

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

## 2005

*Volume II*  
*Part Two*

*Report of the Commission  
to the General Assembly  
on the work  
of its fifty-seventh session*

---

UNITED NATIONS



# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2005

*Volume II  
Part Two*

*Report of the Commission  
to the General Assembly  
on the work  
of its fifty-seventh session*



## 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 ... 2005*).

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.

A/CN.4/SER.A/2005/Add.1 (Part 2)
----------------------------------

UNITED NATIONS PUBLICATION
<i>Sales No.:</i> E.11.V.5 (Part 2) ISBN 978-92-1-133707-5
ISSN 0082-8289

## CONTENTS

	<i>Page</i>
<b><i>Document A/60/10. Report of the International Law Commission on the work of its fifty-seventh session (2 May–3 June and 11 July–5 August 2005).....</i></b>	<b>1</b>
<b>Checklist of documents of the fifty-seventh session .....</b>	<b>95</b>



## DOCUMENT A/60/10\*

### Report of the International Law Commission on the work of its fifty-seventh session (2 May–3 June and 11 July–5 August 2005)

#### CONTENTS

	<i>Page</i>
Abbreviations.....	5
Notes concerning quotations.....	5
Multilateral instruments cited in the present volume.....	6
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION .....	1–11 9
A. Membership .....	2 9
B. Officers and the Enlarged Bureau.....	3–5 9
C. Drafting Committee.....	6–7 9
D. Working groups .....	8–9 10
E. Secretariat .....	10 10
F. Agenda.....	11 10
II. SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-SEVENTH SESSION .....	12–23 11
III. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION .....	24–29 13
A. Shared natural resources .....	24 13
B. Effects of armed conflicts on treaties.....	25 13
C. Responsibility of international organizations .....	26 13
D. Expulsion of aliens .....	27 13
E. Unilateral acts of States .....	28 13
F. Reservations to treaties .....	29 14
IV. SHARED NATURAL RESOURCES .....	30–107 15
A. Introduction .....	30–31 15
B. Consideration of the topic at the present session.....	32–107 15
1. Introduction by the Special Rapporteur of his third report.....	34–47 15
2. Summary of the debate .....	48–98 19
(a) General comments .....	48–60 19
(b) Comments on specific draft articles.....	61–95 20
(c) Comments on form of instrument .....	96–98 25
3. Special Rapporteur's concluding remarks .....	99–107 25
V. EFFECTS OF ARMED CONFLICTS ON TREATIES .....	108–191 27
A. Introduction .....	108–109 27
B. Consideration of the topic at the present session.....	110–191 27
1. General remarks on the topic.....	113–127 27
(a) Introduction by the Special Rapporteur of his first report .....	113–116 27
(b) Summary of the debate .....	117–123 27
(c) Special Rapporteur's concluding remarks.....	124–127 28
2. Article 1. Scope .....	128–133 28
(a) Introduction by the Special Rapporteur .....	128 28
(b) Summary of the debate .....	129–131 29
(c) Special Rapporteur's concluding remarks.....	132–133 29
3. Article 2. Use of terms.....	134–141 29
(a) Introduction by the Special Rapporteur .....	134–135 29
(b) Summary of the debate .....	136–140 30
(c) Special Rapporteur's concluding remarks.....	141 30

\* Initially distributed as *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10*.

