Commission should accordingly revisit the provision at its next session.

41. Mr. AL-BAHARNA said that consideration of guideline 2.6.1 should be postponed and the comments made during the discussion taken into account by the Special Rapporteur, who had already indicated that he favoured such a course of action and would submit a new text to the Commission at its next session. He himself objected to the wording of guideline 2.3.5, on enlargement of the scope of a reservation. Members of the Commission seemed to be evenly divided on that issue, and it might be best, as several had suggested, to formulate a question for submission to the Sixth Committee, and perhaps even to transmit the draft guideline itself for the Committee's consideration.

42. Mr. CHEE drew attention to the definition of a reservation in article 2, subparagraph (d), of the 1969 Vienna Convention as a statement made "when" signing, ratifying, etc. a treaty. "When" in that context meant "at the time of"; there was therefore no connection with the late formulation of a reservation mentioned in guideline 2.3.5.

43. Mr. MATHESON said that he could go along with either of the two courses of action proposed with regard to guideline 2.3.5, but, whichever was adopted, the Commission must keep in mind the close logical relationship between guidelines 2.3.5, on modifications to reservations, and 2.4.10, on modifications to conditional interpretative declarations. The need for consistency in the treatment of reservations and conditional interpretative declarations had frequently been mentioned, and the Drafting Committee's mandate should include looking into that and making the necessary adjustments. If guideline 2.3.5 was referred to States for further comment, the same should be done for guideline 2.4.10.

44. Ms. XUE suggested that in the Special Rapporteur's reformulation of draft guideline 2.6.1, after the phrase "purports to prevent the reservation from having any or some of its legal effects", the words "in their contractual relations under the treaty" should be added. That, after all, was a very important aspect, for a treaty system was a contractual framework. When one person offered to sell a black horse and another agreed to buy it, that person could not demand that a white horse be provided—not under contractual relations, in any case.

45. Mr. MELESCANU said that, on the contrary, if the parties agreed to replace the black horse with a white horse, there was no difficulty. That example illustrated the problem with the modification of late reservations: it was a very limited case in which all parties agreed that a State

could either formulate a reservation late or modify it. It would be a huge mistake not to acknowledge that there was a reasonably large amount of State practice, and he thought the Commission should look into it more closely. The positions adopted by members should be taken into account, of course, but dialogue and solutions should be sought. The guideline should be referred to the Drafting Committee, and if such was the desire of a majority of the Commission's members, the Sixth Committee could be consulted as well.

46. Mr. KEMICHA said he endorsed guideline 2.3.5 but was somewhat shaken by the discussion about it, in which legitimate apprehensions had been expressed that it might be seen by States as encouraging enlargement of the scope of a reservation. That concern could be raised, perhaps in the commentary, and States urged not to engage in that practice. As to guideline 2.6.1, he had endorsed the original version and continued to support it, although the alternative version was also acceptable. Nevertheless, it would be preferable to take a closer look at the new text at the next session, rather than to adopt it now, with some lingering doubts.

47. Mr. DAOUDI said that guideline 2.3.5 was an innovation as far as the 1969 Vienna Convention was concerned. State practice could not be ignored, even out of unshakeable loyalty to the Convention, but while it was substantial, it was somewhat contradictory. He agreed with the Special Rapporteur that guidelines 2.3.1 to 2.3.3 should not be revisited, but on the other hand they did not constitute holy writ. Nothing prevented the Drafting Committee from considering them in tandem with the new provisions, with a view to achieving a comprehensive approach. As to the definition in guideline 2.6.1, additional elements should be introduced, and he was not opposed to referring it to the Drafting Committee on the understanding that it would seek to fill in the gaps. The proposal just made by the Special Rapporteur was an excellent step towards a solution, but he would prefer to see consideration of the matter postponed.

48. Mr. PELLET (Special Rapporteur) said that, for the reasons he had already outlined, he continued to advocate the referral of guideline 2.3.5 to the Drafting Committee. Only Ms. Xue had expressed strong opposition to his alternative text for guideline 2.6.1. He understood her concerns well and wished to reassure her that his intention in proposing the new version was by no means to prejudice any solution that the Commission might adopt regarding the legal effects of objections. Indeed, he had taken Mr. Koskenniemi's remarks on that subject to heart. He was not opposed to the addition she had just suggested, emphasizing contractual relations between States. He proposed that draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* be reconsidered at the next session.

49. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to postpone until its next session the discussion of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*.

*It was so decided.*

50. The CHAIR recalled that an intensive discussion had taken place on draft guideline 2.3.5 but the majority of members seemed to favour referring it to the Drafting Committee. It had also been suggested that in Chapter III of the Commission's report to the General Assembly on the work of its fifty-fifth session, which drew attention to specific issues on which comments would be of particular interest to the Commission, a request should be made for the views of States on draft guideline 2.3.5.

51. Mr. ECONOMIDES said that, before deciding whether the draft guideline should be referred to the Drafting Committee, the Commission must take up the procedural motion to postpone its consideration and draft a question for submission to members of the Sixth Committee. That motion took precedence over any other decision, and he requested that it be decided by an informal vote.

52. Mr. PELLET (Special Rapporteur) called for a formal vote on whether or not to refer the draft guideline to the Drafting Committee. He had no objection to consulting the Sixth Committee, on the understanding that the Commission would take account of the views of States only when the draft guidelines were considered on second reading. If it were to reverse its decision on draft guideline 2.3.1, the Commission would have to find a new Special Rapporteur.

53. The CHAIR, noting that there was no consensus among members of the Commission on whether to refer draft article 2.3.5 to the Drafting Committee, suggested that the matter should be decided by a show of hands.

*The proposal to refer draft guideline 2.3.5 to the Drafting Committee was adopted by 15 votes to 7.*

54. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.4.9, 2.4.10, 2.5.12 and 2.5.13 to the Drafting Committee.

*It was so decided.*

**Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/529, sect. G, A/CN.4/L.645)**

[Agenda item 10]

**REPORT OF THE PLANNING GROUP**

55. Mr. MELESCANU (Chair of the Planning Group) introduced the report of the Planning Group (A/CN.4/L.645), which summarized the Group's discussions on seven different items. The Working Group on the long-term programme of work had made an oral recommendation to the plenary to the effect that, as of the next session, it should study not only possible agenda items but also working methods, given the difficulties in discussing such matters within the Planning Group. That oral recommendation had not been mentioned in the report since no consensus had been reached on it. With regard to the documentation of the Commission, the Planning Group

had concluded that the very strict recommendations made by the Secretary-General of the United Nations and the General Assembly regarding the length of the reports of subsidiary bodies were not acceptable. It had highlighted the fact that the work of the Commission was different from that of other United Nations bodies, as was the purpose of its documentation, which increased in importance over time, unlike that of the political bodies. Hence the request that the Commission should continue to remain exempt from page limitations, as endorsed by previous General Assembly resolutions, while bearing in mind the need to achieve economies whenever possible in the overall volume of documentation.

56. Owing to lack of time, the Planning Group had been unable to discuss procedures and methods of work, although two relevant proposals had been submitted. He suggested that the details of those proposals should be included under chapter III of the report of the Commission to the General Assembly on the work of its fifty-fifth session so as to facilitate their consideration at the fifty-sixth session. The relations of the Commission with the Sixth Committee were very important for the Commission's work. However, the relationship had to work both ways: it was not only the responsibility of the Commission to find the best way of encouraging the dialogue. Furthermore, in order to enhance the usefulness of Chapter III of the report, the Planning Group proposed that, in preparing issues on which the views of Governments were sought, Special Rapporteurs should provide sufficient background material and substantive elaboration to assist Governments in preparing their responses.

57. With respect to honoraria, the Planning Group recommended that the General Assembly should review its decision in resolution 56/272 of 27 March 2002, which had been taken without consulting the Commission. The spirit of public service with which members contributed their time to the Commission should be duly recognized. The decision affected above all Special Rapporteurs, especially those from developing countries, whose work required considerable research, which they could not conduct alone. A text along those lines would be included in the report. In conclusion, he thanked all those who had contributed to the work of the Planning Group, which had held a record number of meetings, seven in all. He looked forward to the continuation of the work of the Planning Group at the next session.

58. The CHAIR invited the Commission to take note of the report of the Planning Group. In accordance with established practice, the relevant parts of the report would be included in due course in the report of the Commission.

59. Mr. ECONOMIDES said that, in connection with the work of the Planning Group, he wished to submit a proposal drafted by eight members of the Commission. In the light of recent events, which had shaken the international legal system, he, Mr. Addo, Mr. Baena Soares, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Pambou-Tchivounda and Mr. Rodríguez Cedeño proposed that the following text should be inserted in the report of the Commission to the General Assembly:



“The International Law Commission wishes to express its deep concern in the light of certain events which have severely tested the fundamental principles of international law that are indispensable in protecting the essential interests of the international community. Recalling the peremptory and hence non-derogable nature of the principles aimed at guaranteeing peace, security, order and stability in international relations, it underlines the absolute and universal need to uphold them.”

As an independent body dealing with international law, the Commission must emphasize in its report the need to observe the fundamental principles of international law, in particular to refrain from the use of force and the threat of the use of force in international relations. The Commission must also make itself available in efforts to strengthen those principles, which were of vital importance to all States and the international community as a whole. He hoped that the Commission would agree to the proposal, with minor amendments, if necessary.

60. Mr. PELLET said he did not endorse the proposed text, as it was too weak. It merely alluded to events, when clearly a super-Power—the United States—had carried out an armed invasion of another State, thereby contravening the provisions of the Charter of the United Nations and international law. Given the situation, there was every reason to be very concerned about the future of international law. However, if the proposal was put to the vote, he would abstain. It was not for a subsidiary body of the General Assembly to take a stance on such matters—something that the General Assembly itself could and should have done on the basis of Articles 10 and 11 of the Charter. So, even though he agreed with the substance of the proposed text, he was against its adoption by the Commission.

61. Mr. KATEKA said that, while he understood the sentiments of those submitting the proposal, the Commission had no competence to deal with such an issue in that manner. If it had been a topic for study, it could have been dealt with under normal procedures. However, to submit such a statement, which on the face of it was vague, ambiguous and innocuous, would merely be counterproductive; that was the business of political bodies such as the General Assembly and the Security Council. Many events took place at the international level that were contrary to international law, and if the Commission were to pronounce itself on each and every one, it would be diverted from its mandate. He could not, therefore, endorse the proposal.

62. Mr. BROWNLIE said he agreed with Mr. Pellet and Mr. Kateka. Although he had great respect for the concern of other members for the rule of law, he did not consider it appropriate for the Commission to take up such issues. Even if the Commission were to broach such issues in some way or another, one would have expected greater consideration from the members concerned by way of notice and for preparation.

63. The CHAIR suggested that the proposal should be taken up again in connection with the report of the Commission.

64. Mr. DUGARD wished to know when exactly the matter would be discussed again, so that those members

who were deeply concerned about it could make sure they would be present.

65. The CHAIR suggested that it should be discussed in connection with chapter XI of the report of the Commission to the General Assembly, entitled “Other decisions and conclusions of the Commission”.

*It was so decided.*

#### **Unilateral acts of States (*concluded*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>11</sup> A/CN.4/L.646)**

[Agenda item 5]

#### **REPORT OF THE WORKING GROUP**

66. Mr. PELLET (Chair of the Working Group on Unilateral Acts of States) said that he felt ill at ease about introducing the report of the Working Group (A/CN.4/L.646) in the absence of the Special Rapporteur on the topic. The report comprised two parts: the report proper, dealing with the scope of the topic and the method of work, and an annex containing commentaries on the scope of the topic. In trying to define the scope, the Working Group, like the Commission as a whole, had been divided into two main schools of thought. Some members of the Working Group had been in favour of an extremely strict definition of a unilateral act as a statement which gave rise to obligations for the party invoking it, while others had preferred a slightly broader definition, namely that a unilateral act created not only legal obligations but also legal effects. The latter had favoured a broader definition covering conduct which, without necessarily being a formal expression of will, had similar or comparable effects to that of a strictly defined unilateral act. In the end the Working Group had decided that, even if a unilateral act was defined as a statement expressing the will or consent by which a State purported to create obligations or other legal effects under international law, there was no reason why the conduct of States should not also be studied, as was indicated in Recommendations 1 and 2 (para. 6). In relation to unilateral acts, draft articles accompanied by commentaries would be proposed, while with respect to conduct State practice would be examined and, if appropriate, guidelines might be adopted, as was indicated in Recommendation 3 (*ibid.*).

67. As far as the method of work was concerned, owing to time restrictions the Working Group had merely made suggestions which the Special Rapporteur might wish to take into account at the next session. He should submit as complete a presentation as possible of State practice on unilateral acts or equivalent conduct. The material assembled should make it possible to identify rules applicable to them with a view to the preparation of draft articles accompanied by commentaries according to an orderly classification of State practice, as was indicated in Recommendations 4 to 6 (para. 8). Later reports would deal with more specific articles, as was indicated in Recommendation 7 (*ibid.*). Recommendations 1, 2 and 3 had been adopted verbatim by the Working Group. However, due to lack of time, that had not been the case with

<sup>11</sup> See footnote 2 above.

Recommendations 4 to 7, although they did accurately reflect the views of the Working Group. The commentaries on the scope of the topic had been set out in the annex to the report for similar reasons. It would be useful for the Commission to endorse the recommendations, which should be followed by the Special Rapporteur and Commission as a whole in the future, thereby bringing an end to the unhealthy habit of continually plaguing the Special Rapporteur with the subject of working methods. Admittedly, it was a compromise solution and was not entirely satisfactory, but it was one which had been the subject of consensus within the Working Group. The Special Rapporteur had indicated to him that he lent his full support to the recommendations, for which he was largely responsible.

68. Mr. KOSKENNIEMI said that he fully understood the need to find a direction for the topic and hence the compromise solution proposed. However, before being definitively adopted such a method of work should be tried out to see what results it brought.

69. Mr. PELLET (Chair of the Working Group on Unilateral Acts) said the Special Rapporteur would need to be left in peace to work on the compromise solution until the Commission could see what results it would yield. The method of work would need to be properly defined at the next session. The Working Group had by no means completed its work, but he hoped it would be reconvened at the next session with a new chair.

70. The CHAIR said that, if he heard no objection, he would take it the Commission wished to adopt the recommendations contained in the report of the Working Group on Unilateral Acts of States.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 2784th MEETING

*Monday, 4 August 2003, at 10.15 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño.

### Draft report of the Commission on the work of its fifty-fifth session

1. The CHAIR invited the members of the Commission to consider chapter IV, sections A and B, of the draft report of the Commission on the work of its fifty-fifth session, on the responsibility of international organizations.

#### CHAPTER IV. *The responsibility of international organizations* (A/CN.4/L.636 and Add.1)

##### A. Introduction (A/CN.4/L.636)

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraphs 3 to 11

*Paragraphs 3 to 11 were adopted.*

2. Mr. GAJA (Special Rapporteur) proposed that the following new paragraph should be added:

“Bearing in mind the close relationship between this topic and the work of international organizations, the Commission, at its 2784th meeting, on 4 August 2003, requested the secretariat to annually circulate the relevant chapter of the report of the Commission to the General Assembly on the work of its session to the United Nations specialized agencies and some other international organizations for their comments.”

3. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*The new paragraph 12 was adopted.*

*Section B, as amended, was adopted.*

4. The CHAIR invited the members of the Commission to consider chapter IV, section C, of the draft report.

##### C. Draft articles on the responsibility of international organizations provisionally adopted so far by the Commission

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.636 Add.1)

*Commentary to article 1* (Scope of the present draft articles)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

5. Mr. ECONOMIDES said that the last sentence was complicated and could be simplified to read: "In yet another case, an international organization may be held responsible for a wrongful act committed by another international organization of which it is a member."

6. Mr. GAJA (Special Rapporteur) said that he had no objection to that amendment and suggested the following wording: "Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member."

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

7. Mr. ECONOMIDES said that the third sentence referred to "an obligation under international law", whereas the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session<sup>1</sup> used the standard term "an international obligation". He asked whether that change was deliberate and was intended to introduce a shade of meaning. He also found that the last sentence in French was very difficult to understand and that it should be improved.

8. Mr. GAJA (Special Rapporteur), referring to the first comment by Mr. Economides, said that that wording did not reflect any intention to change the meaning of the term habitually used, but specified what was meant by an "international obligation", namely, an obligation under international law.

*Paragraph (5) was adopted, subject to the amendment Mr. Economides would propose for the French text.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

9. Mr. BROWNLIE said that a definite article should be added before the word "organ" in the fourth sentence, which would then read: "However, article 4 does not consider the status of the organ under internal law as a necessary requirement."

10. Mr. GAJA (Special Rapporteur) said that the inclusion of a definite article might change the meaning of the sentence. The English text could certainly be improved, without, however, using the definite article. The question was what an organ of the State was, and the definition contained in article 4, paragraph 2, on the responsibility of States indicated that in principle it was the internal law of the State which decided.

11. Mr. AL-BAHARNA proposed that the definite article should be replaced by an indefinite article and that reference should thus be made to the status of "an organ" under internal law.

12. Mr. BROWNLIE proposed the wording "the status of such organs in internal law", it being understood that the decision should be taken by the Special Rapporteur.

13. Mr. GAJA (Special Rapporteur) said that he opted for Mr. Brownlie's proposal. The sentence would thus read: "However, article 4 does not consider the status of such organs under internal law as a necessary requirement."

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

14. Mr. PELLET said that the commentary to article 1 should indicate what the Commission intended to do about responsibility arising out of a breach of the internal law of an organization. Paragraph (10) of the commentary to article 3 dealt with the internal law of an international organization, but it did not answer the question whether the draft articles related to the organization's responsibility in the event of a breach of its internal law. In his opinion, it would be reasonable to exclude that question, but that must be stated from the beginning, in the commentary to article 1, so that it would be clear whether a breach of internal law was covered or not.

15. Mr. GAJA (Special Rapporteur) said that that proposal gave rise to a problem because the Commission had not yet discussed what was meant by the internal law of an international organization. For some members, all the internal law of international organizations was part of international law, while for others that was true for certain elements only, such as the constituent instrument. That question should therefore be set aside for the time being, and the Commission could come back to it when discussing the objective element.