Chapter	Paragraphs	Page
4. Article 3. <i>Ipso facto</i> termination or suspension .....	142–148	30
(a) Introduction by the Special Rapporteur .....	142	30
(b) Summary of the debate .....	143–146	30
(c) Special Rapporteur's concluding remarks.....	147–148	31
5. Article 4. The indices of susceptibility to termination or suspension of treaties in the case of an armed conflict .....	149–156	31
(a) Introduction by the Special Rapporteur .....	149–150	31
(b) Summary of the debate .....	151–154	31
(c) Special Rapporteur's concluding remarks.....	155–156	32
6. Article 5. Express provisions on the operation of treaties.....	157–161	32
(a) Introduction by the Special Rapporteur .....	157	32
(b) Summary of the debate .....	158–160	32
(c) Special Rapporteur's concluding remarks.....	161	33
7. Article 6. Treaties relating to the occasion for resort to armed conflict .....	162–166	33
(a) Introduction by the Special Rapporteur .....	162	33
(b) Summary of the debate .....	163–164	33
(c) Special Rapporteur's concluding remarks.....	165–166	33
8. Article 7. The operation of treaties on the basis of necessary implication from their object and purpose.....	167–175	33
(a) Introduction by the Special Rapporteur .....	167–168	33
(b) Summary of the debate .....	169–173	34
(c) Special Rapporteur's concluding remarks.....	174–175	35
9. Article 8. Mode of suspension or termination .....	176–178	35
(a) Introduction by the Special Rapporteur .....	176	35
(b) Summary of the debate .....	177	35
(c) Special Rapporteur's concluding remarks.....	178	35
10. Article 9. The resumption of suspended treaties .....	179–181	35
(a) Introduction by the Special Rapporteur .....	179	35
(b) Summary of the debate .....	180	35
(c) Special Rapporteur's concluding remarks.....	181	35
11. Article 10. Legality of the conduct of the parties .....	182–187	36
(a) Introduction by the Special Rapporteur .....	182	36
(b) Summary of the debate .....	183–185	36
(c) Special Rapporteur's concluding remarks.....	186–187	36
12. Article 11. Decisions of the Security Council, Article 12. Status of third States as neutrals, Article 13. Cases of termination or suspension, and Article 14. The revival of terminated or suspended treaties .....	188–191	36
(a) Introduction by the Special Rapporteur .....	188	36
(b) Summary of the debate .....	189–190	37
(c) Special Rapporteur's concluding remarks.....	191	37
VI. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS .....	192–206	38
A. Introduction .....	192–194	38
B. Consideration of the topic at the present session.....	195–204	38
C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission .....	205–206	40
1. Text of the draft articles.....	205	42
2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-seventh session.....	206	42
Chapter III. Breach of an international obligation.....		42
Article 8. Existence of a breach of an international obligation.....		42
Commentary .....		42
Article 9. International obligation in force for an international organization.....		43
Commentary .....		43
Article 10. Extension in time of the breach of an international obligation.....		44
Commentary .....		44
Article 11. Breach consisting of a composite act.....		44
Commentary .....		44
Article 12. Aid or assistance in the commission of an internationally wrongful act .....		45
Commentary .....		45
Article 13. Direction and control exercised over the commission of an internationally wrongful act....		46
Commentary .....		46

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
Article 14. Coercion of a State or another international organization .....		46
Commentary .....		46
Article 15 [16]. Decisions, recommendations and authorizations addressed to member States and international organizations .....		47
Commentary .....		47
Article 16. Effect of this chapter .....		48
Commentary .....		48
VII. DIPLOMATIC PROTECTION .....	207–241	49
A. Introduction .....	207–224	49
B. Consideration of the topic at the present session .....	225–241	50
1. Clean hands doctrine .....	226–236	50
(a) Introduction by the Special Rapporteur .....	226–230	50
(b) Summary of the debate .....	231–235	51
(c) Special Rapporteur’s concluding remarks .....	236	52
2. Other issues .....	237–241	52
(a) Summary of the debate .....	237–238	52
(b) Special Rapporteur’s concluding remarks .....	239–241	52
VIII. EXPULSION OF ALIENS .....	242–274	54
A. Introduction .....	242–243	54
B. Consideration of the topic at the present session .....	244–274	54
1. Introduction by the Special Rapporteur .....	245–250	54
2. Summary of the debate .....	251–270	55
(a) General comments .....	251–252	55
(b) The concept of the expulsion of aliens (scope and definitions) .....	253–260	55
(c) The right to expel .....	261–262	56
(d) Grounds for expulsion .....	263–265	56
(e) Rights related to expulsion .....	266–268	57
(f) Methodological issues .....	269–270	57
3. Special Rapporteur’s concluding remarks .....	271–274	58
IX. UNILATERAL ACTS OF STATES .....	275–332	59
A. Introduction .....	275–293	59
B. Consideration of the topic at the present session .....	294–332	60
1. Introduction by the Special Rapporteur of his eighth report .....	295–300	60
2. Summary of the debate .....	301–316	60
3. Special Rapporteur’s concluding remarks .....	317–326	62
4. Conclusions of the Working Group .....	327–332	62
X. RESERVATIONS TO TREATIES .....	333–438	63
A. Introduction .....	333–342	63
B. Consideration of the topic at the present session .....	343–436	64
1. Introduction by the Special Rapporteur of his tenth report .....	350–388	64
2. Summary of the debate .....	389–426	68
3. Special Rapporteur’s concluding remarks .....	427–436	70
C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission .....	437–438	71
1. Text of the draft guidelines .....	437	71
2. Text of the draft guidelines on reservations to treaties and the commentaries thereto provisionally adopted by the Commission at its fifty-seventh session .....	438	76
2.6 Formulation of objections to reservations .....		76
Commentary .....		76
2.6.1 Definition of objections to reservations .....		77
Commentary .....		77