16. Mr. PELLET said it would be much wiser to say that the Commission had decided not to deal with breaches of the internal law of an organization, but if it did not want to go that far, it should add a footnote stating: "The Commission reserves the possibility of deciding later whether the draft articles should cover the responsibility of an organization for breaches of certain internal rules or its own internal law. On this point, see paragraph (10) of the commentary to article 3 below."

17. Mr. BROWNLIE said that he was not opposed to Mr. Pellet's proposal, but that it would be useful to indicate that, in the case of States, the distinction between, so to speak, the "treaty envelope" and internal law was well understood and well established, whereas it was more difficult to distinguish between the "shell" of international organizations and their internal law. If a footnote was to be added, it should explain that, in the view of some members of the Commission, the problem was how the distinction should be drawn, and that the question should be set aside for the time being.

18. Mr. PELLET said that Mr. Brownlie's comment was entirely justified, but that was explained in paragraph (10) of the commentary to article 3, which should be referred to in a footnote.

<sup>1</sup> See 2751st meeting, footnote 3.



19. Mr. GAJA (Special Rapporteur) said that such a footnote would be complicated to draft and might, as things now stood, give rise to more problems than not saying anything at all. However, he would not object if Mr. Pellet drafted the footnote in such a way as to help the reader.

20. The CHAIR suggested that the Commission should come back to paragraph (9) later.

*It was so decided.*

*Commentary to article 2 (Use of terms)*

Paragraph (1)

21. Mr. ECONOMIDES said he did not think it should be stated at the beginning of the first sentence that the definition of “international organization” given in article 2 was not intended as a general definition. That definition had in fact been drafted for a general purpose in order to cover all international organizations, but, scientifically, it could not be complete because it did not contain all the possible elements of an international organization; it was thus a definition which was appropriate for the purposes of the draft articles. It was contrary to the Commission’s main intention to say that it was not a general definition.

22. Mr. PELLET said he agreed with Mr. Economides that a good definition of international organizations in general had been given in article 2. He proposed that the words “is not intended as a general definition, but rather as” should be replaced by the word “constitutes”, which would allow the Commission not to take a stand one way or the other on whether the definition was a general one.

23. Mr. GALICKI, supported by Mr. GAJA (Special Rapporteur) and Mr. BROWNLIE, said that he was in favour of keeping the wording as it stood. He pointed out, in particular, that that “modest” wording was in keeping with the approach adopted in the 1986 Vienna Convention, in which the term “international organization” was defined exclusively for the purposes of that Convention, and that it was therefore logical to abide by that approach.

24. Mr. MOMTAZ proposed that the first sentence should be amended to read: “The definition of ‘international organization’ given in article 2 is a definition which is appropriate for the purposes of the draft articles and is not intended as a general definition.”

25. Mr. MANSFIELD, referring to the proposal by Mr. Momtaz, suggested the following wording: “The definition of ‘international organization’ given in article 2 is considered appropriate for the purposes of the draft articles and is not intended as a definition for all purposes.”

26. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted paragraph (1), as amended by Mr. Momtaz and Mr. Mansfield.

*It was so decided.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

27. Mr. PELLET said that the sixth sentence was meaningless because “intergovernmental organization” usually did not mean either the constituent instrument of the organization or the members composing it, but the entity which resulted from the constituent instrument and was composed of members. The sentence should be either deleted or amended.

28. Mr. GAJA (Special Rapporteur) said that the words “refers to” should be translated into French by the word *visé*. The term “intergovernmental organization” did in fact give rise to a problem to which he had referred in his report and which had been raised during the plenary discussion. That was one of the reasons why the Commission had abandoned the traditional definition of the term “international organization”.

29. Mr. BROWNLIE said that the word “anyway” should be replaced by the words “in any case”.

30. Mr. ECONOMIDES said that, as a result of the amendment of paragraph (1), the words “and not as a general definition” in the second sentence should be replaced by the words “and not for all purposes”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

31. Mr. GAJA (Special Rapporteur), replying to a request for clarifications by Mr. Brownlie, proposed that the fourth sentence should be amended to read: “In other cases, although an implicit agreement may be held to exist, member States insisted that no treaty has been concluded to that effect, as, for example, in respect of OSCE.” The purpose of the amendment was to make it clear that States did not question the existence of the international organization, but only that of an implicit agreement.

32. Mr. RODRÍGUEZ CEDEÑO said that, contrary to what was stated in the sixth sentence, General Assembly resolutions could be binding. In addition, UNCTAD, referred to in the seventh sentence, was not an international organization but an organ of the United Nations, and should therefore not be given as an example of an international organization.

33. Mr. GAJA (Special Rapporteur) said it could not be inferred from the English text that all General Assembly resolutions were not binding. He was prepared to delete the reference to UNCTAD, if the Commission so wished.

34. Mr. BROWNLIE said that many authors regarded UNCTAD as an international organization. It was not so much the binding nature of a resolution as the general attitude of States, a kind of informal consent to establish an international organization, that was decisive.

35. Mr. ECONOMIDES, supporting Mr. Rodríguez Cedeño, proposed that the words “non-binding” should be replaced by the words “soft law”. It was from the point

of view of the internal system that the question must be approached. Not all resolutions establishing international organizations were binding, but the rules of procedure of those organizations were binding.

36. Mr. MOMTAZ said that what were important were the will and the intention of States to establish an international organization by means of such non-binding instruments. That intention should be referred to.

37. Mr. RODRÍGUEZ CEDEÑO proposed the wording “international instruments other than treaties by which States seek to establish an international organization”. In his view, regarding UNCTAD as an international organization might create problems involving the attribution of responsibilities because it could not be held responsible for an internationally wrongful act.

38. Mr. GAJA (Special Rapporteur) said that the fifth sentence met Mr. Rodríguez Cedeño’s concerns.

39. Mr. MATHESON proposed the wording “a non-binding instrument adopted by the General Assembly”.

40. Mr. MOMTAZ said that the criterion to be adopted in paragraph (4) was whether international legal personality existed or not. In that case, the deletion of the reference to UNCTAD would be justified.

41. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the amendment of the fourth sentence proposed by the Special Rapporteur and the deletion of the words “non-binding” in the sixth sentence and the reference to UNCTAD in the seventh sentence.

*It was so decided.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

42. Mr. BROWNLIE proposed that, in the last sentence, the words “any way” should be deleted because they were not necessary.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

43. Mr. PELLET questioned the logic of the third sentence, which referred to the more recent dicta of ICJ on the legal personality of international organizations without explaining what the earlier ones had been.

44. Following a discussion on the relationship between the recent dicta and the advisory opinion on the *Reparation for Injuries* case, in which Mr. PELLET, Mr. GAJA (Special Rapporteur), Mr. MANSFIELD, Mr. BROWNLIE and Mr. GALICKI took part, the Special Rapporteur suggested that the words “more recent” should be deleted.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

45. Mr. PELLET said that paragraph (10) did not explain why the usual wording, according to which the legal personality of an organization must be “distinct” from that of its member States”, was not used instead of the wording of article 2, according to which the legal personality of the organization should be its “own”.

46. Mr. ECONOMIDES said that the words “own legal personality” were better because they referred to the autonomous legal personality of international organizations. He found it surprising that the last sentence ruled out the possibility that a certain conduct could also be attributed to all the members of the organization and not only to one or more of them. He therefore proposed that the end of the paragraph should read: “to one or more of its members, or to all of its members”.

47. Mr. PAMBOU-TCHIVOUNDA said that the majority of the members of the Drafting Committee had considered that the words “distinct from that of its members” and the word “own” meant the same thing and had therefore opted for the latter in order to economize on wording.

48. Mr. PELLET proposed that, for the sake of clarity, the word “own” should be followed by the words “a term that the Commission considers synonymous with the phrase ‘distinct from that of its member States’”.

*Paragraph (10) was adopted, subject to the two changes proposed by Mr. Economides and Mr. Pellet.*

Paragraph (11)

49. Mr. PELLET said it was regrettable that the Commission did not refer in paragraph (11) to the question of organizations of international organizations, of which the Joint Vienna Institute was the best example, even if only to indicate that it was not adopting a position in that regard.

50. Mr. BROWNLIE said that he shared Mr. Pellet’s view.

51. Mr. GAJA (Special Rapporteur) said that, in principle, that type of organization was covered by the general clause in the commentary to article 1 stating that the fact that an entity did not correspond to the definition of an international organization did not mean that the principles embodied in the draft articles could not be applied to it. It was better, moreover, not to refer specifically to organizations established by international organizations in order not to introduce concepts that were not clear, such as the indirect role of States, particularly as that phenomenon was, for the time being, limited.

52. Mr. ECONOMIDES said that organizations of international organizations were not covered by the definition adopted by the Commission. He would nevertheless agree

that the commentary should explain that the Commission did not intend to take a position on those entities.

53. Mr. GAJA (Special Rapporteur) proposed that a note on the Joint Vienna Institute should be added to paragraph (11) later in order to explain that, without taking a position on such entities, the Commission considered that they were included in the above-mentioned general clause.

*Paragraph (11) was adopted, subject to the addition of the note the Special Rapporteur would prepare on the basis of his proposal.*

Paragraph (12)

54. Ms. ESCARAMEIA said that the words “rather than States” in the last sentence could lead to the conclusion either that the paragraph contradicted article 2 or that the Commission was using the word “State” to mean two different things.

55. Mr. GAJA (Special Rapporteur) suggested that the words “rather than States” should be deleted.

*Article (12), as amended, was adopted.*

Paragraph (13)

56. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence, the words “associate or affiliate” should be added between the word “additional” and the word “members” because, in many cases, entities other than States did not have full membership status within international organizations that admitted them.

57. Ms. ESCARAMEIA said that some regional trade organizations in Asia had accepted territories such as Macao, Hong Kong and Taiwan as full members.

58. Mr. GAJA (Special Rapporteur) said that it was difficult to generalize one way or another, but, for accuracy’s sake and in order to reply to Mr. Rodríguez Cedeño’s comment, he would check the Convention of the World Meteorological Organization and, if necessary, amend the footnote.

*Paragraph (13) was adopted, subject to that reservation.*

Paragraph (14)

59. Mr. MOMTAZ said that, for accuracy’s sake, the word “international” should be added before the word “responsibility” in the first sentence.

60. Mr. GAJA (Special Rapporteur) said that the same amendment should be made in the second sentence.

*Paragraph (14), as amended, was adopted.*

*The commentary to article 2, as amended, was adopted.*

*Commentary to article 3 (General principles)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

61. Mr. PELLET said that the second sentence was hard to understand and very clumsy. He proposed that the beginning should be amended to read: “A judicial statement of this principle appears in the advisory opinion of ICJ...”.

62. Mr. PAMBOU-TCHIVOUNDA said that the word “judicial” was not necessary because reference was being made to ICJ.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

63. Mr. BROWNLIE said that the beginning of the last sentence was incorrect and should be amended to read: “Thus, in appropriate circumstances...”.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) and (9)

*Paragraphs (8) and (9) were adopted.*

Paragraph (10)

64. Mr. PELLET said that, probably because of the way it had been translated from English into French, the fifth sentence of the French text was meaningless. He would prepare a revised translation himself and submit it to the secretariat.

65. Mr. GAJA (Special Rapporteur), supporting the proposal by Mr. Pellet, said that, at the beginning of that sentence, the words *à la charge* should be replaced by the words *à l’égard*.

66. Mr. ECONOMIDES said that, since the internal law of international organizations as a whole belonged to international law, it was incorrect to say, as the Commission had done in the fourth sentence, that “some further parts of the internal law of the organization” belonged to international law. He therefore proposed that the end of the sentence should be amended to read: “and the other parts of its internal law, which belonged to international law”.

67. Mr. PELLET said that the question raised by Mr. Economides was actually much more complex and controversial than he had suggested and that the Commission could not take such a definite position by way of the commentary to a draft article.

68. Mr. ECONOMIDES proposed that, in order to take account of Mr. Pellet’s comment, the end of the sentence



should be amended to read: “and other parts of its internal law which belong to international law”.

*Paragraph (10), as amended, was adopted, on the understanding that Mr. Pellet would submit a revised translation of the fifth sentence to the secretariat.*

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 1 (Scope of the present draft articles) (concluded)*

Paragraph (9) (concluded)

69. The CHAIR invited the Commission to consider the footnote which would be indicated by an asterisk at the end of paragraph (9) of the commentary to article 1, the text of which had been distributed to the members of the Commission and which read:

“The Commission has not yet adopted a position on whether the draft articles will apply to violations of what is sometimes called the ‘internal law of international organizations’ and intends to take a decision on this question later. For a discussion of the problems to which the concept of the ‘internal law of international organizations’ gives rise, see paragraph (10) of the commentary to article 3.”

70. Mr. GAJA (Special Rapporteur) suggested that the word “whether” should be replaced by the words “the extent to which” to give the Commission some room for manoeuvre.

71. Mr. PELLET proposed that both terms should be retained.

72. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted that proposal.

*It was so decided.*

*The commentary to article 1, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter IV of the report, as amended, was adopted.*

#### CHAPTER V. Diplomatic protection (A/CN.4/L.637 and Add.1–4)

73. The CHAIR invited the members of the Commission to consider, with a view to its adoption, chapter V of the draft report of the Commission on diplomatic protection.

#### A. Introduction (A/CN.4/L.637)

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.637 and Add.1 and 4)

Paragraphs 12 to 14 (A/CN.4/L.637)

*Paragraphs 12 to 14 were adopted.*

Paragraph 15

74. Mr. GAJA (Special Rapporteur) said that a sentence reflecting the Commission’s consideration of draft articles 21 and 22 should be added to paragraph 15 or to a new paragraph 16.

75. The CHAIR said that that would be done by the Rapporteur in consultation with the Special Rapporteur. He invited the members of the Commission to consider document A/CN.4/L.637/Add.1, which related to the consideration of articles 17 to 20.

*Paragraph 15 was adopted, subject to the amendment proposed.*

Paragraph 16 (A/CN.4/L.637/Add.1)

*Paragraph 16 was adopted.*

Paragraph 17

76. Mr. GAJA said that the words “State of nationality of the”, which had been left out by mistake, should be added before the word “corporation”.

77. Mr. PELLET said that the phrase “and might even be corporations” should be added after the phrase “nationals of many countries”.

78. Mr. DUGARD (Special Rapporteur) said that he supported the proposal by Mr. Pellet.

*Paragraph 17, as amended, was adopted.*

Paragraph 18

*Paragraph 18 was adopted.*

Paragraph 19

79. Mr. BROWNLIE, referring to the *ELSI* case, said that there seemed to be a contradiction between paragraph 19 and paragraph 51. He proposed that the Special Rapporteur should take another look at those two paragraphs.

80. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 2785th MEETING

Monday, 4 August 2003, at 3.05 p.m.

Chair: Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

#### CHAPTER V. *Diplomatic protection* (concluded) (A/CN.4/L.637 and Add.1-4)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter V, section B, of the draft report of the Commission on the work of its fifty-fifth session.

#### B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.637 and Add.1 and 4)

Paragraph 19 (*concluded*) (A/CN.4/L.637/Add.1)

2. Mr. MOMTAZ questioned the need for the last part of the first sentence, which read: “given that decisions of ICJ were not binding on the Commission”. He suggested deleting it, particularly in view of the reference in the last sentence to the *Barcelona Traction* case as a true reflection of customary international law.

3. Mr. PELLET recalled that the Special Rapporteur had specifically mentioned in his report the fact that the decisions of ICJ were not binding on the Commission. It was therefore for him to decide whether that part of the sentence should be deleted.

4. Mr. DUGARD (Special Rapporteur) confirmed that statement and said he had even cited instances in which the Commission had not followed the decisions of ICJ. He was therefore in favour of retaining the last part of the sentence.

5. Mr. BROWNLIE said that, since the Commission was a deliberative body and not one that dealt with cases, the question of whether it should be bound by the decisions of ICJ did not arise.

6. Mr. DUGARD (Special Rapporteur) recalled that the issue at stake had been whether the Commission could disregard the *Barcelona Traction* case and formulate rules of its own. He had made it clear at the very outset that it was possible to do so, and the debate had proceeded on

that basis. The last part of the first sentence might well be considered tautological, but the first part, which stated that it was for the Commission to decide on such matters, must be retained.

7. Mr. ECONOMIDES endorsed the suggestion by Mr. Momtaz. As currently worded, the phrase in question might give the impression that the judgments of ICJ were worthless. If the phrase were not deleted then a more accurate formulation should be found.

8. Mr. BROWNLIE suggested the wording “given that decisions of ICJ were not necessarily binding on the Commission given the different responsibilities of the two bodies”. That would make it quite clear that the Commission was not in competition with the Court.

9. Mr. DUGARD (Special Rapporteur) endorsed that suggestion.

10. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the wording suggested by Mr. Brownlie, but he suggested, to avoid repetition, that “given the different responsibilities of the two bodies” should read “bearing in mind the different responsibilities of the two bodies”.

*It was so decided.*

11. Mr. DUGARD (Special Rapporteur) recalled that at the previous meeting Mr. Brownlie had drawn attention to an inconsistency between the second sentence of paragraph 19 and paragraph 51. Further to consultations with Mr. Brownlie, he would suggest that the first part of the second sentence should be reworded to read: “He observed that, in the *ELSI* case, although the Chamber of the Court was there dealing with the interpretation of a treaty and not customary international law, it had overlooked the *Barcelona Traction* case...”.

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 to 23

*Paragraphs 20 to 23 were adopted.*

Paragraph 24

12. Mr. GAJA said that, in the light of the amendment to paragraph 19, paragraph 24 would need to be expanded slightly to make it quite clear that the *ELSI* case by no means contradicted *Barcelona Traction*, as had been pointed out during the debate on the subject. He suggested that, after the first sentence, a new sentence should be inserted to read: “This was held not to be contradicted in the *ELSI* case.”