Chapter	Paragraphs	Page
2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation .....		82
Commentary .....		82
XI. FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW .....	439–493	83
A. Introduction .....	439–441	83
B. Consideration of the topic at the present session .....	442–444	83
C. Report of the Study Group .....	445–493	83
1. General comments and the projected outcome of the work of the Study Group .....	445–448	83
2. Discussion of a memorandum on “regionalism” in the context of the Study on “the Function and scope of the <i>lex specialis</i> rule and the question of ‘self-contained regimes’” .....	449–466	84
3. Discussion on the Study on the interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community .....	467–479	86
4. Discussion of the Preliminary Report entitled “Hierarchy in international law: <i>jus cogens</i> , obligations <i>erga omnes</i> , Article 103 of the Charter of the United Nations, as conflict rules” .....	480–493	89
XII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .....	494–524	92
A. Programme, procedures and working methods of the Commission, and its documentation .....	494–501	92
1. Cost-saving measures .....	497	92
2. Documentation .....	498	92
3. Working Group on the long-term programme of work .....	499	92
4. New topic for inclusion in the current programme of work of the Commission .....	500	92
5. Honorariums .....	501	92
B. Date and place of the fifty-eighth session of the Commission .....	502	92
C. Cooperation with other bodies .....	503–509	92
D. Representation at the sixtieth session of the General Assembly .....	510–511	93
E. International Law Seminar .....	512–524	93

## ABBREVIATIONS

ECHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
IAH	International Association of Hydrogeologists
ICJ	International Court of Justice
IUSCTR	Iran-United States Claims Tribunal
ICRC	International Committee of the Red Cross
ILA	International Law Association
KFOR	Kosovo Force
MERCOSUR	Southern Common Market
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UNIDROIT	International Institute for the Unification of Private Law
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

\*

\*   \*

<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

\*

\*   \*

In the present volume, the “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

\*

\*   \*

## 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.

\*

\*   \*

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

## MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

### Privileges and immunities, diplomatic and consular relations

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.
United Nations Convention on jurisdictional immunities of States and their property (New York, 2 December 2004)	<i>Official Records of the General Assembly, Fifty-Ninth Session, Supplement No. 49 (A/59/49)</i> , vol. I, resolution 59/38, annex.

### Human rights

Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol to the above-mentioned Convention, (Paris, 20 March 1952)	<i>Ibid.</i>
Protocol No. 7 to the above-mentioned Convention, (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
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.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i>
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.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
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>Ibid.</i> , vol. 2171, No. 27531, p. 227.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990)	<i>Ibid.</i> , vol. 2220, No. 39481, p. 3.

### Narcotic drugs and psychotropic substances

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
--	---

### Refugees and stateless persons

Convention relating to the Status of Refugees (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.
Convention on territorial asylum (Caracas, 28 March 1954)	<i>Ibid.</i> , vol. 1438, No. 24378, p. 127.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	<i>Ibid.</i> , vol. 989, No. 14458, p. 175.

Source

**International trade and development**

Fourth ACP-EEC Convention (Lomé, 15 December 1989)

United Nations, *Treaty Series*, vol. 1924, No. 32847, p. 3.**Transport and communications**

Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (Geneva, 14 November 1975)

United Nations, *Treaty Series*, vol. 1079, No. 16510, p. 89.**Navigation**

Convention on the International Maritime Organization (Geneva, 6 March 1948)

United Nations, *Treaty Series*, vol. 289, No. 4214, p. 3.**Penal matters**

Rome Statute of the International Criminal Court (Rome, 17 July 1998)

United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.**Law of the sea**

Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958)

Convention on the Territorial Sea and the Contiguous Zone

United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205.

Convention on the Continental Shelf

*Ibid.*, vol. 499, No. 7302, p. 311.

Convention on the High Seas

*Ibid.*, vol. 450, No. 6465, p. 11.

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)

*Ibid.*, vol. 1833, No. 31363, p. 3.

Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention) (Paris, 22 September 1992)

*Ibid.*, vol. 2354, No. 42279, p. 67.**Law applicable in armed conflict**

Conventions respecting the Laws and Customs of War on Land (The Hague, 29 July 1899 and 18 October 1907)

J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100.

Treaty of Peace with Italy (Paris, 10 February 1947)

United Nations, *Treaty Series*, vol. 49, No. 747, p. 3.

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)

*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq.*

Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)

*Ibid.*, vol. 249, No. 3511, p. 215.**Law of treaties**

Vienna Convention on the law of treaties (Vienna, 23 May 1969)

United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978)

*Ibid.*, 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 Civil Liability for Damage resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)

Council of Europe, *European Treaty Series*, No. 150.

## Source

## Environment

Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention) (London, 17 February 1978)	United Nations, <i>Treaty Series</i> , vol. 1340, No. 22484, p. 61.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	<i>Ibid.</i> , vol. 1513, No. 26164, p. 293.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	<i>Ibid.</i> , vol. 1989, No. 34028, p. 309.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	<i>Ibid.</i> , vol. 1771, No. 30822, p. 107.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	<i>Ibid.</i> , vol. 1760, No. 30619, p. 79.
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/51/49)</i> , volume III, resolution 51/229, annex.
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.

## Miscellaneous

UNIDROIT Convention on stolen or illegally exported cultural objects (Rome, 24 June 1995)	United Nations, <i>Treaty Series</i> , vol. 242, No. 43718, p. 3.
Consolidated version of the Treaty establishing the European Community (Amsterdam, 2 October 1997)	<i>Official Journal of the European Communities</i> , No. C 340, vol. 40 (10 November 1997), p. 173.

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission held the first part of its fifty-seventh session from 2 May to 3 June 2005 and the second part from 11 July to 5 August 2005 (see paragraph 497 below) at its seat at the United Nations Office at Geneva. The session was opened by Ms. Hanqin Xue, First Vice-Chairperson of the Commission at its fifty-sixth session.

#### A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei ADDO (Ghana)  
Mr. Husain M. AL-BAHARNA (Bahrain)  
Mr. Ali Mohsen Fetais AL-MARRI (Qatar)  
Mr. João Clemente BAENA SOARES (Brazil)  
Mr. Ian BROWNLIE (United Kingdom of Great Britain and Northern Ireland)  
Mr. Enrique CANDIOTI (Argentina)  
Mr. Choung Il CHEE (Republic of Korea)  
Mr. Pedro COMISSÁRIO AFONSO (Mozambique)  
Mr. Riad DAOUDI (Syrian Arab Republic)  
Mr. Christopher John Robert DUGARD (South Africa)  
Mr. Constantin ECONOMIDES (Greece)  
Ms. Paula ESCARAMEIA (Portugal)  
Mr. Salifou FOMBA (Mali)  
Mr. Giorgio GAJA (Italy)  
Mr. Zdzislaw GALICKI (Poland)  
Mr. Peter KABATSI (Uganda)  
Mr. Maurice KAMTO (Cameroon)  
Mr. James Lutabanzibwa KATEKA (United Republic of Tanzania)  
Mr. Fathi KEMICHA (Tunisia)  
Mr. Roman Anatolyevitch KOLODKIN (Russian Federation)  
Mr. Martti KOSKENNIEMI (Finland)  
Mr. William MANSFIELD (New Zealand)  
Mr. Michael MATHESON (United States of America)  
Mr. Teodor Viorel MELESCANU (Romania)  
Mr. Djamchid MOMTAZ (Islamic Republic of Iran)  
Mr. Bernd NIEHAUS (Costa Rica)  
Mr. Didier OPERTTI BADAN (Uruguay)  
Mr. Guillaume PAMBOU-TCHIVOUNDA (Gabon)