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 to 37

*Paragraphs 25 to 37 were adopted.*

## Paragraph 38

13. Mr. DUGARD (Special Rapporteur) enquired as to the status of the text of article 17, which had been adopted by consensus in the Drafting Committee as a working basis for discussion at the fifty-sixth session. Perhaps some reference should be made to it in the paragraph.

14. Mr. MANSFIELD (Rapporteur) said he agreed with the Special Rapporteur. The paragraph was somewhat misleading, as it merely reproduced the text referred by the Working Group to the Drafting Committee, when in fact the Committee had reached consensus on a text.

15. Mr. KATEKA (Chair of the Drafting Committee) said that technically, since he had not reported to plenary on the outcome of the Drafting Committee's discussion on article 17, the matter should be held in abeyance until the next session. However, it was essential that discussion should not be reopened on the subject as a result.

16. Mr. GAJA drew attention to paragraph 14 of document A/CN.4/L.637, which stated that at its 2764th meeting the Commission had decided to refer article 17 to the Drafting Committee. It would be helpful for whoever was reading paragraph 38 of the document now under consideration to know exactly what the status of the article was. Perhaps a new sentence could be added to that effect. Moreover, for the sake of consistency, information on the status of all texts referred to the Drafting Committee should be included throughout the report.

17. The CHAIR said that paragraph 14 of document A/CN.4/L.637 would seem to meet the Special Rapporteur's concern.

18. Mr. DUGARD (Special Rapporteur) said his main concern was that the whole issue would not be reopened for discussion at the fifty-sixth session, given that the Drafting Committee had met twice to discuss the text and had reached consensus on it.

19. Mr. PELLET said he felt uncomfortable about mentioning something in the report which had not been reported to plenary earlier in the session. He assured the Special Rapporteur that the whole issue would not be reopened for discussion at the next session.

20. The CHAIR said that the Secretary had noted the status of the text and the concerns expressed, which would be taken into account when dealing with it at the next session. On that understanding, he would take it that the Commission wished to retain the text of paragraph 38 as it stood.

*It was so decided.*

## Paragraphs 39 to 44

*Paragraphs 39 to 44 were adopted.*

## Paragraph 45

21. Mr. PELLET, referring to the penultimate sentence, questioned the appropriateness of the phrase in the French text *plusieurs conventions d'investissement* given that more than 2,000 investment conventions were involved.

He suggested that it should be replaced by the words *un grand nombre de conventions d'investissement*.

22. Mr. GAJA suggested that in the English text the word "conventions" be replaced by "treaties".

23. Mr. BROWNLIE suggested by way of solution that the phrase "treaties and conventions" might be used, as was sometimes done in English text.

24. The CHAIR endorsed Mr. Gaja's suggestion, which was in line with the wording of the 1969 and 1986 Vienna Conventions.

25. Mr. DUGARD (Special Rapporteur), supported by Mr. Sreenivasa RAO, also stated a preference for the word "treaties". He had used that term in his report when referring to bilateral investment treaties.

26. Mr. PELLET said that the word *conventions* should be retained in the French version.

*Paragraph 45, as amended, was adopted.*

## Paragraphs 46 to 48

*Paragraphs 46 to 48 were adopted.*

## Paragraph 49

27. Mr. ECONOMIDES said that the last sentence of the paragraph did not read very well, at least in the French version.

28. Mr. DUGARD (Special Rapporteur) agreed and suggested that the text should be reworded: "His own view was that a customary rule was developing and that the Commission should be encouraged to engage in progressive development of the law in this area, if necessary. However, it should do so with great caution."

*Paragraph 49, as amended, was adopted.*

## Paragraphs 50 to 69

*Paragraphs 50 to 69 were adopted.*

**C. Draft articles on diplomatic protection provisionally adopted so far by the Commission (A/CN.4/L.637/Add.2 and 3)**

**1. TEXT OF THE DRAFT ARTICLES (A/CN.4/L.637/Add.2)**

**Article 9 [11] (Categories of claims)**

29. Mr. PELLET said that he was about to take a course of action of which he strongly disapproved: he wished to call into question the title of draft article 9 [11], even though it had already been adopted. The use of the French word *classement*, which the multilingual Mr. Gaja had told him translated into English as "shelving", was, however, totally inappropriate. That was not what draft article 9 [11] dealt with. At the very least, therefore, he would wish to see the French text aligned with the English word "classification". Even in English, however, "classification" was not quite right. The expression "characterization of claims" (and in French *qualification des réclamations*) would be preferable.



30. Mr. DUGARD (Special Rapporteur) said that his original title had been “Nature of claims”, which had been judged too bland. Mr. Pellet’s suggestion was acceptable to him if it commanded general support.

31. Mr. BROWNLIE said he feared he had been a member of the language group that had endorsed the title. Although not ideal, “characterization” of claims was greatly preferable to “classification”.

32. Ms. ESCARAMEIA suggested that the simplest solution would be to use the expression “types of claims”. The French version would be *types* and the Spanish *tipos*.

33. Mr. PELLET suggested the word “categories”, which, like “types”, was virtually the same in all three languages.

34. Mr. DUGARD (Special Rapporteur) concurred. “Categories” had the same meaning as “types” but was more elegant. The episode should be a lesson to the Commission that, in its satisfaction at drafting an acceptable text, it should not overlook other details.

35. The CHAIR, after expressing his concern that the Commission was breaking with every known precedent, said that, if he heard no objection, he would take it that the title of draft article 9 [11] should be amended to “Categories of claims”.

*Section C.1, as amended, was adopted.*

**B. Consideration of the topic at the present session (concluded)  
(A/CN.4/L.637 and Add.1 and 4)**

Paragraphs 70 and 71 (A/CN.4/L.637/Add.4)

*Paragraphs 70 and 71 were adopted.*

Paragraph 72

36. The CHAIR said that the words “article 5” in the second sentence of the English text should read “article 55”.

*Paragraph 72, as amended, was adopted.*

Paragraphs 73 to 77

*Paragraphs 73 to 77 were adopted.*

Paragraph 78

37. Ms. ESCARAMEIA said that the last sentence of the paragraph did not fully reflect the debate. She—and, she believed, others—had said that the provision should not be recast as a rule of priority. In order, therefore, to avoid giving the impression that the remedy in question must be exhausted before diplomatic protection could apply, she suggested that the following sentence might be added at the end of the paragraph: “The view was also expressed that a regime of priority could not be presumed, and that a ‘special regime’ could not always be seen as the remedy that needed to be exhausted before diplomatic protection could apply.”

*Paragraph 78, as amended, was adopted.*

Paragraphs 79 to 84

*Paragraphs 79 to 84 were adopted.*

Paragraph 85

38. Mr. GAJA said he welcomed the inclusion of the paragraph. Indeed, it was the kind of paragraph that he would have welcomed at the conclusion of the previous discussion: it would be very useful for the reader to be informed that a given draft article had been referred to the Drafting Committee, without needing to consult other documents to see what action had been taken.

39. Mr. MIKULKA (Secretary of the Commission) said that the paragraph had been included because of the specific nature of its content. Since the question of referring articles to the Drafting Committee was traditionally dealt with in another part of the report, it would, rather, be confusing to insert such paragraphs elsewhere, since the expectation would be raised that similar wording would be found in other chapters.

40. Mr. Sreenivasa RAO said that inverted commas should be inserted around the words “without prejudice”.

41. Mr. ECONOMIDES said that, according to his recollection, the decision had not been as clear-cut as was indicated in the paragraph. The suggestion that the provision should be reformulated as a “without prejudice” clause had been forcefully made, but other views had been expressed. The second half of the sentence should be made less categorical with the addition of a phrase such as “in particular”.

42. Mr. DUGARD (Special Rapporteur) recalled that the paragraph reflected the Chair’s support of the provision, which he himself had proposed should be deleted. There had been little discussion but general agreement with the Chair’s proposal to refer the provision to the Drafting Committee. It had been felt that it would be useful to reach agreement on a clause that retained the notion of the “special regime” but did not prejudice other regimes, particularly diplomatic protection.

43. The CHAIR acknowledged that he had seen some merit in retaining a clause that contemplated the existence of other regimes, such as bilateral investment treaties or human rights treaties. Such a clause should be of a general nature and should appear at the end of the draft articles, so that special regimes could be retained without necessarily being made *lex specialis*.

44. Mr. MATHESON confirmed that a “without prejudice” clause had been only one of several possibilities. He therefore suggested that the second half of the paragraph should be reworded along the following lines: “... with a view to having it reformulated and located at the end of the draft articles—for example, as a ‘without prejudice’ clause”.

*Paragraph 85, as amended, was adopted.*

Paragraphs 86 to 89

*Paragraphs 86 to 89 were adopted.*

Paragraph 90

45. Mr. GAJA said that two words had been omitted from the last sentence, which should read: "... provided that the place of management is located or registration takes place in the territory of the same State".

*Paragraph 90, as amended, was adopted.*

Paragraph 91

*Paragraph 91 was adopted.*

Paragraph 92

46. Ms. ESCARAMEIA suggested that the first word, "Several", should be replaced by "Some"; according to her recollection, only one person had expressed concern about the resort to diplomatic protection for the benefit of legal persons other than corporations, which was consistent with the view described in paragraph 93 that the Commission should not draft rules on the diplomatic protection of other legal persons. The opposite point had also been made: that States could always protect any other legal person. The following sentence should be added at the end of the paragraph: "Other speakers thought that diplomatic protection extended to all other legal persons, including non-governmental organizations, and that, anyway, States had always the discretionary power of protecting their own nationals."

47. Mr. DUGARD (Special Rapporteur) said that he supported the proposal, which more accurately reflected the balance of the debate.

48. Mr. KATEKA (Chair of the Drafting Committee) proposed that the second half of the proposed text should be reworded along the following lines: "... and that in any case States had the discretionary right to protect their own nationals".

49. Mr. RODRÍGUEZ CEDEÑO said that some explanatory phrase ought to be added to the term "non-governmental organizations". He therefore proposed that a phrase should be inserted after "organizations", namely, "the establishment and functioning of which were generally governed by the domestic law of those States".

*Paragraph 92, as amended, was adopted.*

Paragraphs 93 to 97

*Paragraphs 93 to 97 were adopted.*

*Section B, as amended, was adopted.*

### C. Draft articles on diplomatic protection provisionally adopted so far by the Commission (concluded)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.637/Add.3)

*Commentary to article 8 [10] (Exhaustion of local remedies)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

50. Mr. GAJA pointed out that, although all mention of the burden of proof had been removed from the article itself, it had reappeared in the commentary, and, in that connection, he was against the reference to the *ELSI* case, where it had been stated that the burden of proof was on the defendant, because in that case no distinction had been drawn between the existence of remedies and their effectiveness. He therefore urged the deletion of any allusion to the burden of proof and to the *ELSI* case.

51. Mr. DUGARD (Special Rapporteur) said that, while he could see the justification for dropping a reference to the *ELSI* case, he wondered if it was wise to omit all reference to the burden of proof, because the Commission had debated the matter at some length and some mention of it in the commentary would show that the Commission was aware of that thorny issue. Moreover, the commentary did distinguish between the two situations.

52. Mr. GAJA said that, after the protracted discussion to which the Special Rapporteur had alluded, many Commission members had decided that it was not proper to deal with the question of the burden of proof in a draft article, and therefore the commentary should also be silent on the matter. The rules on burden of proof varied tremendously, and even in the case law of the European Court of Human Rights those rules were evolving. As a compromise, he suggested that reference should be made to the subject in a footnote.

53. Mr. DUGARD (Special Rapporteur) said that most studies on the exhaustion of local remedies touched on the burden of proof and the Commission should not convey the impression that it had ignored the matter, particularly as the Commission had expunged the adjectives "adequate and effective" from the reference to local remedies. For that reason, he suggested inserting the word "generally" before "on the applicant State" and starting the footnote with the phrase "See also the *ELSI* case".

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted with minor drafting changes.*

Paragraph (6)

54. Mr. GAJA said that he was not in favour of quoting the *Finnish Ships Arbitration* as an authority that "all the contentions of fact and propositions of law which are

brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts” [p. 1502], because it established too stringent a test. He would rather use language from the *ELSI* case, namely, “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success” [p. 46, para. 59]. That criterion was more recent, more accurate and more flexible. Reference could be made to the *Finnish Ships Arbitration* in the footnote.

55. Mr. PELLET agreed with Mr. Gaja and recommended that the whole text of the paragraph should be reformulated.

56. Mr. DUGARD (Special Rapporteur) suggested the following wording:

“In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of ICJ stated that, ‘for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success’. This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that ‘all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts’. The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.”

The last sentence would not be amended.

57. The CHAIR noted that the footnotes would be modified accordingly.

*Paragraph (6), as amended, was adopted.*

*The commentary to article 8 [10], as amended, was adopted.*

*Commentary to article 9 [11] (Categories of claims)*

Paragraph (1)

58. Mr. GAJA said that he objected to the last sentence of the paragraph, as the principle cited was often invoked in the context of jurisdictional immunity, whereas in the case in point the foreign State had no immunity and there was no reason why it should not use local foreign courts. The sentence should be deleted, because it might confuse the reader, as it referred to a case in which the foreign State had been a defendant and was therefore inappropriate.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted with minor drafting changes.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

*The commentary to article 9 [11], as amended, was adopted.*

*Commentary to article 10 [14] (Exceptions to the local remedies rule)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted with minor drafting changes.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

*Paragraph (5) was adopted with minor drafting changes.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

*Paragraph (8) was adopted with minor drafting changes.*

Paragraph (9)

59. Mr. PELLET raised the question of italicization of Latin names and in references to the cases cited in Commission documents.

60. Mr. MIKULKA (Secretary of the Commission) undertook to check the editorial rules on italicization.

*Paragraph (9) was adopted with minor drafting changes.*

Paragraph (10)

61. Mr. MOMTAZ drew attention to the word “accidentally” in the first sentence, referring to the shooting down of an aircraft, and said it was not for the Commission to say whether such an action was taken “accidentally” or not. In some of the cases given as examples, the question was still at issue between the countries concerned. The word “accidentally” should be deleted. In the third sentence, relating to the aerial incident between Iran and the United States, the words *ex gratia* which appeared in the English version had been omitted in the French. It was important to know which text was authoritative. Since the



United States had never acknowledged a breach of international law, he questioned whether the case was relevant in the context of diplomatic protection.

62. Mr. MATHESON said it was a measure of the extent of Iranian-American cooperation that he, too, questioned the relevance of the case. Paragraph (10) of the commentary was intended to provide practical examples of cases in which States agreed to do away with the exhaustion of local remedies as a precondition for permitting certain kinds of claims. The *Aerial Incident of 3 July 1988* case between the United States and Iran had involved an offer of *ex gratia* payment, not a legal claim, and had certainly not entailed overlooking the exhaustion of local remedies rule as a precondition for bringing claims. He accordingly suggested that the sentence be deleted.

63. Mr. BROWNLIE said that, while the precedents given in paragraph (10) of the commentary should not be entirely ignored, he had doubts about whether they constituted viable examples: they were bargained settlements on an *ex gratia* basis. The claim by Pakistan against India (*Aerial Incident of 10 August 1999*) had involved the destruction of a State aircraft, and the local remedies rule would not have been applicable in any event.

64. Mr. CHEE said he endorsed Mr. Momtaz's comments. The shooting down of an aircraft, even if "accidental", was prohibited by the relevant article of the Protocol relating to an amendment to the Convention on International Civil Aviation (art. 3 *bis*), adopted by ICAO in 1984. If an aircraft, whether military or passenger, strayed into foreign airspace, the country concerned had to guide it to land at the nearest airport.

65. Mr. DUGARD (Special Rapporteur) said it was a pity the issue had not been raised earlier, but it did seem that paragraph (10) of the commentary had been shot down. If the Commission wished, he would try to salvage it, perhaps by deleting the first part relating to aircraft destruction and retaining the second part on transboundary environmental damage.

66. Mr. GALICKI pointed out that the example given in the last sentence was not appropriate inasmuch as the Convention on International Liability for Damage Caused by Space Objects established a special regime which could not be treated as support for the thesis advanced in paragraph (10). It had already been agreed that self-contained regimes should not be taken into account because they used specific systems applicable only to the situations governed by the relevant conventions.

67. Mr. ECONOMIDES said that, while some of the examples given in paragraph (10) might need to be deleted, the references in the footnotes of the paragraph to specific precedents should be retained. A solution might be to retain the first sentence, deleting the word "accidentally", and to attach a single footnote that combined the footnotes of the paragraph.

68. Mr. PELLET said that was not really a proper solution. If the examples were not pertinent, they remained so irrespective of whether they were placed in the text or in footnotes.

69. After further contributions to the discussion from Mr. BROWNLIE and Mr. CHEE, the CHAIR suggested that the Special Rapporteur be assigned the task of revising the paragraph in the light of the comments made.

70. Mr. DUGARD (Special Rapporteur) said that he would prefer to see the entire paragraph deleted.

*It was so decided.*

Paragraphs (11) to (18)

*Paragraphs (11) to (18) were adopted.*

*The commentary to article 10 [14], as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Chapter V of the report, as amended, was adopted.*

71. Mr. DUGARD (Special Rapporteur) thanked the members of the Commission for the careful reading they had given to the commentary and for all the corrections, editorial as well as substantive, that they had proposed. Their efforts ensured that the commentary did what it was supposed to do, namely, reflect the views of the Commission.

#### CHAPTER VIII. *Reservations to treaties* (A/CN.4/IL.640 and Add.1-3)

##### A. *Introduction* (A/CN.4/L.640/Add.1)

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted with a minor editing change in paragraph 5.*

Paragraphs 10 to 15

72. Mr. PELLET (Special Rapporteur) queried the use of the words "the Commission provisionally adopted" in paragraphs 10, 13 and 15. It was his understanding that the draft guidelines in question had been adopted on first reading.

73. The CHAIR pointed out that a text was adopted on first reading only when all of its constituent elements were available. The Secretariat would investigate the situation and ensure consistency throughout the draft report further to the comments by the Special Rapporteur.