Mr. Alain PELLET (France)  
Mr. Pemmaraju Sreenivasa RAO (India)  
Mr. Víctor RODRÍGUEZ CEDEÑO (Venezuela)  
Mr. Bernardo SEPULVEDA (Mexico)  
Ms. Hanqin XUE (China)  
Mr. Chusei YAMADA (Japan)

#### B. Officers and the Enlarged Bureau

3. At its 2831st meeting, on 2 May 2005, the Commission elected the following officers:

*Chairperson:* Mr. Djamchid Momtaz  
*First Vice-Chairperson:*  
Mr. Guillaume Pambou-Tchivounda  
*Second Vice-Chairperson:* Mr. Roman Kolodkin  
*Chairperson of the Drafting Committee:*  
Mr. William Mansfield  
*Rapporteur:* Mr. Bernd Niehaus

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairpersons of the Commission<sup>1</sup> and the Special Rapporteurs.<sup>2</sup>

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Mr. Guillaume Pambou-Tchivounda (Chairperson), Mr. Emmanuel Akwei Addo, Mr. Choung Il Chee, Mr. Pedro Comissário Afonso, Mr. Riad Daoudi, Mr. Constantin Economides, Ms. Paula Escarameia, Mr. Salifou Fomba, Mr. Zdzislaw Galicki, Mr. Peter Kabatsi, Mr. James Lutabanzibwa Kateka, Mr. Fathi Kemicha, Mr. Roman Anatolyevitch Kolodkin, Mr. Martti Koskenniemi, Mr. Michael Matheson, Mr. Didier Opertti Badan, Mr. Alain Pellet, Ms. Hanqin Xue and Mr. Bernd Niehaus (*ex officio*).

#### C. Drafting Committee

6. At its 2834th and 2844th meetings, on 6 and 25 May 2005 respectively, the Commission established a Drafting

<sup>1</sup> Mr. João Clemente Baena Soares, Mr. Enrique Candiotti, Mr. Zdzislaw Galicki, Mr. Peter Kabatsi, Mr. Teodor Viorel Melescanu, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao and Mr. Chusei Yamada.

<sup>2</sup> Mr. Ian Brownlie, Mr. Christopher John Robert Dugard, Mr. Giorgio Gaja, Mr. Maurice Kamto, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao, Mr. Victor Rodríguez Cedeño and Mr. Chusei Yamada.

Committee, composed of the following members for the topics indicated:

(a) Reservations to treaties: Mr. William Mansfield (Chairperson), Mr. Alain Pellet (Special Rapporteur), Mr. Pedro Comissário Afonso, Mr. Riad Daoudi, Ms. Paula Escarameia, Mr. Salifou Fomba, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Fathi Kemicha, Mr. Roman Anatolyevitch Kolodkin, Mr. Michael Matheson, Ms. Hanqin Xue and Mr. Bernd Niehaus (*ex officio*);

(b) Responsibility of international organizations: Mr. William Mansfield (Chairperson), Mr. Giorgio Gaja (Special Rapporteur), Mr. Choung Il Chee, Mr. Pedro Comissário Afonso, Mr. Constantin Economides, Ms. Paula Escarameia, Mr. Roman Anatolyevitch Kolodkin, Mr. Michael Matheson, Mr. Pemmaraju Sreenivasa Rao, Ms. Hanqin Xue, Mr. Chusei Yamada and Mr. Bernd Niehaus (*ex officio*).

7. The Drafting Committee held a total of six meetings on the two topics indicated above.

#### D. Working groups

8. At its 2832nd, 2836th, 2840th and 2843rd meetings, on 3, 11, 18 and 24 May 2005 respectively, the Commission also established the following Working Groups and Study Group:

(a) Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law. *Chairperson*: Mr. Martti Koskenniemi;

(b) Working Group on unilateral acts of States. *Chairperson*: Mr. Alain Pellet;

(c) Working Group on shared natural resources. *Chairperson*: Mr. Enrique Candioti;

(d) Working Group on responsibility of international organizations. *Chairperson*: Mr. Giorgio Gaja.

9. The Working Group on the long-term programme of work reconvened and was composed of the following members: Mr. Alain Pellet (Chairperson), Mr. João

Clemente Baena Soares, Mr. Zdzislaw Galicki, Mr. Maurice Kamto, Mr. Martti Koskenniemi, Ms. Hanqin Xue and Mr. Bernd Niehaus (*ex officio*).

#### E. Secretariat

10. Mr. Nicolas Michel, 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. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Senior Legal Officer, served as Senior Assistant Secretary, Mr. Trevor Chimimba and Mr. Arnold Pronto, Legal Officers, served as Assistant Secretaries to the Commission.

#### F. Agenda

11. At its 2831st meeting, the Commission adopted an agenda for its fifty-seventh session consisting of the following items:

1. Organization of work of the session.
2. Diplomatic protection.
3. Responsibility of international organizations.
4. Shared natural resources.
5. Unilateral acts of States.
6. Reservations to treaties.
7. Expulsion of aliens.
8. Effects of armed conflicts on treaties.
9. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-eighth session.
13. Other business.



## Chapter II

### SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-SEVENTH SESSION

12. As regards the topic “Shared Natural Resources”, the Commission considered the third report of the Special Rapporteur (A/CN.4/551 and Add.1), which contained a complete set of 25 draft articles on the law of transboundary aquifers. The Commission also established a Working Group on Transboundary Groundwaters chaired by Mr. Enrique Candioti to review the draft articles presented by the Special Rapporteur, taking into account the debate in the Commission on the topic. The Working Group had the benefit of advice and briefings from experts on groundwaters from UNESCO and IAH. It also held an informal briefing by the Franco-Swiss Genevise Aquifer Authority. The Working Group reviewed and revised eight draft articles and recommended that it be reconvened in 2006 to complete its work (see chapter IV).

13. Concerning the topic “Effects of armed conflicts on treaties”, the Commission considered the first report of the Special Rapporteur on the topic (A/CN.4/552), presenting an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commenting, including providing State practice. The Commission endorsed the Special Rapporteur’s suggestion that a written request for information be circulated to member Governments (see chapter V).

14. As regards the topic “Responsibility of international organizations”, the Commission considered the Special Rapporteur’s third report (A/CN.4/553), proposing nine draft articles dealing with the existence of a breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another international organization. The Commission considered the third report and adopted nine draft articles together with commentaries (see chapter VI).

15. As regards the topic “Diplomatic protection”, the Commission considered the Special Rapporteur’s sixth report (A/CN.4/546) dealing with the clean hands doctrine (see chapter VII).

16. As regards the topic “Expulsion of aliens”, the Commission considered the Special Rapporteur’s preliminary report on the topic (A/CN.4/554), presenting an overview of some of the issues involved and a possible outline for further consideration of the topic (see chapter VIII).

17. With regard to the topic “Unilateral acts of States” the Commission considered the eighth report of the Special Rapporteur (A/CN.4/557) which contained an

analysis of 11 cases of State practice and the conclusions thereof. A Working Group on Unilateral Acts was reconstituted, its work focusing on the study of State practice and on the formulation of preliminary conclusions on the topic which the Commission should consider at its next session (see chapter IX).