*Paragraphs 10 to 15 were adopted.*

Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.640 Add.1–3)**

Paragraphs 18 to 21 (A/CN.4/L.640/Add.1)

*Paragraphs 18 to 21 were adopted.*

**C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.640 and Add.1)**

**1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.640/Add.1)**

Paragraph 22

*Paragraph 22 was adopted.*

*Section C.1 was adopted.*

**Organization of work of the session (concluded)\***

[Agenda item 2]

74. Mr. PELLET said that the meetings being held at the present session to discuss reservations to treaties with individual human rights bodies were extremely interesting. It might be useful, however, to hold a general colloquium or symposium bringing together all the human rights bodies for a slightly more structured discussion, perhaps on the basis of reports. Such a meeting could be held during the Commission's session in 2004 or 2005; it would be particularly useful before the Commission took a decision on the preliminary conclusions on reservations to multi-lateral normative treaties, including human rights treaties, that it had adopted at its forty-ninth session.<sup>1</sup> What did members of the Commission think?

75. Mr. DUGARD said he strongly supported the proposal and thought it should be implemented in 2004, if possible. The meetings with human rights bodies had been encouraging. They should become an ongoing dialogue on an issue on which there was a great need for cooperation.

76. Mr. MANSFIELD said he also supported the proposal. The meetings with human rights bodies had allowed some progress to be made in harmonizing positions that had initially appeared very far apart. The organizational aspects of implementing the proposal, including venue and cost implications, should be investigated.

77. Ms. ESCARAMEIA said the meetings with human rights bodies were extremely useful but what was lacking was some sort of structure. Often the bodies had taken positions in individual cases but had not reflected very deeply on the overall question of reservations. She would like to see the dialogue with individual bodies continued, with particular emphasis on their reasoning about reservations to the treaties that concerned them. As for holding a symposium, it was certainly an interesting idea and she could support it, but not at the expense of a continuing dialogue with individual human rights bodies.

78. Mr. Sreenivasa RAO said exchanges were useful but should not amount to negotiation between the Commission and the human rights bodies.

79. Mr. BROWNLIE said the proposal was very attractive from the logical standpoint, but his intuitive reaction was that it was premature. It would be absolutely appropriate, but at a later stage in the dialogue with the human rights bodies. Bilateral, somewhat informal contacts were probably all they were prepared for at the moment. They were feeling their way forward, and the Commission should not be seen to be imposing a structure on the discussion or pressing for a resolution of the issue.

80. Mr. PELLET said the point was for everyone to feel the way forward together. He understood Mr. Sreenivasa Rao's concerns about not entering into negotiations, but it would be useful to seek a synthesis of positions about reservations to treaties, especially since he sincerely hoped that in 2005 the Commission would adopt a decision on the preliminary conclusions it had adopted at its forty-ninth session. He would not, however, press his proposal.

81. The CHAIR said there was no substantive opposition to Mr. Pellet's proposal but some questions had been raised about the logistical implications. Members of the Commission should continue to reflect on the idea.

*The meeting rose at 6.05 p.m.*

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## 2786th MEETING

*Tuesday, 5 August 2003, at 10 a.m.*

*Chair: Mr. Enrique CANDIOTI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, 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. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.*

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\* Resumed from the 2780th meeting.

<sup>1</sup> See 2781st meeting, footnote 11.

## Draft report of the Commission on the work of its fifty-fifth session (*continued*)

### CHAPTER VIII. *Reservations to treaties* (continued) (A/CN.4/L.640 and Add.1–3)

#### C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.640 and Add.1)

#### 2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.640)

*Commentary to the explanatory note*

Paragraph (1)

1. Mr. GAJA proposed that the words “Following a suggestion by the Drafting Committee”, which were inappropriate in that context, should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

2. Mr. GAJA, referring to the peremptory tone of the last sentence, said it suggested that readers were incapable of reaching their own conclusions and had to rely on the commentaries to the model clauses to determine whether the situation was one in which the inclusion of the clauses in the treaty would be useful.

3. Mr. MANSFIELD proposed that the words “alone can determine” should be replaced by the words “may help in determining”.

*Paragraph (4), as amended, was adopted.*

*Commentary to draft guideline 2.5 (Withdrawal and modification of reservations and interpretative declarations)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph [(3)]

4. Mr. PELLET (Special Rapporteur) said that, since the Commission had not adopted draft guideline 2.3.5, paragraph [(3)] should be deleted for the time being.

*Paragraph [(3)] was deleted.*

Paragraph (4)

*Paragraph (4), which became paragraph (3), was adopted with a minor drafting change.*

*Commentary to draft guideline 2.5.1 (Withdrawal of reservations)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted with minor drafting changes.*

Paragraph (3)

5. Mr. GAJA noted that paragraph (3) stated that the new draft article 19 no longer mentioned the notification procedure for the withdrawal of reservations. The proposal by Sir Gerald Fitzmaurice on formal notification<sup>2</sup> was reproduced in full in paragraph (2), while the description of the notification procedure proposed by Sir Humphrey Waldock<sup>3</sup> was relegated to a footnote. It would be clearer if it was included in the body of paragraph (3) in order to indicate that there had been a specific proposal on the notification procedure.

6. Mr. PELLET (Special Rapporteur) said that he agreed with that proposal and indicated that some footnotes corresponding to the paragraph in question should be merged.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

Paragraph (10)

7. Mr. GAJA said that the last sentence implied that reservations were only the result of the unilateral expression of the will of a State, but the Commission had not yet considered the question of the existence of an agreement. He therefore proposed that that sentence should be deleted.

8. Mr. MATHESON said that the word “unilateralism” had taken on a negative political connotation and referred to action carried out by a State in total disregard for the rights and interests of others, but that was certainly not what was meant at the end of the second sentence. He therefore suggested that that word should be replaced by a term such as “unilateral action” or “unilateral decision”, which would not have the same political implications.

9. Mr. MELESCANU said that, in his view, the last sentence contained a very important idea and an argument in favour of the idea that a reservation could be withdrawn unilaterally. It was important to indicate that the withdrawal of a reservation could be done without the agreement of the other contracting parties, although he did agree that the concept of unilateralism, which was perhaps overemphasized, should be eliminated.

10. Mr. PELLET (Special Rapporteur) said that he supported Mr. Gaja’s proposal even though he disagreed with him. Two unilateral acts did not make an agreement. The idea he was trying to put across was that an agreement was one unilateral act and a reservation was another. It might

<sup>2</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

<sup>3</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 76.



be considered that two unilateral acts ultimately ended up as an agreement, but that was not the case. The question was complicated and the Commission would have an opportunity to come back to what non-objection meant. The sentence under discussion was not wrong, but it did represent a doctrinal stand, and it was perhaps too early to lead the Commission into its adoption without having discussed it. It should therefore be deleted.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted with a minor drafting change in the French text.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

*Paragraph (13) was adopted with a minor drafting change in the French text.*

Paragraphs (14) to (16)

*Paragraphs (14) to (16) were adopted.*

*Commentary to draft guideline 2.5.2 (Form of withdrawal)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

*Paragraph (5) was adopted with a minor drafting change.*

Paragraphs (6) to (10)

*Paragraphs (6) to (10) were adopted.*

Paragraph (11)

11. Mr. GAJA said that he had problems with the theoretical approach taken in paragraph (11). The relationship between treaties and domestic law was very complex and it could not simply be assumed that the treaty would in any event be regarded as exclusively applicable and that a domestic law should just be ignored. If a reference to monism or dualism had to be included, it should be more flexible. Perhaps the text should be redrafted to take account of the fact that a treaty did not necessarily take precedence over an amended domestic law.

12. Mr. PELLET (Special Rapporteur) said that Mr. Gaja's argument about the complexity of the relationship between treaties and domestic law was not necessarily transposable to the problem covered by paragraph (11), which dealt with the relationship between reservations to treaties and domestic law.

13. Mr. GAJA said that the theoretical element of paragraph (3) gave a rather sketchy idea of the relationship between treaties, including reservations, and domestic law. He therefore proposed that the two sentences referring to monism and dualism should be deleted.

14. Mr. PELLET (Special Rapporteur) said that the deletion of those two sentences would disrupt his reasoning and was all the more unnecessary in that the sentences indicated that the result could but did not have to be legal chaos. For example, in monist countries, the court might have to decide whether it should apply the treaty—and the reservation thereto—or domestic law, even though the reservation had been based on that law.

15. Mr. GAJA said that a problem of interpretation could arise regardless of the legal theory prevailing in the country concerned.

16. The CHAIR noted that the majority of the members of the Commission were in favour of retaining the two sentences referred to by Mr. Gaja.

17. Mr. ECONOMIDES said that the words “the scope of which, however, is still uncertain” in the last sentence were unnecessary and should be deleted.

18. Mr. BROWNLIE said that the legal chaos referred to in paragraph (11) did not have to be described as “total”.

19. Mr. PELLET (Special Rapporteur) said that the French text of the last sentence referred to the possibility that the reserving State could continue “à s'en prévaloir à l'égard des autres parties”, whereas the English text used the words “to have an advantage over the other parties”. In his opinion, the words “to avail itself of” should be used.

20. The CHAIR proposed the following amendments: to delete the word “total” in the third sentence; to replace the words “to have an advantage over” by the words “to avail itself of the reservation with regard to” in the fourth sentence; and to delete the phrase referred to by Mr. Economides.

*It was so decided.*

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

*Commentary to draft guideline 2.5.3 (Periodic review of the usefulness of reservations)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

21. Mr. MATHESON proposed that the scope of the second sentence should be reduced by replacing the word “undermines” by the words “may undermine”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*Commentary to draft guideline 2.5.4 [2.5.5]* (Formulation of the withdrawal of a reservation at the international level)

Paragraphs (1) to (8)

*Paragraphs (1) to (8) were adopted.*

Paragraph (9)

22. Mr. PELLET (Special Rapporteur) said that he would check with the secretariat that it was draft guideline 2.1.3 that should be referred to in this paragraph and that the text of that provision, as contained in the footnote, actually corresponded to the version adopted by the Commission.

*Paragraph (9) was adopted, subject to that condition.*

Paragraphs (10) to (17)

*Paragraphs (10) to (17) were adopted.*

*Commentary to draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter]* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

23. Mr. GAJA said that, at the end of the footnote, the word “international” should be replaced by the word “internal”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

24. Mr. PELLET (Special Rapporteur) said that the last footnote in the paragraph should read: “See commentary to draft guideline 2.5.4, para. (17)”. The next footnote should read: “*Ibid.*, para. (1)”.

25. Mr. GAJA proposed that, in the second sentence, the words “the position that it took” should be replaced by the words “the position taken”.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft guideline 2.5.6* (Communication of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

26. Mr. GAJA proposed that the words “recipients of withdrawals of reservations” should be replaced by the

words “recipients of communications of the withdrawal of reservations”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.7 [2.5.7, 2.5.8]* (Effect of withdrawal of a reservation)

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted, on the understanding that the secretariat would rearrange the presentation of paragraph (2) to make it more readable.*

Paragraph (7)

27. Mr. PELLET (Special Rapporteur) said that, in the first sentence of the French text, the words *lui-même et* should be deleted.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

28. Mr. GAJA proposed that, in order to remove any ambiguity, the words “as of the entry” should be replaced by the words “as from the entry”.

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*Commentary to draft guideline 2.5.8 [2.5.9]* (Effective date of withdrawal of a reservation)

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were adopted.*

Paragraph (11)

29. Mr. GAJA said that the words “in respect of them” should be added after the word “effect” in the second sentence because the withdrawal did not take effect at the same time in respect of all the States and international organizations concerned.

*Paragraph (11), as amended, was adopted.*

Paragraphs (12) to (14)

*Paragraphs (12) to (14) were adopted.*

*Commentary to model clause A* (Deferment of the effective date of the withdrawal of a reservation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

30. Mr. GAJA said that, in the penultimate sentence of the French text, the words *projet de directive 2.5.8* should be replaced by the words *projet de directive 2.5.9*.

*Paragraph (2), as amended, was adopted.*

*Commentary to model clause B* (Earlier effective date of withdrawal of a reservation)

Paragraph (1)

31. Mr. GAJA proposed that the following sentence should be added at the end to indicate when the model clause could be used: “This is especially true when there is no need to modify internal law as a consequence of the withdrawal of a reservation by another State or organization.”

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

*Commentary to model clause C* (Freedom to set the effective date of withdrawal of a reservation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*Commentary to draft guideline 2.5.9 [2.5.10]* (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

32. Mr. GAJA said that he did not understand the second sentence of the French text.

33. Mr. PELLET (Special Rapporteur) said that that was perhaps because the sentence contained a mistake which distorted its meaning: the word *préserver* should be replaced by the word *réserver*.

34. Mr. GALICKI, referring to the words “integral obligations”, asked whether the quotation marks were really necessary.

35. Mr. PELLET (Special Rapporteur) said that that concept was in quotation marks because it was not yet fully accepted by writers on law.

36. Mr. MANSFIELD proposed that that term should be defined in a footnote.

37. Mr. PELLET (Special Rapporteur) said that he did not want to get into the definition of a controversial concept in a footnote. The obligations in question were primarily “non-reciprocal” obligations that also existed, for example, in environmental law. The concept had originated with Sir Gerald Fitzmaurice.

38. Mr. PAMBOU-TCHIVOUNDA proposed that the wording “, i.e., non-reciprocal obligations” should be added after the wording “integral obligations”.

39. Mr. PELLET (Special Rapporteur) said that they were not only non-reciprocal obligations, but also obligations whose breach could not result in the suspension of the treaty. That was a seminal concept, and in his view it would be a mistake for the Commission to leave it out. He proposed that it should be retained and that a footnote relating to it should be prepared.

*Paragraph (5) was adopted, subject to that amendment.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*Commentary to draft guideline 2.5.10 [2.5.11]* (Partial withdrawal of a reservation)

40. Mr. GAJA said that the English and French texts of the draft guideline were different. The French text read: “*Le retrait partiel d’une réserve atténue ... et assure plus complètement ...*”, while the English text stated: “The partial withdrawal of a reservation purports to limit ... and to achieve a more complete ...”. He suggested that the two texts should be harmonized.

41. Mr. PELLET (Special Rapporteur) said that the Drafting Committee had adopted the French text of the draft guideline and that the authentic English text was the one contained in document A/CN.4/L.640/Add.1, which read: “The partial withdrawal of a reservation limits ... and achieves ...”.

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

42. Mr. BROWNLIE said that the use of the word “we” should be avoided. He proposed that the first sentence should be amended to read: “Reservation clauses expressly ... are to be found more frequently.”

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

43. Mr. PAMBOU-TCHIVOUNDA said that it should be indicated in a footnote, for example, why “This similarity is ... sometimes contested in the literature”.



44. Mr. PELLET (Special Rapporteur) suggested that, in the French text, the words *Cette assimilation, confirmée par la pratique* should be replaced by the words *Ce rapprochement, confirmé par la pratique*.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

45. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the words “to conventions” should be added after the wording “a number of reservations”. The quotation from Mr. Schabas should be in italics.

Paragraph (7)

46. Mr. GAJA proposed that, for the sake of consistency with the quotation contained in paragraph (6), the wording “limits the scope” should be replaced by the wording “does not enlarge the scope”.

47. Mr. PELLET (Special Rapporteur) said that he had no objection to that amendment, provided that the words *n'élargit pas* were in italics in the French text.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

48. Mr. ECONOMIDES said that the words “after much hesitation” and the word “(correctly)” in the footnote at the end of the sentence should be deleted.

49. Mr. PELLET (Special Rapporteur) said he agreed that the word “(correctly)” could be deleted. However, the words “after much hesitation” reflected an objective element and should therefore be maintained.

50. Mr. MOMTAZ said that the use of those words would have to be justified.

51. Mr. ECONOMIDES, agreeing with Mr. Momtaz, said that indications justifying the use of those words should be given in a footnote.

*Paragraph (9), as amended, was adopted, subject to the addition of the footnote proposed by Mr. Economides.*

Paragraph (10)

52. The CHAIR said that, in the French text, the words *le droit des conventions* should be replaced by the words *le droit des traités*.

*Paragraph (10), as amended, was adopted.*

Paragraphs (11) to (20)

*Paragraphs (11) to (20) were adopted.*

*Commentary to draft guideline 2.5.11 [2.5.12] (Effect of a partial withdrawal of a reservation)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

53. Mr. GAJA said that, in the penultimate sentence, the words “does not relate” should be replaced by the words “does not apply” and the words “that has been withdrawn” by the words “which has been withdrawn”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

54. Mr. GAJA said that the words “for there seems to be no case where partial withdrawal of a reservation has led to a withdrawal of objections” should be deleted.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

55. Mr. PELLET (Special Rapporteur) said that the words *prima facie* should be added in the French text of the second sentence and that the words “there might seem, *prima facie*, to be less doubt” should be replaced by the words “it might seem, *prima facie*, very doubtful”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

56. Ms. ESCARAMEIA said that, as it stood, paragraph (6) did not refer to the fact that the withdrawal of a reservation could have a discriminatory effect, not only in respect of the States parties to the treaty but also in respect of the persons directly concerned. The commentary should therefore be amended accordingly.

57. Mr. PELLET (Special Rapporteur) said that he agreed with Ms. Escarameia's comment and proposed that, at the end of the third sentence, the words “or some categories of beneficiaries to the exclusion of others” should be added after the words “certain parties or categories of parties” and that, in the fourth sentence, the words “In that case” should be replaced by the words “In such cases”.

*Paragraph (6), as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Section C, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2787th MEETING

*Tuesday, 5 August 2003, at 3 p.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)* (A/CN.4/L.638)

1. The CHAIR invited members of the Commission to take up chapter VI of the draft report.

#### A. Introduction

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

Paragraph 7

2. In response to a comment by Mr. BROWNLIE, Mr. Sreenivasa RAO (Special Rapporteur) suggested that in the first sentence the word “again” should be deleted.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

Paragraph 11

3. Mr. MOMTAZ queried the phrase “International liability in case of loss from transboundary harm arising out of hazardous activities”, which was placed in parentheses in the first sentence.

4. Mr. MIKULKA (Secretary of the Commission) pointed out that it was part of the official title of the topic.

5. Mr. GAJA noted that in earlier paragraphs a different title was given, and that that might create some confusion. The transition should be made clearer.