18. Concerning the topic “Reservations to treaties”, the Commission considered part of the Special Rapporteur’s tenth report (A/CN.4/558 and Add.1–2) and referred to the Drafting Committee seven draft guidelines dealing with validity of reservations and definition of the object and purpose of the treaty. The Commission also adopted two draft guidelines dealing with the definition of objections to reservations and the definition of objection to the late formulation or widening of the scope of a reservation together with commentaries (see chapter X).

19. In relation to the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, the Commission held an exchange of views on the topic on the basis of a briefing by the Chairperson of the Study Group on the status of work of the Study Group. The Study Group considered the memorandum on regionalism in the context of the study on the “Function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”, the Study on the interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c) of the Vienna Convention on the law of treaties (hereinafter the 1969 Vienna Convention)), and the final report on the Study on hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules. The Study Group also received the final report on the Study concerning the modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention) (see chapter XI). The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles, to the fifty-eighth session of the Commission (2006).

20. The Commission set up a Planning Group to consider its programme, procedures and working methods (see chapter XII, sect. A). The Commission decided to include in its current programme of work one new topic, namely “The obligation to extradite or prosecute (*aut dedere aut judicare*)”. In this regard, the Commission decided to appoint Mr. Zdzisław Galicki as Special Rapporteur for the topic.

21. The Commission continued traditional exchanges of information with ICJ, the Inter-American Juridical



Committee, the Asian-African Legal Consultative Organization, and the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (see chapter XII, sect. C).

22. A training seminar was held with 24 participants of different nationalities (see chapter XII, sect. E).

23. The Commission decided that its next session would be held at the United Nations Office at Geneva in two parts, from 1 May to 9 June and 3 July to 11 August 2006 (see chapter XII, sect. B).

## Chapter III

### SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

#### A. Shared natural resources

24. Under this topic, the Commission is now focusing for the time being on codification of the law on transboundary groundwaters (aquifers and aquifer systems). The work is progressing in the form of formulation of draft articles on the basis of the proposals by the Special Rapporteur contained in his third report (A/CN.4/551 and Add.1). In its report to the General Assembly on the work of its fifty-sixth session in 2004, the Commission requested States and relevant intergovernmental organizations to provide information in reply to the questionnaire prepared by the Special Rapporteur.<sup>3</sup> The responses received from 23 States and three intergovernmental organizations (A/CN.4/555 and Add.1) were very useful to the Commission in its current work. Accordingly, the Commission requests those States and intergovernmental organizations that have not yet responded to submit detailed and precise information on the basis of the questionnaire prepared by the Special Rapporteur.

#### B. Effects of armed conflicts on treaties

25. The Commission would welcome any information Governments may wish to provide concerning their practice with regard to this topic, particularly more contemporary practice. Any further information that Governments consider relevant to the topic is also welcome.

#### C. Responsibility of international organizations

26. The next report of the Special Rapporteur will address questions relating to circumstances precluding wrongfulness, and responsibility of States for the internationally wrongful acts of international organizations. The Commission would welcome comments and observations relating to these questions, especially on the following points:

(a) Article 16 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third meeting only considers the case where a State aids or assists another State in the commission of an internationally wrongful act.<sup>4</sup>

<sup>3</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 55, para. 81.

<sup>4</sup> Article 16 reads as follows:

*“Article 16. Aid or assistance in the commission of an internationally wrongful act*

*“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

*“(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*

*Should the Commission also include in the draft articles on responsibility of international organizations a provision concerning aid or assistance given by a State to an international organization in the commission of an internationally wrongful act? Should the answer given to the question above also apply to the case of direction and control<sup>5</sup> or coercion<sup>6</sup> exercised by a State over the commission by an international organization of an act that would be wrongful but for the coercion?*

*(b) Apart from the cases considered under (a), are there cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member?*

#### D. Expulsion of aliens

27. The Commission would appreciate receiving any information concerning the practice of States on the subject, including national legislation.