6. Following a discussion in which Mr. MANSFIELD (Rapporteur) and Mr. KATEKA (Chair of the Drafting Committee) took part, the CHAIR suggested that the phrase in parentheses in the first sentence should be deleted and the last sentence revised to read: “The Commission adopted the report of the Working Group, decided that the topic would be entitled ‘International liability in case of loss from transboundary harm arising out of hazardous activities’ and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.”

*Paragraph 11, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### B. Consideration of the topic at the present session

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

7. Ms. ESCARAMEIA said the paragraph raised a general question about how the proceedings of the working groups were reflected in the Commission’s report. The practice seemed to be to say nothing about them, and that was the approach used in paragraph 13. On the other hand, the Commission’s report to the General Assembly on the work of its fifty-fourth session contained an entire section on the activities of the Working Group on the present topic.<sup>1</sup> At the current session, the same Working Group had made a great deal of progress on a number of substantive questions, and it was difficult to see why such progress was not reflected in the report.

8. Mr. Sreenivasa RAO (Special Rapporteur) said that in 2002 the Working Group had reached agreement on fundamental issues relating to the approach to the topic. In 2003 a productive exchange of ideas had taken place, but no conclusions had been reached. During the preparation of the draft report, the idea of covering the Working Group’s deliberations had been discussed, but after due consideration it had been decided not to. However, in deference to Ms. Escameia’s position and to give a sense of the very productive work that had been done, he could suggest the inclusion, at the end of the second sentence, of the phrase “and generally exchanged views on different aspects of the topic, particularly on the basis of the summary and submissions presented by the Special Rapporteur in his report”.

9. The CHAIR said he thought there was no harm in providing a factual description of what the Working Group had done, even though the secretariat had informed him that that went against the general practice and might set an unfortunate precedent. In addition, the Working Group in question was not a Working Group of the Commission, but a body convened to assist the Special Rapporteur.

<sup>1</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C, paras. 442–457.

10. Mr. BROWNLIE said that it would be a pity if precedents and past practice were the sole considerations governing reporting on the efforts of working groups. On the other hand, there were substantial reasons for not giving extensive coverage to what went on in those groups: their deliberations were therapeutic in character, problem-solving exercises that provided a foundation for future progress. He would be in favour of keeping the reporting at the present low level of coverage, without being entirely secretive about the proceedings in the Working Group.

11. Following a discussion in which Mr. MELESCANU, Mr. PELLET, Mr. MANSFIELD (Rapporteur) and Mr. CHEE took part, Mr. Sreenivasa RAO (Special Rapporteur) undertook to draft a text describing the Working Group's deliberations for insertion in the section entitled "Comments on the summation and submissions of the Special Rapporteur".

12. The CHAIR suggested that the Commission should endorse that proposal and that the phrase "to exchange views on various items with a view to assisting the Special Rapporteur in the preparation of his next report" should be inserted at the end of the first sentence in paragraph 13.

*It was so decided.*

*Paragraph 13, as amended, was adopted.*

#### Paragraph 14

13. In response to a remark by Mr. PELLET, the CHAIR suggested that the word *dommages* in the French version should be replaced by *préjudice*.

*It was so decided.*

*Paragraph 14, as amended, was adopted.*

#### Paragraph 15

14. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "once again" in the first sentence should be deleted and the word "urged" replaced by "recalled".

*It was so decided.*

15. Mr. BROWNLIE said he was unhappy with the substance of subparagraph (b) because it contradicted certain other propositions that appeared in the report, one of which was that the work on liability was without prejudice to the operation of the system of State responsibility. In real life, there was a great potential for overlap between the two systems. It would accordingly be preferable to modify the phrase "not involving State responsibility" to read "not necessarily involving State responsibility".

16. Mr. MELESCANU said the problem was that, if the Commission was simply endorsing the recommendations made by the Working Group in 2002, the wording of those recommendations could not be changed.

17. Mr. BROWNLIE said he accepted Mr. Melescanu's point, but adoption of subparagraph (b) as it stood would greatly narrow the scope of the topic, for the situations covered would shrink in number.

18. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Brownlie's amendment should be incorporated; even if that meant slightly deviating from the wording of the Working Group's recommendations, it would give the Commission more room to deal with certain issues.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

#### Paragraph 16

19. Mr. PELLET queried the use of the term "innocent victim" in subparagraph (c), which seemed to imply that some victims were not innocent. The term had been extensively discussed the year before and he had been under the impression that it was to be avoided.

20. Mr. Sreenivasa RAO (Special Rapporteur) said the phrase had been used in the discussion of the topic from the very start. The meaning of "innocent victim" as a term of art had even been brought up in the General Assembly. It should be retained because it had entered into the vernacular as a means of referring to those who were not involved in the operation of a project as either administrators or managers yet were likely to be affected by the project.

21. Ms. ESCARAMEIA said that the expression "innocent victim" had been used in the Working Group. During discussions in plenary she had objected to the expression, but her objection differed from that of Mr. Pellet. She considered that the environment *per se* should be covered, yet the quality of innocence could not be attributed to the environment, and thus the adjective "innocent" was inappropriate. It was surprising that there was no mention of that discussion under subsection B.2 of the report, relating to the summary of the debate. When the Commission came to deal with that section, reference should be made to the fact that the expression "innocent victim" had been discussed and different views and concerns had been expressed.

22. Mr. Sreenivasa RAO (Special Rapporteur) said that when the Commission dealt with that section of the report it would consider inserting a few lines to satisfy Ms. Escarameia's concern and ensure that her views were properly reflected. The expression "innocent victim" was a term of art generally used to describe human beings—not the environment—who were innocent in the sense that they were not directly involved in the operation of hazardous activities. A distinction was drawn between those involved and those not involved because the former would normally be governed by factories acts or other relevant national legislation. A footnote could be added to the effect that an innocent victim generally referred to a person adversely affected by the damage resulting from a hazardous activity who was not a person employed to conduct or be in control of the activity.

23. Mr. GAJA wondered whether such a definition would not rule out some people the Commission was seeking to protect. For instance, in the case of a firm which employed people on both sides of a border, when harm was caused to those living on the other side of the border the fact that they were employed or somehow connected with hazard-



ous activities should not really be relevant. What of employees living within the border of the territory where the harm had originated? Should they not also be protected? Since it would clearly be difficult for the Commission to decide on a definition at that juncture, perhaps the matter should be deferred until the next report.

24. Mr. MANSFIELD (Rapporteur) said that the footnote suggested by Mr. Sreenivasa Rao could be shortened considerably by saying something along the lines of “generally referred to those not involved in or benefiting from the activity in question”.

25. The CHAIR observed that the views of the Special Rapporteur must be accurately reflected.

26. Mr. BROWNLIE said that, like some other members, he was in favour of retaining the expression “innocent victim”, which seemed the most apt under the circumstances. There were all kinds of unresolved technical problems, such as the case of the innocent victim who owned shares in an offending enterprise in another State. However, the Commission did need a provisional term of art, which had some political advantages. Perhaps it could be made clear in the footnote that the definition was without prejudice to the various technical problems that would be explored in due course.

27. Mr. ECONOMIDES said that the notion of the innocent victim lay at the very heart of the draft and must therefore be referred to sooner rather than later. It should be mentioned in general terms by means of a footnote. For the time being, it did not seem necessary to provide a definition, since it was clear what it meant—the victim of a tragedy.

28. Mr. MOMTAZ said that the idea conveyed by the expression “innocent victim” was of a person who did not derive benefit from a hazardous activity. In that connection, he drew attention to the last sentence of paragraph 27, which stated that such activities were essential for the advancement of the welfare of the international community. The basic criterion was thus not a question of a person’s involvement or non-involvement in such activities but whether they derived some benefit from them.

29. Ms. ESCARAMEIA said it would be useful to have a footnote, but instead of providing a definition of the “innocent victim” it should simply say that the expression generally signified a person who did not benefit from the activity in question. No mention should be made of the involvement aspect.

30. Mr. MATHESON said that members were losing sight of the purpose of the section of the report under consideration—to relate what the Special Rapporteur had said when introducing his first report. It should not reflect what members felt the Special Rapporteur should or could have said, but simply what he had said.

31. Mr. PELLET said that was all very well, but the Commission needed to understand what the Special Rapporteur meant. He wished to explain what bothered him about the expression “innocent victim”. Some 10 years ago there had been an attack on a synagogue in Paris which had caused around 15 casualties. The Prime Minister at that time had had the bad taste to announce that

there had been three Jewish victims and nine innocent victims. Surely the Jews were also innocent victims? He had been very upset by the incident and had mentioned it to the Commission the previous year. He was raising the matter again because at that time he had felt that the Special Rapporteur had grasped the problem and was ready to give him satisfaction. That no longer seemed to be the case. As far as the example of workers at a nuclear power station was concerned, perhaps they were not innocent in the sense the Special Rapporteur intended, but they were innocent in the usual sense. They might well be the innocent victims of a nuclear disaster—they were certainly not guilty. He was not asking for a different term to be used, but he did want to dispel the uneasiness surrounding the expression “innocent victim”. He was certain the Special Rapporteur was not using the expression in a pejorative way, but his own understanding of innocence differed from the Special Rapporteur’s. Those working in hazardous activities were as innocent as others who did not. He did not wish to reopen the discussion on the matter, particularly since they were dealing with the Special Rapporteur’s report. He endorsed the idea of a footnote along the lines suggested by Mr. Momtaz—in other words, defining a specific concept. What the Special Rapporteur surely had in mind was not the innocence of Adam and Eve but the fact of not deriving greater benefit from an activity. The Commission would need to be careful about the implications of the words it chose.

32. Mr. GAJA disagreed. The idea of deriving benefit was not what the Commission was looking for. One might take the example of a dam built for agricultural purposes: there was an accident, the dam broke, and the farmland was flooded. Undoubtedly, the dam had been built for the benefit of the farmers, but would that mean that they were not victims? The Commission should not try to decide on a definition in such a short time, in view of the problems that remained to be resolved. If a footnote was to be added, it should be to the effect that the concept would be clarified in due course.

33. Mr. MELESCANU endorsed Mr. Gaja’s remarks. He did not believe it really useful to define an innocent victim as someone who did not derive benefit from the activity in question. Mr. Momtaz and Mr. Pellet had given the example of workers in the nuclear power industry, but they did derive some benefit because they earned a salary. It was very difficult to determine what was meant by deriving benefit from an activity, and the more the matter was discussed, the more complicated it became. The only solution, therefore, was a footnote stating that the concept would be defined in due course.

34. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed with Mr. Gaja. It was very difficult to define the concept of benefit as it was such a broad term. All consumers, persons supported by social welfare, traders and dealers were beneficiaries. If the term were extended to cover those kinds of situations, it would be impossible to draw a distinction between innocent victims, who were entitled to compensation, and those who were not. From the outset, the Commission had worked on the assumption that a large class of persons not directly involved in an operation should be given the benefit of compensation. In the case of the operation of motor vehicles it was easy to draw the distinction. One person drove the vehicle and

the others were passengers; if the latter were hurt they would be classified as innocent victims. However, if one attempted to extend the concept of operation to workers in the chemical or nuclear industries where different people were involved in the various operating stages—safety, monitoring, maintenance—the matter was not so straightforward. Mr. Pellet had said that the Commission had one year to resolve the problem. However, it was not a question of time. The Commission would not be able to solve the problem even if it had 10 years at its disposal, at least not without dissenting opinions. His suggestion had not been made without reflection. He had been an adviser in his country at the time of the drafting of a liability act for an atomic energy plant. The answer had been that persons working on and in the plant were covered by the Factories Act, whereas general liability provisions covered the remainder of the workers. That was the kind of idea he was trying to introduce, but it might not be acceptable to the Commission.

35. Ms. Escameia had introduced a completely different dimension, which might well be envisaged. There was no reason why different elements could not be added to the concept over time. Also, the sentimental aspect referred to by Mr. Pellet should be borne in mind so as to ensure that the Commission did not commit a similar gaffe. The expression “innocent victim”, was a term of art used since the beginning of the consideration of the topic, and the question of who was covered for the purposes of liability and for compensation required careful study. His understanding of the expression was that it meant persons not directly involved in the relevant operation. He would make no reference to those responsible for accidents, since the Commission did not want to make it a culpability issue. Therefore, a footnote should be added stating that “innocent victim” was a term of art generally understood to mean persons not directly involved in the operation, without prejudice to other technical issues, which, as Mr. Brownlie had suggested, would leave scope for further debate.

36. Mr. CHEE said he failed to understand the need to debate the definition of an innocent victim. In his view, it simply meant a person innocent of causing the accident. It could be used in tort law and a variety of other situations. In paragraph 16 it was being used in the context of harm caused in a situation over which the victim had no control; he was in favour of retaining it.

37. The CHAIR said that the debate had been long and interesting. However, if he heard no objection, he would take it that the Commission endorsed the Special Rapporteur’s proposal to add a footnote explaining what was meant by “innocent victim”.

*It was so decided.*

*Paragraph 16, as amended, was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

38. Mr. BROWNLIE said that the second sentence was rather clumsy. It would be easier to read if it were turned around. It should be reworded to read: “Factors which militated against the achievement of full and complete compensation included the following: problems with the definition of damage; difficulties of proof of loss; problems of the applicable law; limitations on the operator’s liability; and limitations within which contributory and supplementary funding mechanisms operated.”

*Paragraph 18, as amended, was adopted.*

Paragraph 19

*Paragraph 19 was adopted with a minor drafting change.*

Paragraph 20

39. Mr. PELLET, referring to the end of the second sentence, said that the word “(liability)” would need to be inserted in the French version after the word *responsabilité*. He also questioned the use of the term “option”; perhaps the word “aspect” would be more appropriate.

40. Mr. Sreenivasa RAO (Special Rapporteur) suggested the addition of a phrase at the end of the last sentence which would read: “as it might force the Commission to enter a different field of study altogether”.

41. The CHAIR suggested that the word “force” should be replaced by “lead”.

*Paragraph 20, as amended, was adopted.*

Paragraph 21 (a)

42. Mr. MOMTAZ asked for clarification regarding the phrase at the end of the second sentence: “still less one based on any particular set of elements”.

43. Mr. MANSFIELD (Rapporteur) said the problem stemmed from the phrase in the first part of the sentence “that duty would be best discharged by negotiating a liability convention”. He suggested it should be reworded: “that the best approach would be the negotiation of a liability convention”. Similarly, the phrase in the third sentence “the duty could be equally discharged, if considered appropriate” should be replaced by “another possibility would be”.

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase queried by Mr. Momtaz would be clearer if the start of the sentence were reworded: “While the schemes of liability reviewed had common elements” and the words “of compensation” were inserted after “duty” in the second sentence. In his review of various liability regimes, he had listed the different factors involved. It was difficult to negotiate a particular liability convention precisely because of the wide variety of factors.

45. Mr. MOMTAZ requested confirmation that the Special Rapporteur’s aim was not to draft a convention that would consolidate the elements of various regimes but simply to identify the general principles that would apply to all activities.

46. Mr. Sreenivasa RAO (Special Rapporteur) said that the way forward was not yet clear. There were no elements common to all regimes, so it seemed impossible to draft a comprehensive convention. On the other hand, in the absence of a model convention, he wondered whether various elements could be used in an *ad hoc* manner, although such a course of action was more difficult because it provided less guidance. However, for the time being, the aim was just to report to the General Assembly. Finer points of detail could be thrashed out within the Commission at the next session.

47. Mr. MOMTAZ said that the second sentence remained misleading. He wondered whether the Special Rapporteur's argument would be impaired if the phrase "still less one based on any particular set of elements" was deleted.

48. Mr. Sreenivasa RAO (Special Rapporteur) said any fears Mr. Momtaz might harbour that the Commission would be unable to draft a convention were misplaced, although it was not yet clear what form such a convention would take. There were strong views on both sides, but the phrase to which Mr. Momtaz had referred would not vitiate any future convention exercise.

49. Mr. MANSFIELD (Rapporteur) suggested that the Special Rapporteur's views would be more accurately reflected if the second sentence was reworded along the following lines: "Certainly the review did not suggest that the duty to compensate would best be discharged by negotiating a particular form of liability convention."

*Paragraph 21 (a), as amended, was adopted.*

Paragraph 21 (b)

*Paragraph 21 (b) was adopted.*

Paragraph 21 (c)

50. Mr. BROWNLIE said that, as it stood, the wording of subparagraph (5) was too elliptical: wording should be found to make it clear that State liability was the exclusive basis of liability in the case of outer space activities.

51. Mr. Sreenivasa RAO (Special Rapporteur) suggested the wording "Except in the case of outer space activities, State liability was not used exclusively as a basis of liability."

52. Ms. ESCARAMEIA pointed out that State liability existed as a subsidiary rather than a primary form in several conventions. Subparagraph (5) did not fully convey that. Therefore, the phrase "in the sense of exclusive liability" should be inserted after the word "exception".

53. Mr. GAJA recalled that some space activities, such as damage by one spaceship to another, were subject to fault liability rather than absolute liability. State liability was, in short, a very vague term and included liability based on fault.

54. Mr. GALICKI said that such exclusive State liability was not without exceptions, such as the combined liability of States and international organizations. The text should therefore take account of the possible variations.

55. Mr. Sreenivasa RAO (Special Rapporteur) said that he feared that tinkering with the paragraph would only make it worse. The points in paragraph 21 (c) were, after all, merely his recommendations; and the Commission understood what he had meant to convey in subparagraph (5).

56. Mr. BROWNLIE drew attention to two editorial changes that should be made in subparagraph (14).

*Paragraph 21 (c), as amended by Mr. Brownlie, was adopted.*

*Paragraph 21 as a whole, as amended, was adopted.*

Paragraph 22

57. Mr. Sreenivasa RAO (Special Rapporteur) said it was not clear that the last sentence related to a recommendation made by him rather than by the Commission. The wording "he suggested," should be inserted after "possibility".

*Paragraph 22, as amended, was adopted.*

Paragraph 23

58. Ms. ESCARAMEIA regretted that the negative tone of the paragraph might give the impression that the debate had focused exclusively on the viability of the topic and its conceptual and structural difficulties in relation to other areas of international law. In order to reflect the positive attitude of some members, the words "difficulties in relation to" should be replaced by "affinities with".

*Paragraph 23, as amended, was adopted.*

Paragraph 24

59. Ms. ESCARAMEIA said that not only the Sixth Committee had been favourably disposed towards consideration of the topic: strong support had also been expressed within the Commission. She therefore suggested that the following sentence should be added at the end of the paragraph: "Since General Assembly resolution 56/82 requested in its paragraph 3 that the Commission review the consideration of the liability aspects of the topic and article 18, paragraph 3, of the Commission's statute requires that priority be given to requests of the General Assembly, a discussion on the viability of the project was misplaced."

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 and 26

60. Mr. BROWNLIE said that the word "pragmatic" in the penultimate sentence of paragraph 25 was redundant and should be deleted.

61. Mr. PELLET said that the last sentence of paragraph 26 appeared to be inconsistent with the body of the paragraph.

62. Mr. BROWNLIE said that paragraph 26 needed restructuring altogether. He also suggested that the phrase



“incidence of cases highly probable” in the second sentence should be replaced by the phrase “a greater incidence of cases probable”.

63. Mr. MANSFIELD (Rapporteur) said the problem lay in the fact that the middle section comprised a summary of the statement by Mr. Koskenniemi, in which he had identified all the various criticisms that had been made and rebutted them point by point. The paragraph, however, listed only the criticisms and not the rebuttals; that was the reason for the apparent inconsistency noted by Mr. Pellet.

64. Ms. ESCARAMEIA said that what was in effect a double negative in the first sentence was misleading. The sentence should be rephrased to the effect that “some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development”. She also suggested the addition of a final sentence that would sum up Mr. Koskenniemi’s conclusions.

*The meeting was suspended at 4.35 p.m. and resumed at 4.45 p.m.*

65. Mr. Sreenivasa RAO (Special Rapporteur) said that, following informal consultations, paragraph 26 would be recast, taking account of the suggestions that had been made and incorporating the sentence at the end suggested by Ms. Escarameia. The middle section of the paragraph, enumerating the criticisms of the topic—(a) to (e)—would be transposed to paragraph 25, to follow the penultimate sentence. It would be preceded by the phrase “In addition, the following difficulties were noted:...”. The revised paragraph 26 would read:

“On the other hand, some members considered that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development. They expressed the view that the subject was important theoretically and in practice, with a greater incidence of highly probable cases in the future. They also noted that some of the various criticisms against the topic needed to be taken into account in the Commission’s work, but they did not debar the Commission from achieving a realizable objective. The Commission could draft general rules of a residual character that would apply to all situations of transboundary harm that occurred despite best-practice prevention measures.”

*Paragraphs 25 and 26, as amended, were adopted.*

Paragraphs 27 and 28

*Paragraphs 27 and 28 were adopted.*

Paragraph 29

66. Mr. BROWNLIE said that the text would read better if the word “which” was inserted before “caused”, in the second sentence.

67. Mr. PELLET suggested that, in view of the Commission’s previous discussion, the expression “innocent parties” should be replaced by “innocent victims”.

68. Mr. Sreenivasa RAO (Special Rapporteur) agreed to the proposal. He also proposed that the second half of the last sentence should be recast along the following lines: “and, second, to deal with the different social costs, which, from an analysis of the various regimes, varied from sector to sector”.

*Paragraph 29, as amended, was adopted.*

Paragraph 30

69. Mr. Sreenivasa RAO (Special Rapporteur) said that the words “were not prejudiced”, in the first sentence, should be replaced by “should not be prejudiced”.

70. Mr. BROWNLIE said that, if the Commission was taking the *Corfu Channel* case as the basis for its argument, as it should, precisely because the principle it enshrined was important, the fifth sentence of the paragraph should refer not only to a State’s knowledge of acts contrary to the rights of other States but also to the means of knowledge: Albania had been held liable not on the basis of the proof of its knowledge but because it had the means of knowing that a mine had been laid. He therefore suggested that the phrase “of which it had knowledge or means of knowledge” should be inserted after the word “acts”. He also suggested that the phrase following the words “other States” should be recast as a separate sentence, to read: “Such obligation would apply to the environment as well.” He would add that the distinction was nonetheless somewhat artificial, because the *Corfu Channel* was also part of the environment.

71. Mr. MOMTAZ said that he detected a contradiction between the last sentence, which appeared to sum up the paragraph, and the content of the paragraph itself. On the one hand, it was said that State responsibility largely dealt with the subject matter of the topic, yet surely that was not compatible with the aim of avoiding an overlap.

72. Mr. BROWNLIE said that, in his opinion, a system of options existed and the option of State responsibility still applied where appropriate. The snag had always been that earlier Special Rapporteurs had used as examples of what they deemed to be liability cases which were in fact classic instances of State responsibility. The problem was not one of conflict, but of the relationship between separate, coexisting options. That was why every draft contained a proposition that the State liability project was without prejudice to the law relating to State responsibility. If that were not so, it would be necessary to reconsider the 40 years’ work on State responsibility, and a splendid mess would then ensue.

73. Mr. Sreenivasa RAO (Special Rapporteur) said that he would defer to Mr. Brownlie on that question.

74. Mr. MANSFIELD (Rapporteur) said he agreed with Mr. Brownlie and that there was no disagreement on the main issue. The crux was that, in order for State responsibility to be incurred, there had to be a wrongful act, whereas the situations covered in chapter VI of the report were primarily those in which loss had arisen in circumstances where no wrongful act had occurred and where fault-prevention action had been taken.

75. Mr. BROWNLIE said that, in the paragraph under consideration, the Special Rapporteur had faithfully reflected the debate on the issue. He personally wished to make it clear that in his own previous comment he had not added anything new, but had merely elucidated the precedents set by the *Corfu Channel* case.

76. Mr. MOMTAZ said that readers would be perplexed, because the whole paragraph alluded to the interaction between the two regimes and yet the last sentence asserted that it was within the competence of the Commission to avoid any overlap.

77. The CHAIR said that the sentence in question reflected an individual opinion expressed during the debate and Mr. Brownlie appeared to be satisfied that his standpoint had been correctly reported. Although he therefore believed that the sentence should be retained, he asked Mr. Brownlie if he insisted on keeping the sentence.

78. Mr. BROWNLIE said that he had not, in fact, drawn that conclusion. His position was that there was a whole series of options, which included all the existing schemes of multilateral treaties dealing with that kind of issue. The Commission was wisely designing a new option. A benign competition took place between those options. They did not collide with one another. Hence there was an overlap, but it was not something negative. What alternative was there to acknowledging that coexistence? Was the Commission supposed to consolidate everything into a single scheme of liability that would subsume State responsibility and all the other treaty regimes? To his knowledge, no member had expressed that view.

79. The CHAIR suggested that the last sentence should be deleted.

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 and 32

*Paragraphs 31 and 32 were adopted.*

Paragraph 33

80. Ms. ESCARAMEIA said that, further to the discussion centering on the term “innocent victim”, it might be advisable, at the end of the paragraph, to add the following sentence: “Some members commented also on the appropriateness of the expression ‘innocent victim’, as in the case of damage to the environment.”

81. Mr. PELLET said that if that sentence were included in the report another sentence would have to be added in order to indicate that some members disagreed with that notion. Furthermore, he wished to know what was meant by “replacement language for a draft convention”. Did that phrase embrace the possibility of a draft convention?

82. Mr. Sreenivasa RAO (Special Rapporteur) said that the terms “models” and “legal regimes” had been selected so as not to imply that the definite aim was the drafting of a convention.

83. Mr. PELLET said his impression was that the idea to be conveyed was that the terms “models” and “legal regimes” did not necessarily exclude the possibility of a draft convention but, on the contrary, covered the whole

range of potential outcomes. If that was the case, the expression “replacement language” was inapt.

84. Following a discussion in which Mr. ECONOMIDES, Mr. PELLET, Ms. ESCARAMEIA and the CHAIR took part, Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should end with a formulation reading: “Some members also commented on the appropriateness of the expression ‘innocent victim’, particularly in relation to damage to the environment. Another view objected in principle to the use of the expression ‘innocent victim’.”

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 and 35

*Paragraphs 34 and 35 were adopted with minor drafting changes.*

Paragraph 36

85. Mr. PELLET said that the structure of the paragraph was illogical, as it referred to “general support” in one sentence and “some members” in the next. For that reason, it would be better to say that there had been wide support for maintaining the same threshold.

*Paragraph 36, as amended, was adopted.*

Paragraph 37

*Paragraph 37 was adopted.*

Paragraph 38

86. Mr. Sreenivasa RAO (Special Rapporteur) said that the traditional liability approach should not serve as a pretext for skirting the topic of damage to the environment. He suggested that, in order to make the meaning of the second sentence plainer, it should read, “It was stressed that any emphasis on traditional civil liability approaches should not be considered as an excuse for not dealing with questions concerning damage to the environment.”

*Paragraph 38, as amended, was adopted.*

Paragraph 39

87. Mr. Sreenivasa RAO (Special Rapporteur) said that the footnote should refer to the final printed version of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

*Paragraph 39 was adopted with minor drafting changes.*

*The meeting rose at 6 p.m.*

## 2788th MEETING

*Wednesday, 6 August 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.638)*

#### B. Consideration of the topic at the present session (*concluded*)

Paragraph 40

1. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the words “made comments” in the first sentence of the English text should be replaced by the word “commented”. He also suggested that the word “general” in the second sentence should be replaced by “wide” and that the phrase “detailed comprehensive regimes that would cover” in the last sentence should be replaced by “detailed comprehensive regimes with wide scope covering”.

2. Mr. PELLET suggested that the words “The Commission” should be replaced by “The members of the Commission”.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

*Paragraph 41 was adopted.*

Paragraph 42

3. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the phrase “offered their comments with hesitancy” in the first sentence should be replaced by “made tentative comments”, and that the words “arising from” in the English text of the penultimate sentence should be replaced by “indicating”.

4. Mr. MANSFIELD, Mr. GAJA and Ms. ESCARAMEIA wondered what exactly was meant by the second sentence, which appeared to be saying that the Commission had to await the reaction of the Commission.

5. Mr. GAJA suggested that the end of that sentence, starting with the words “before first receiving”, should be deleted.

*Paragraph 42, as amended, was adopted.*

Paragraphs 43 and 44

*Paragraphs 43 and 44 were adopted.*

Paragraph 45

6. Mr. PELLET pointed out that the correct name of the court mentioned in the footnote was “Court of Justice of the European Communities”.

*Paragraph 45, as amended, was adopted.*

Paragraph 46

7. Ms. ESCARAMEIA said that the last sentence of the paragraph was confusing, as it gave the impression that some considerations were not legitimate.

8. Mr. MANSFIELD (Rapporteur) suggested rewording the sentence to read: “Accordingly, even if the question of strict or fault liability was to be set aside, the basis of State liability would arise, as would the question whether or not compensation would in such cases be full or limited.”

9. Mr. PELLET pointed out that the second sentence introduced a false opposition between absolute liability and strict liability, when in fact the former was the ultimate stage of the latter.

10. Mr. ECONOMIDES suggested that the words “and not strict” should be deleted from the sentence.

*Paragraph 46, as amended, was adopted.*

Paragraph 47

11. Mr. MANSFIELD (Rapporteur) said that the last sentence in the paragraph was unclear.

12. Mr. BROWNLIE said that declarations of acceptance of the compulsory jurisdiction of ICJ often mentioned other methods of settlement. The last sentence of paragraph 47 was intended to make it clear that the system which the Commission wished to develop would be just one of those other methods. He therefore suggested clarifying that point by putting the phrase “another available means of settlement” in quotation marks.

13. Mr. GAJA suggested deleting the words “or regimes regarding reservations”.

14. Mr. PAMBOU-TCHIVOUNDA noted that the second sentence did not specify the purpose for which the general principle “would probably not be sufficient”.

15. Mr. PELLET wondered what the precise nature of that general principle was.

16. Mr. MANSFIELD (Rapporteur) suggested that the phrase “the general principle alone would probably not be sufficient in practice” should be replaced by “a statement



to that effect would not be sufficient for that purpose”, the purpose in question being the one expressed in the previous sentence, namely, not to prejudice the work on State responsibility.

*Paragraph 47, as amended, was adopted.*

#### Paragraph 48

17. Mr. MOMTAZ, supported by Mr. Sreenivasa RAO (Special Rapporteur), said that, in order to faithfully reflect the discussion and for the sake of logic, the order of the second and third sentences in paragraph 48 should be reversed.

18. The CHAIR said he took it that the Commission agreed to that proposal.

*It was so decided.*

*Paragraph 48, as amended, was adopted.*

#### Paragraph 49

19. Mr. PELLET said that the phrase “within the same territory” in the first sentence made little sense.

20. Mr. GAJA said that the sentence in question was intended to reflect a comment he had made during the discussion, namely, that the harm caused within the territory of the State of origin itself should not be ignored. He therefore suggested replacing the words “within the same territory” by “within the territory of the State of origin”.

21. The CHAIR said he took it that the Commission agreed to Mr. Gaja’s proposal.

*It was so decided.*

*Paragraph 49, as amended, was adopted.*

#### Paragraph 50

22. Ms. ESCARAMEIA recalled that during the discussion she had said that for the purposes of compensation she would prefer to retain a lower threshold, such as that of “appreciable harm”, as was in fact mentioned in paragraph 36. It therefore seemed contradictory to say in paragraph 50 that the Commission had agreed with the principle of retaining the same threshold. She would like to have the beginning of the first sentence changed.

23. Mr. Sreenivasa RAO (Special Rapporteur) said that the first sentence of paragraph 50 could not be deleted, as it reported a view expressed about a specific provision, whereas paragraph 36 dealt with general comments. He therefore suggested, in order to take account of Ms. Escarameia’s comment, that paragraph 36 should be reproduced at the beginning of paragraph 50, but with the words “general support” replaced by “wide support”. The remainder of the paragraph would then read: “The suggestion was made that, in the context of liability, the term ‘significant harm’ could be changed to ‘significant damage’. The importance of reaching agreement on a meaning of ‘significant harm’ that would be understood in all legal systems was emphasized.”

24. The CHAIR said he took it that the Commission agreed to the Special Rapporteur’s proposal.

*It was so decided.*

*Paragraph 50, as amended, was adopted.*

#### Paragraph 51

25. Mr. PELLET drew attention to a mistake in the French translation of the third sentence of the paragraph and suggested that the words *l’appui de la Sixième Commission* should be replaced by *un certain appui de la Sixième Commission*.

26. Ms. ESCARAMEIA said that it was an opinion that she had expressed that was reported in the sentence in question; she suggested, for the sake of completeness, that the words “and was covered in several instruments, including the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment” should be added.

27. The CHAIR said he took it that the Commission agreed to the proposals made by Mr. Pellet and Ms. Escarameia.

*It was so decided.*

*Paragraph 51, as amended, was adopted.*

#### Paragraph 52

28. Mr. GALICKI suggested that the terminology used in the paragraph and in the footnote should be made consistent, since one spoke of “a European Union Directive” while the other referred to “a Directive of the European Parliament and of the Council”.

29. The CHAIR said that the Secretariat would attend to the matter.

30. Mr. MANSFIELD (Rapporteur) suggested that the word “Conversely” at the beginning of the fourth sentence in paragraph 52 should be deleted, as there was no logical contrast between the sentence it introduced and the one that preceded it.

*It was so decided.*

*Paragraph 52, as amended, was adopted.*

#### Paragraph 53

31. Mr. GAJA said that the paragraph reported a view that had been expressed by him, and he suggested that, in the interest of accuracy, it should be reworded to read:

“Further, it was observed that this proposition should be reviewed from the perspective of the need to secure assets in the event of loss. It was essentially for that reason that ship-owners rather than charterers were held liable in the relevant conventions for harm caused by ships. Those who owned assets such as ships could insure such assets against risks and could easily pass on the costs to others if necessary.”

32. The CHAIR said he took it that the Commission agreed to Mr. Gaja's proposal.

*It was so decided.*

*Paragraph 53, as amended, was adopted.*

Paragraph 54

33. Mr. MANSFIELD (Rapporteur) said that the third sentence of the paragraph was not clear.

34. Mr. PELLET said that it referred to an opinion he had expressed during the discussion in response to a passage in the report of the Special Rapporteur in which the latter had contrasted the causal link with reasonableness. He proposed that the sentence should be amended to read: "According to this view, 'causality' was a criterion for establishing 'reasonableness'."

35. The CHAIR said he took it that the Commission agreed to Mr. Pellet's proposal.

*It was so decided.*

*Paragraph 54, as amended, was adopted.*

Paragraph 55

*Paragraph 55 was adopted.*

Paragraph 56

36. Mr. BROWNLIE said that "would" should be changed to "could" at the end of the second sentence.

37. The CHAIR said he took it that the Commission agreed to Mr. Brownlie's proposal.

*It was so decided.*

*Paragraph 56, as amended, was adopted.*

Paragraph 57

*Paragraph 57 was adopted.*

Paragraph 58

38. Ms. ESCARAMEIA said that the paragraph was intended to reflect an opinion that she had expressed and that, in order to report accurately what she had said, the word "would" in the second sentence of the English text should be replaced by "should".

*Paragraph 58, as amended, was adopted.*

Paragraphs 59 to 65

*Paragraphs 59 to 65 were adopted.*

Paragraphs 66 and 67

39. Mr. MANSFIELD (Rapporteur) said that the paragraphs appeared to introduce some confusion in the concepts involved, namely, on the one hand, the idea that damage to the environment could be caused within the

jurisdiction of the State or in an area beyond national jurisdiction and, on the other hand, the issue of whether it was possible to compensate for damage to the environment which it was not possible to quantify in monetary terms. He therefore proposed that paragraphs 66 and 67 should be combined into a single paragraph which would read:

"The submission that damage to the environment *per se* should not be considered compensable for the purposes of the topic received some support. In that regard, it was noted that there was a distinction between damage to the environment which could be quantified and damage to the environment which it was not possible to quantify in monetary terms. It was pointed out that in some liability regimes, such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the proposal for a Directive of the European Parliament and of the Council on environmental liability, damage to the environment or natural resources would be directly compensable. The work of the United Nations Compensation Commission was also considered helpful in this area. A separate issue was whether, in view of global interconnectedness, the inclusion of damage to the environment beyond national jurisdiction should be considered."

40. The CHAIR said he took it that the Commission agreed to the Special Rapporteur's proposal for paragraphs 66 and 67 and to the subsequent renumbering of the following paragraphs.

*It was so decided.*

*The new paragraph 66, which was based on a combination of paragraphs 66 and 67, was adopted.*

Paragraphs 68 to 77

*Paragraphs 68 to 77 were adopted.*

Paragraph 78

41. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "cannot be traced" in the English version should be replaced by "could not be traced" and that the words "with the jurisdiction" should be replaced by "within the jurisdiction".

42. Mr. MOMTAZ wondered what was meant by the phrase *la dimension équitable du degré subsidiaire faisant intervenir l'État* in the French text.

43. Mr. ECONOMIDES proposed that the phrase should be simplified to read: *la dimension équitable de la charge subsidiaire qui devrait être assumée par l'État*.

44. Mr. Sreenivasa RAO (Special Rapporteur) supported Mr. Economides' proposal and said that the English version should also be improved.

45. Mr. MANSFIELD (Rapporteur) suggested the following wording for the English version: "equity for involving the State as a subsidiary tier".

*Paragraph 78, as amended, was adopted.*

## Paragraph 79

46. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should be simplified to read: “He noted that there was a need for further work and reflection on the various issues raised and, if possible, to produce concrete formulations in the next report.”

*Paragraph 79, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VI of the report, as amended, was adopted.*

**CHAPTER VII. Unilateral acts of States (A/CN.4/L.639 and Add.1)**

47. The CHAIR invited members of the Commission to consider section A and the first part of section B of chapter VII of the draft report, on unilateral acts of States, as contained in document A/CN.4/L.639.

**A. Introduction (A/CN.4/L.639)**

Paragraphs 1 to 12

*Paragraphs 1 to 12 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.639 and Add.1)**

Paragraph 13 (A/CN.4/L.639)

*Paragraph 13 was adopted.*

Paragraph 14

48. The CHAIR said that the following text should be added at the end of the sentence: “chaired by Mr. Alain Pellet. At its 2783rd meeting, on 31 July 2003, the Commission considered and adopted the recommendations contained in parts 1 and 2 of the report of the Working Group (A/CN.4/L.646) [see sect. C below].” A section C containing parts 1 and 2 of document A/CN.4/L.646 would therefore be added to the chapter.

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 to 40

*Paragraphs 15 to 40 were adopted.*

49. The CHAIR invited members of the Commission to consider the continuation of section B of chapter VII of the draft report, contained in document A/CN.4/L.639/Add.1.

Paragraphs 1 and 2 (A/CN.4/L.639/Add.1)

*Paragraphs 1 and 2 were adopted.*

## Paragraph 3

50. Mr. MOMTAZ suggested replacing the words “on grounds of absence of coherence and lack of legal quality” with “on grounds of absence of coherence and lack of legal character”.

*Paragraph 3, as amended, was adopted.*

## Paragraph 4

*Paragraph 4 was adopted.*

## Paragraph 5

51. Mr. GAJA suggested that the words “and acts” in the second sentence should be deleted.

*Paragraph 5, as amended, was adopted.*

## Paragraph 6

52. Mr. GAJA suggested that the word “very” in the third sentence should be deleted and that the fifth sentence should be amended to read: “The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects...”. He suggested replacing the verb “constitute” with the phrase “provide the basis for”. Finally, he thought that it would be better to delete the sentence that read: “Furthermore, the examination of the basis for the obligatory nature of recognition could not be dealt with under the heading of the legal effects of recognition.”

*Paragraph 6, as amended, was adopted.*

## Paragraphs 7 to 14

*Paragraphs 7 to 14 were adopted.*

## Paragraph 15

53. Mr. MOMTAZ suggested that the word “perilously” in the first sentence should be deleted.

*Paragraph 15, as amended, was adopted.*

## Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

## Paragraph 18

54. Mr. PELLET suggested that the words “given in paragraphs 42 to 45 of the report” should be replaced by “given in the report”.

*Paragraph 18, as amended, was adopted.*

## Paragraph 19

55. Mr. ECONOMIDES said that the word *constitutive* in the French version should read *déclarative*.



56. Mr. BROWNLIE said that, in the second sentence of the English version, it would be preferable to insert the words “to be” between “recognition” and “declaratory”.

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 to 28

*Paragraphs 20 to 28 were adopted.*

Paragraph 29

57. Mr. PELLET suggested that, as the last sentence of the paragraph made little sense, it should be replaced with the following sentence: “The main purpose of the sixth report was to show that the definition of recognition corresponded to the draft definition of unilateral act, *stricto sensu*, analysed by the Commission in previous years.”

58. Mr. RODRÍGUEZ CEDEÑO supported that proposal but said that it should refer to “the definition of the act of recognition”.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 and 31

*Paragraphs 30 and 31 were adopted.*

*Section B, as amended, was adopted.*

*Chapter VII of the report, as amended, was adopted.*

**CHAPTER X. *The fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/L.642)**

**A. Introduction**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 6

59. Mr. PELLET said that, for the sake of coherence, the words “following his election to ICJ” should be added at the end of the paragraph.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

*Section B, as amended, was adopted.*

**C. Report of the Study Group**

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

Paragraph 12

*Paragraph 12 was adopted with minor drafting changes.*

Paragraphs 13 to 22

*Paragraphs 13 to 22 were adopted.*

Paragraph 23

60. Mr. PELLET asked if there were any plans to publish the outline prepared by Mr. Koskenniemi, Chair of the Study Group on the Fragmentation of International Law, which was an extremely interesting, enlightening and fundamental work that would benefit from exposure to a wider readership in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*.

61. Ms. ESCARAMEIA said that the Study Group had made such a proposal; however, if that was not feasible, the outline should at least be posted on the Commission’s web site. According to the secretariat, the outline could not be published, as it was not an official document.

62. Mr. MIKULKA (Secretary to the Commission) said that documents for limited distribution were not made public, as that was the Commission’s policy. Of course, the Commission was free to decide otherwise, but it should be borne in mind that the Chair of the Study Group had indicated that he considered his outline to be still at a preliminary stage, and it was thus understood that it should not be published in the *Yearbook of the International Law Commission*.

63. Mr. PELLET said that outlines by chairs of study groups were similar to the reports of special rapporteurs. Of course, if the author concerned did not wish the document to be included in the *Yearbook of the International Law Commission*, he could not be forced to agree to it. However, as a rule, the suggestion should be put to him, and the Commission should perhaps issue a guideline on the matter.

64. The CHAIR said that the author’s opinion had to be taken into account; if the author did not think that his document was in final form, the Commission should wait until the next session for a completed version.

65. Mr. BROWNLIE said that it was of course desirable to consult the author, who was perhaps not expecting his work to be published; however, the Commission was certainly able to reclassify the document, which should pose no problem unless Mr. Koskenniemi had some objection.

66. Mr. GAJA said he did not think that Mr. Koskenniemi would have objected, but the latter had not written the document with publication in mind, and it should not be forgotten that the Commission was considering a report by the Study Group which was actually a very detailed summary of what Mr. Koskenniemi had said, with a few changes. Moreover, the final product would be available to the Commission at its next session. If the document

was to be published, it would be preferable, as with all other documents of that kind, to do so on the Commission's website rather than in the *Yearbook of the International Law Commission*.

67. Mr. MIKULKA (Secretary to the Commission) pointed out that as soon as the final version of the Study Group's report was available, it would be dealt with in the same way as the reports by special rapporteurs and thus would be published in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*. To insist on having the outline published there would serve little practical purpose, as volume II was scheduled to appear in just six years, five years after the final version of the Study Group's report would have been published as a document for general distribution. Posting the document on the Commission's website after consulting the author was therefore a solution that the Commission might wish to consider.

68. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to post on its website, after consultation with Mr. Koskenniemi, the outline of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

*It was so decided.*

Paragraphs 23 to 25

*Paragraphs 23 to 25 were adopted.*

Paragraph 26

*Paragraph 26 was adopted with minor drafting changes to the English version.*

Paragraph 27

69. Mr. PELLET suggested that the words "self-contained regimes" should be inserted in parentheses after the words *régimes autonomes* in the French text, as the English term was commonly used in French, whereas the term *régime autonome* was never used.

*Paragraph 27, as amended, was adopted.*

Paragraphs 28 and 29

*Paragraphs 28 and 29 were adopted.*

*Section C, as amended, was adopted.*

*Chapter X of the report, as amended, was adopted.*

*The meeting rose at 1 p.m.*

## 2789th MEETING

*Thursday, 7 August 2003, at 10.10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, 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. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-fifth session (*continued*)

#### CHAPTER VIII. *Reservations to treaties* (*continued*)\* (A/CN.4/L.640 and Add.1–3)

##### B. *Consideration of the topic at the present session* (*continued*)\*\* (A/CN.4/L.640/Add.1–3)

Paragraphs 1 to 8 (A/CN.4/L.640/Add.2)

*Paragraphs 1 to 8 were adopted.*

#### CHAPTER IX. *Shared natural resources* (A/CN.4/L.641)

##### A. *Introduction*

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

##### B. *Consideration of the topic at the present session*

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

1. Mr. YAMADA (Special Rapporteur) asked whether it would be against the rules to list the names of the experts from FAO and UNESCO and of the representatives of ILA who had briefed the Commission. He proposed that the second sentence of the paragraph should read: "The Commission also had an informal briefing by experts on groundwaters from FAO and the International Association of Hydrogeologists on 30 July 2003. Their presence was arranged by UNESCO."

2. Mr. MIKULKA (Secretary of the Commission) explained that the exchanges with the representatives of ILA had not formed part of the discussion of the topic, but had taken place within the framework of cooperation with

\* Resumed from the 2786th meeting.

\*\* Resumed from the 2785th meeting.

other bodies. The issue should therefore be raised in the context of chapter XI.

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 10

*Paragraphs 6 to 10 were adopted.*

Paragraph 11

*Paragraph 11 was adopted with minor drafting changes.*

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

*Paragraph 13 was adopted with minor drafting changes.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

3. Mr. PELLET said that, in the French version, either the word “liability” should be added in brackets after the words *responsabilité internationale*, or the full title of the topic should be given.

*Paragraph 15 was adopted with that drafting change in the French version.*

Paragraph 16

4. Mr. PAMBOU-TCHIVOUNDA queried the use of the word “metaphor”.

5. Mr. BROWNLIE said that he was happy to claim responsibility for having introduced that term during the debate, when he had referred to the example of the Nubian aquifer. The report therefore accurately reflected that debate.

6. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized the statements of Mr. Operti Badan and Mr. Brownlie.

*Paragraph 16 was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

7. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence of the Spanish version, the word *recelos* was too strong.

8. The CHAIR suggested *dudas*.

9. Mr. MOMTAZ suggested the addition of the adjective “solid” to qualify “minerals”.

10. Following a discussion in which Mr. PELLET, Mr. BROWNLIE, Mr. KATEKA and Ms. ESCARAMEIA took part, the Commission concluded that minerals could take the form of solids or solutes.

*Paragraph 18 was adopted with minor drafting changes.*

Paragraph 19

11. Mr. MOMTAZ proposed that the word “general” should be replaced by “single”.

*Paragraph 19, as amended, was adopted.*

Paragraph 20

12. Mr. RODRÍGUEZ CEDEÑO said he could see no reason to retain the paragraph. Deleting it would have the advantage of enabling paragraph 19 to be merged with or followed immediately by paragraph 21, the two paragraphs being linked by a common thread of argument.

13. Mr. MATHESON said that paragraph 20 set out a viewpoint expressed during the discussion that the subject of oil and gas was not suitable for the Commission’s consideration, raised issues different from those raised by groundwaters and could be addressed by other processes. It should therefore be retained.

*Paragraph 20 was adopted.*

Paragraph 21

14. Mr. MATHESON said that the second sentence did not accurately reflect what he had said in the debate. He therefore proposed that it be replaced by a sentence reading: “The view was expressed that any consideration of the topic of oil and gas should be postponed until the Commission had completed its work on groundwaters.”

*Paragraph 21, as amended, was adopted.*

Paragraph 22

15. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized comments by Mr. Pambou-Tchivounda, Mr. Momtaz and Mr. Operti Badan, but needed improvement. In the first sentence, the words “in some cases” should be deleted.

*It was so decided.*

16. Mr. MANSFIELD (Rapporteur) said the point made by those three members was that the Commission should perhaps be developing a type of framework regime, like that established by the United Nations Convention on the Law of the Sea, under which regional arrangements in addition to the overall structure were envisaged. The word “framework” should perhaps be inserted in the first sentence, before “regime”. The second sentence reflected Mr. Operti Badan’s concern that any reference to maritime resources might imply a common heritage. He proposed



that the first part of that sentence, which read “Nonetheless, it was also stressed that the criterion of sovereignty should be applied to groundwaters, just as it had been for oil and gas...”, should be revised to read: “It was also stressed that the criterion of sovereignty was as relevant to groundwaters as it was to oil and gas...”

17. Mr. BROWNLIE said that the reference in the first sentence to a regime “along the lines of the one for maritime resources” was not clear. What regime was envisaged? The law of the sea dealt with maritime spaces, not resources, or, in the case of the exclusive economic zone, with the allocation of resources.

18. Mr. PELLET said that, as an objective observer not having participated in the debate on the subject, he found the paragraph unclear. In particular, the reference at the end to the “shared heritage of mankind” seemed to come from nowhere.

19. Mr. PAMBOU-TCHIVOUNDA said the reference to “characteristics” in the first sentence was somewhat vague and the word “hydrogeological” should perhaps be inserted before it. His point had been that State jurisdiction over confined groundwaters should perhaps be determined on the basis of the depth of the groundwaters beneath the surface. The phrase “criterion of sovereignty” was incorrect: it should read “principle of sovereignty”. Mr. Operti Badan’s remarks, reflected in the phrase “any reference to the concept of shared heritage of mankind would raise concerns”, followed on remarks of a different nature made by other members, and they might be better placed elsewhere.

20. Mr. MANSFIELD (Rapporteur) said that the paragraph appeared to require extensive redrafting: Might it not be better to delete it altogether?

21. Mr. CHEE said that the concept of the common heritage of mankind had been proposed by Arvid Pardo in 1962 in connection with seabed mineral resources outside national jurisdiction.<sup>1</sup> The phrase “maritime resources” was ambiguous, as it carried the connotation of fisheries resources.

22. The CHAIR said that, to avoid any confusion, the phrase “along the lines of the one for maritime resources” in the second sentence should be deleted. In the first sentence, the word “groundwaters” should be replaced by “them”.

*It was so decided.*

23. Mr. BROWNLIE said that the phrase “shared heritage”, in the second sentence, should be replaced by “common heritage”.

*It was so decided.*

*Paragraph 22, as amended, was adopted.*

Paragraph 23

*Paragraph 23 was adopted.*

Paragraph 24

24. Ms. ESCARAMEIA suggested the inclusion of additional wording at the end of the paragraph in order better to reflect the point she had made. The amendment would read: “and to clarify the meaning of ‘confined’, since it did not seem to be a term used by hydrogeologists”.

25. Mr. MELESCANU endorsed the proposal but said the word “legal” should be inserted before “meaning”, to make it plain that it was not the technical or scientific aspect that would be addressed.

*Paragraph 24, as amended, was adopted.*

Paragraph 25

*Paragraph 25 was adopted.*

Paragraph 26

*Paragraph 26 was adopted with minor drafting changes.*

Paragraph 27

26. The CHAIR said that, at the beginning of the paragraph, “The point was made” should be replaced by “Some members suggested”.

*Paragraph 27, as amended, was adopted.*

Paragraph 28

27. Mr. PAMBOU-TCHIVOUNDA said that the paragraph did not read well. In particular, he took issue with the opening phrase “The view was expressed”, which might give the impression *inter alia* that only one member had stated that the principles of the permanent sovereignty of States over natural resources should be taken into account. In fact, several members had made that point. The phrase should be reworded to read: “Some members expressed the view...”

*Paragraph 28, as amended, was adopted.*

Paragraph 29

28. Mr. PAMBOU-TCHIVOUNDA suggested that, in order to follow on from paragraph 28, the opening phrase “Some members” should read “Other members”.

29. Ms. ESCARAMEIA said that the paragraph did not reflect the concern expressed by some members about the need to differentiate between the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses and the work of the Commission, particularly since the Convention dealt with groundwaters linked with surface waters as they flowed into a common terminus. She therefore suggested adding a sentence that would read: “Some members also raised concerns regarding the scope of the present study *vis-à-vis* that of the Convention on the Law of the Non-navigational Uses of International Watercourses, since this Convention also covered some types of groundwaters and used expressions such as

<sup>1</sup> See A. Pardo, *The Common Heritage: Selected Papers on Oceans and World Order, 1967–1974* (Malta University Press, 1975).

‘flowing into a common terminus’, which were not very clear.”

30. The CHAIR suggested deleting the last part of Ms. Escameia’s proposal, which implied criticism of the wording of the Convention on the Law of the Non-navigational Uses of International Watercourses, for which the Commission was also partly responsible.

*It was so decided.*

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 32

*Paragraphs 30 to 32 were adopted.*

Paragraph 33

31. Mr. MANSFIELD (Rapporteur), referring to the second sentence, suggested that the word “would” should be replaced by “should” and that the phrase “to identify the means to get assistance in” should be reworded to read: “identify appropriate techniques for”.

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 to 36

*Paragraphs 34 to 36 were adopted.*

Paragraph 37

32. Mr. YAMADA (Special Rapporteur) suggested that the words “priority focusing on” should be replaced simply by the word “and”.

*Paragraph 37, as amended, was adopted.*

Paragraph 38

*Paragraph 38 was adopted.*

*Section B, as amended, was adopted.*

*Chapter IX of the report, as amended, was adopted.*

#### **CHAPTER XI. Other decisions and conclusions of the Commission (A/CN.4/L.643)**

##### **A. Programme, procedures and working methods of the Commission, and its documentation**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

33. Mr. PELLET suggested deleting the words “in fact” in the last sentence.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

34. Mr. ECONOMIDES proposed, on behalf of eight members of the Commission, the inclusion of an additional paragraph in the report based on a text submitted to the Commission at its 2783rd meeting. He suggested that it might come under the heading “Reminder of the fundamental principles of international law”. Since the 2783rd meeting the text had been substantially revised with a view to attracting the support of more members and (he hoped) the majority of the Commission. Mr. Galicki had already signalled his support for the new text, which read:

“Some members of the Commission recalled that the fundamental principles of international law are designed to guarantee peace, security and order in relations among States. They stressed the absolute need for the international community to preserve such principles, which are peremptory and thus non-derogable, and proposed that the Commission should make itself available with a view to reaffirming them.”

The factual part of the text which had prompted considerable reaction had been deleted; what now remained was more neutral in tone and dealt only with the fundamental principles of the international legal order. It was also fully in line with the statement by the Secretary-General of the United Nations published in the *International Herald Tribune* on 1 August 2003, which stressed the urgent need to review the role of the United Nations in the light of the international crisis.

35. Mr. GAJA asked for clarification of the procedure to be followed, since it was fairly unusual for such a proposal to be submitted at the present juncture. Without wishing to enter into the details of the proposed text, he thought the Commission might consider it appropriate to deal with the substance under its long-term programme of work in connection with enhancing the effectiveness of the role of the United Nations. He did have some reservations about the Commission setting a precedent by expressing views on issues which related to United Nations resolutions. If it were to comment on one issue, might not its silence on other decisions of the United Nations be regarded as tacit approval? In his opinion, it was not the role of the Commission to take up such matters; it should adhere to its mandate, namely, codification and progressive development of international law.

36. Mr. DUGARD said that the purpose of the proposal was to express concern about recent events which, although not of a political nature, nonetheless threatened the role of international law. Mr. Economides had radically amended his original proposal. Notwithstanding Mr. Pellet’s remark that he could not endorse a proposal unless it expressly condemned one particular State, Mr. Economides had watered the text down simply to indicate the Commission’s concern about the fundamental principles of the international legal order. The proposal raised the question of whether it would ever be appropriate for the Commission to comment on such matters, which were clearly not provided for in its mandate. In that connection, he recalled the debate which had frequently taken place among legal bodies in South Africa during the apartheid era, when the basic principles of law were being undermined by the executive, the legislature and the ruling political party. Initially opinion in the legal bodies had been divided, but finally they had felt that it was incumbent

upon them to express their views. Perhaps the Commission had not yet reached that stage, but many members believed that recent events inside and outside the United Nations warranted comment. Moreover, many members who were in teaching found it increasingly difficult as students began to question the very existence of international law. It should be borne in mind that the Commission was the senior international law body in the United Nations system, and obviously ICJ could not comment on such matters in the absence of any dispute submitted to it. It was incumbent on the Commission to act in the final resort as a guardian of the principles of international law and to reaffirm them as and when appropriate. He was not certain that Mr. Economides' very bland proposal captured the concerns of the members who had originally supported it, but somewhere and somehow it had to be said that some members were concerned by recent developments in international law.

37. Mr. YAMADA, speaking on a point of order, said that he fully respected the views of Mr. Economides and Mr. Dugard and recognized their right to air them in the Commission. Nevertheless, he believed the proposed text was an evaluation of an external political event that simply fell outside the mandate of the Commission. If action was taken on the proposal, it would have serious implications in the General Assembly and would divide the members of the Commission, who had worked so harmoniously thus far. In accordance with rule 113 of the rules of procedure of the General Assembly, he requested the Chair to rule that the matter fell outside the mandate of the Commission.

38. The CHAIR said that, having listened to the arguments on both sides, he was ruling that, although the concern that had been expressed was undoubtedly valid, a chapter relating to the decisions and conclusions of the Commission was not the appropriate place for the proposal read out by Mr. Economides. The matter would be more appropriately raised within the Planning Committee or the Study Group on the Fragmentation of International Law. Important and topical though it was, the issue should be addressed in accordance with the appropriate procedure, in the same way that the Commission took up all its concerns.

39. Mr. ECONOMIDES said that, while he respected the Chair's ruling, he regretted that members had not been afforded an opportunity to express their views on a topic that was far from exhausted. Indeed, discussion had been curtailed in a somewhat authoritarian way. If, however, the proposed text was unacceptable in that part of the report, he proposed that an even more anodyne text should be inserted in the section on relations of the Commission with the Sixth Committee, with the following wording: "A proposal was made within the Commission that the Commission should offer its availability to contribute to the consideration and reaffirmation of the fundamental principles of international law." It was the least the Commission could do to show its concern.

40. The CHAIR said that, if a challenge was being made to his ruling, it should be made clearly and openly.

41. Mr. PELLET said that he wished to emphasize that, although his personal feeling had been that the original

proposal was too weak, he had never used the words ascribed to him by Mr. Dugard. He fully supported the Chair's ruling: the Commission was not the right body for that kind of statement.

42. Ms. ESCARAMEIA pointed out that Mr. Economides had made a new proposal, to be inserted in a different part of the report. There was surely no reason why the Commission should not offer to study the fundamental principles of international law. Moreover, since the issue had been raised a number of times during the current session, the concern should be reflected in the report.

43. Mr. YAMADA pointed out that, according to rule 123 of the rules of procedure, when a proposal had been adopted or rejected, it could not be reconsidered at the same session unless a two-thirds majority of the Commission so decided.

44. The CHAIR ruled that the proposed text was not appropriate in the chapter under consideration and had not gone through all the necessary steps in the Commission's normal procedure for insertion in another chapter. He added that he would prefer that the issue should not go to a vote. The Commission should try to avoid reaching a situation in which a vote became inevitable.

45. Ms. ESCARAMEIA, speaking on a point of order, said that she wished to place on record her disagreement with the assertion that rule 123 of the rules of procedure was applicable. There was no question of reconsidering the proposal: in accordance with rule 113, there had been no appeal against the Chair's ruling. On the contrary, a new proposal had been made. Any talk of voting was therefore out of place.

46. Mr. PAMBOU-TCHIVOUNDA said that the Chair's ruling had been based on the principle that the consideration of Mr. Economides' proposal was not appropriate under agenda item 10. The proposal had, however, been submitted under agenda item 13 ("Other business"), and it was regrettable that the Chair had not allowed the discussion to proceed on that basis. As for the question of whether, in considering the topic, the Commission would be straying beyond its mandate, he recalled that the Commission's development and codification of international law was based on principles; otherwise the exercise would be meaningless. If the Commission was competent to develop and codify the law, it was surely competent to express a view on the current state of international law.

47. The CHAIR invited the Commission, in the absence of a challenge to his ruling, to continue adopting the report.

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

Paragraph 12

48. Mr. PELLET proposed that the paragraph, together with its title, should be deleted. It said nothing, yet at the same time it might attract unwelcome attention from the Sixth Committee.



49. Mr. MELESCANU said that, in the absence of Mr. Kabatsi, he felt bound to convey to the Commission his colleague's strong view, expressed in the Planning Committee, that the paragraph performed a useful function. The Commission had, after all, adopted cost-saving measures, including the introduction of the shorter session.

50. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to delete the paragraph.

*Paragraph 12 was deleted.*

Paragraph 13

51. Mr. BROWNLIE said that the text would read better if the words "the basis of" were inserted between "fairness on" and "which the United Nations".

*Paragraph 13, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### **B. Date and place of the fifty-sixth session**

Paragraph 14

*Paragraph 14 was adopted.*

*Section B was adopted.*

#### **C. Cooperation with other bodies**

Paragraphs 15 to 18

*Paragraphs 15 to 18 were adopted.*

Paragraph 19

52. Mr. YAMADA said that a reference to the meeting on the topic of shared natural resources had appeared elsewhere. The last sentence could therefore be deleted.

53. The CHAIR said that, in view of the fact that the paragraph concerned cooperation with other bodies, both references should be retained. He added that the meeting with the experts from UNESCO and FAO had taken place not on 23 July, as was stated, but on 30 July.

54. Mr. PELLET expressed regret that the Commission's contacts with the human rights bodies were dealt with so cursorily. He would prefer to have them described as useful, interesting or stimulating.

55. Mr. MANSFIELD (Rapporteur) agreed that the effect was rather stark. He would like to see the inclusion of a warm tribute to the experts from UNESCO, who had made special efforts to meet the Commission.

56. The CHAIR suggested that a sentence should be introduced at the beginning of the paragraph, reading: "The following meetings, which were particularly valuable and useful, took place."

57. Mr. KATEKA (Chair of the Drafting Committee) said that the Commission would not be holding such

meetings if it did not consider them valuable. There was no need to state the obvious.

58. The CHAIR, after observing that to single out for praise meetings with one body might seem to cast an aspersions on the others, said that he nonetheless saw some merit in drawing attention to the expansion of the Commission's contact with other bodies.

59. Mr. PELLET concurred. The Commission's relations with human rights bodies had not always been particularly warm in the past. To include words of commendation would be both truthful and tactful.

60. The CHAIR suggested the insertion of a new paragraph 20 *bis* stating that the meetings with other bodies had been useful.

*It was so decided.*

*Paragraph 19, as amended, was adopted.*

Paragraph 20

*Paragraph 20 was adopted.*

*Section C, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

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## **2790th MEETING**

*Friday, 8 August 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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### **Draft report of the Commission on the work of its fifty-fifth session (concluded)**

1. The CHAIR invited the members of the Commission to continue their consideration of chapter XI of the draft

report of the Commission on the work of its fifty-fifth session. He recalled that the Commission had adopted sections A, B and C of that chapter at its previous meeting.

**CHAPTER XI. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.643)**

**D. Representation at the fifty-eighth session of the General Assembly**

Paragraph 21

*Paragraph 21 was adopted.*

Paragraph 22

2. The CHAIR said he took it that the Commission wished Mr. Gaja to attend the fifty-eighth session of the General Assembly.

*It was so decided.*

*With this addition, paragraph 22 was adopted.*

*Section D was adopted.*

**E. International Law Seminar**

Paragraphs 23 to 25

*Paragraphs 23 to 25 were adopted.*

*Section E was adopted.*

*Chapter XI of the report, as amended, was adopted.*

3. The CHAIR invited the members of the Commission to continue their consideration of chapter VIII, section B, of the draft report of the Commission.

**CHAPTER VIII. Reservations to treaties (concluded) (A/CN.4/L.640 and Add.1–3)**

**B. Consideration of the topic at the present session (concluded) (ACN.4/L.640/Add.1–3)**

Paragraphs 1 to 4 (A/CN.4/L.640/Add.3)

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

4. Mr. GAJA said that the word “compared” in the first sentence of the English text should be replaced by the word “likened”.

*Paragraph 5, as amended, was adopted.*

Paragraph 6

5. Mr. GAJA proposed that the last sentence of the paragraph, which was almost incomprehensible, should be deleted.

6. The CHAIR said he took it that the Commission agreed to Mr. Gaja’s proposal.

*It was so decided.*

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 14

*Paragraphs 7 to 14 were adopted.*

Paragraph 15

7. Ms. ESCARAMEIA proposed that the words “Secretary-General of the” should be inserted before “Council of Europe” in the first sentence of paragraph 15, and that the word “perhaps” should be deleted from the second sentence. In addition, as the penultimate sentence of the paragraph did little to enlighten the reader, she proposed that the following words should be added after the closing bracket: “as it was never possible to give a broader interpretation to a reservation made earlier, even if all parties agreed with it”.

8. The CHAIR said he took it that the Commission agreed to Ms. Escarameia’s proposals.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 to 28

*Paragraphs 16 to 28 were adopted.*

*Section B, as amended, was adopted.*

*Chapter VIII of the report, as amended, was adopted.*

**CHAPTER II. Summary of the work of the Commission at its fifty-fifth session (A/CN.4/L.634)**

9. Mr. PELLET said that chapter II in its current form left the reader no wiser. It would have been better to highlight the main problems the Commission had had to deal with rather than simply enumerate in a mechanical way the formal decisions it had taken. It would be a good idea in the future to rethink the structure of the chapter.

10. Mr. MANSFIELD (Rapporteur), agreeing with Mr. Pellet’s comment, said that the Commission should organize an early meeting of the Planning Group at its next session to remedy the problem.

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Paragraph 5*

11. Mr. GALICKI pointed out that, since the Commission had not referred draft articles on objections to reservations to the Drafting Committee, the words “and also with objections to reservations” should be deleted from the end of paragraph 5.

12. The CHAIR said he took it that the Commission agreed to Mr. Galicki's proposal.

*It was so decided.*

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 11

*Paragraphs 6 to 11 were adopted.*

*Chapter II of the report, as amended, was adopted.*

**CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.635)**

Paragraph 1

*Paragraph 1 was adopted.*

**A. The responsibility of international organizations**

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

*Section A was adopted.*

**B. Diplomatic protection**

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

*Section B was adopted.*

**C. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)**

Paragraph 6

13. Ms. ESCARAMEIA proposed that the words "of State funding and" should be inserted before the words "of the steps that might or should be taken ..." in subparagraph (d). She also proposed the addition of a new subparagraph, (f), to read: "(f) The final form of the Commission's work."

14. The CHAIR said he took it that the Commission agreed to Ms. Escameia's proposal.

*It was so decided.*

*Paragraph 6, as amended, was adopted.*

*Section C, as amended, was adopted.*

**D. Unilateral acts**

Paragraph 7

15. Mr. MATHESON proposed that, in the first sentence, the words "the broadening of the purpose or scope of the topic" should be replaced by the words "a redefinition of the scope of the topic". Moreover, States should be

told what the Commission meant by "unilateral acts *stricto sensu*", a term used in the second sentence. He therefore proposed that a footnote reference should be added after the word *sensu* and that the definition of the phrase as formulated within the Working Group should be given in the footnote. Finally, the words "unilateral acts" should be replaced by the words "these unilateral acts" in the last sentence.

16. The CHAIR said he took it that the Commission agreed to Mr. Matheson's proposal.

*It was so decided.*

*Paragraph 7, as amended, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

Paragraph 9

17. Mr. PELLET proposed that the words "to consider the possibility of providing" should be replaced by the words "to provide" in the second sentence, as the Commission was actually once again requesting Governments to provide information.

18. The CHAIR said he took it that the Commission agreed to Mr. Pellet's proposal.

*It was so decided.*

*Paragraph 9, as amended, was adopted.*

*Section D, as amended, was adopted.*

**E. Reservations to treaties**

Paragraphs 10 to 12

*Paragraphs 10 to 12 were adopted.*

Paragraph 13

19. Mr. GAJA proposed that the words "would be happy to know" in the first sentence should be replaced by the words "would like to know".

20. The CHAIR said he took it that the Commission agreed to Mr. Gaja's proposal.

*It was so decided.*

*Paragraph 13, as amended, was adopted.*

Paragraph 14

*Paragraph 14 was adopted.*

21. Ms. ESCARAMEIA proposed that a new paragraph 14 *bis* should be adopted, to read: "Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to



divergent positions. It would be of interest to the Commission to know whether Governments think it should be kept, deleted or amended.”

22. Mr. PELLET pointed out that such a proposal would be applicable only on second reading. In fact, the draft had been returned to the Drafting Committee on first reading, and account must be taken of that fact. As far as the actual text of the proposal was concerned, he objected to it strongly, as it offered no explanation to States and so did not allow them to reply.

23. Mr. MELESCANU suggested that, to facilitate the adoption of the new paragraph proposed by Ms. Escameia, it could be pointed out that a vote had been taken and the Commission had decided to retain the draft guideline. As it stood, the text gave the impression that the Commission had no opinion on the matter, whereas it had in fact taken a decision.

24. Mr. Sreenivasa RAO reminded the members of the Commission that, as a rule, the report covered only the official discussions within the Commission.

25. Mr. ECONOMIDES said that he supported Ms. Escameia's proposal, which he found comprehensive and objective. He also agreed with Mr. Sreenivasa Rao's comment.

26. Mr. GAJA said that the Commission did not need to ask Governments whether a particular proposal should be deleted or amended. That decision was for the Commission to take. However, it could ask for comments on the issue. The request should be drafted in such a way that Governments could understand it; it would therefore be useful to include in a footnote the draft text submitted to the Drafting Committee.

27. Mr. MELESCANU said that he supported Mr. Gaja's proposal, which struck him as a compromise.

28. The CHAIR proposed that Ms. Escameia's proposal should be formulated in the following way: “Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to divergent views. It was referred to the Drafting Committee. The views of Governments on this guideline would be particularly welcomed.” He also proposed that a footnote containing the text of the relevant draft should be added. If he heard no objections, he would take it that the Commission agreed to those proposals.

*It was so decided.*

*The new paragraph 14 bis was adopted.*

*Section E, as amended, was adopted.*

## F. Shared natural resources

Paragraph 15

29. The CHAIR proposed that the text of subparagraph (b) should be replaced by the phrase “Main uses of specific groundwaters and State practice relating to their management” and the text of subparagraph (d) by the phrase “National legislation, in particular the legislation of federal States that governs groundwaters across its political subdivisions, together with information as to how such legislation is implemented”.

*Paragraph 15, as amended, was adopted.*

*Section F, as amended, was adopted.*

*Chapter III of the report, as amended, was adopted.*

## CHAPTER I. Organization of the session (A/CN.4/L.633)

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted.*

Paragraph 10

30. Mr. PELLET said that the words *composés comme suit* should be deleted from the end of the sentence in the French text.

31. The CHAIR said that they had been left in by mistake, like the corresponding words in the Spanish version, *integrados por los miembros que a continuación se indican*, which should also be deleted.

*Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 13

*Paragraphs 11 to 13 were adopted.*

*Chapter I of the report was adopted.*

*The report of the Commission on the work of its fifty-fifth session, as a whole, as amended, was adopted.*

## CLOSURE OF THE SESSION

32. After the customary exchange of courtesies, the CHAIR declared the fifty-fifth session of the International Law Commission closed.

*The meeting rose at 10.55 a.m.*