#### E. Unilateral acts of States

28. The Commission would welcome comments and observations from Governments on the revocability and modification of unilateral acts. In particular, it would be interested to hear about practice relating to the revocation or modification of unilateral acts, any particular circumstances and conditions, the effects of a revocation or a

*“(b) the act would be internationally wrongful if committed by that State.”*

*(Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 65)

<sup>5</sup> See article 17 of the draft articles on responsibility of States for internationally wrongful acts, which reads as follows:

*“Article 17. Directives and control in the commission of an internationally wrongful act*

*“A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:*

*“(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*

*“(b) the act would be internationally wrongful if committed by that State.”*

*(Ibid.*, p. 67–68)

<sup>6</sup> See article 18 of the draft articles on responsibility of States for internationally wrongful acts, which reads as follows:

*“Article 18. Coercion of another State*

*“A State which coerces another State to commit an act is internationally responsible for that act if:*

*“(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and*

*“(b) the coercing State does so with knowledge of the circumstances of the act.”*

*(Ibid.*, p. 69)

modification of a unilateral act and the scope of possible third-party reactions in that respect.

#### **F. Reservations to treaties**

29. States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the

treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in the view of Governments, this practice accords with article 19 (c) of the 1969 Vienna Convention.

## Chapter IV

### SHARED NATURAL RESOURCES

#### A. Introduction

30. The Commission, at its fifty-fourth session (2002), decided to include the topic “Shared natural resources” in its programme of work<sup>7</sup> and appointed Mr. Chusei Yamada as Special Rapporteur.<sup>8</sup> The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission’s decision to include the topic “Shared natural resources” in its programme of work.

31. At its fifty-fifth (2003) and fifty-sixth (2004) sessions, the Commission considered the first<sup>9</sup> and second<sup>10</sup> reports, respectively, of the Special Rapporteur. The latter report contained a proposed general framework and a set of six draft articles. At its fifty-sixth session, the Commission also established a Working Group, chaired by the Special Rapporteur.

#### B. Consideration of the topic at the present session

32. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/551 and Add.1). It considered the report at its 2831st to 2836th meetings, held on 2, 3, 4, 6, 10 and 11 May 2005. The Commission also had an informal technical presentation on the Guarani Aquifer System Project on 4 May 2005. At its 2836th meeting, the Commission established a Working Group chaired by Mr. Enrique Candioti. The Working Group held 11 meetings.

33. At its 2863rd meeting, on 3 August 2005, the Commission took note of the report of the Working Group. It expressed its appreciation that the Working Group had made substantial progress in its work by reviewing and revising eight draft articles. The Commission took note of the proposal of the Working Group that the Commission consider reconvening it at the 2006 session in order that it might complete its work.

#### 1. INTRODUCTION BY THE SPECIAL RAPPOURTEUR OF HIS THIRD REPORT

34. In introducing the complete set of 25 draft articles contained in the third report, the Special Rapporteur recalled that in the report of the Commission to the General Assembly on the work of its fifty-sixth session, in 2004, he had already indicated his intention to submit

such a complete set on the basis of the general outline.<sup>11</sup> From the debates of the Sixth Committee during the fifty-ninth session of the General Assembly, there appeared to be general support for his basic approach and an endorsement of his proposal to submit such a set of draft articles. Commenting on the substance of the draft articles, the Special Rapporteur first observed that the need for an explicit reference to General Assembly resolution 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, had been advocated by some delegations in the debate of the Sixth Committee. In his view such a reference could be in the preamble, the formulation of which would, however, have to be deferred until the completion of the consideration of the substantive provisions.

35. Secondly, the Special Rapporteur introduced the various draft articles. The substance of draft article 1,<sup>12</sup> remained the same as proposed in the second report.<sup>13</sup> However, it was reformulated to clarify the three different categories of activities that are intended to fall within the scope of the draft articles.

36. Regarding draft article 2,<sup>14</sup> its subparagraph (a) had been recast to respond to concerns expressed on the terms “rock formation” and “exploitable quantities” of

<sup>11</sup> See *Yearbook ... 2004*, vol. II (Part Two), p. 15, para. 27 and p. 55–56, para. 86.

<sup>12</sup> Draft article 1, as proposed by the Special Rapporteur in his third report, reads as follows:

“Article 1 [Article 1]. *Scope of the present Convention*

“The present Convention applies to:

“(a) Utilization of transboundary aquifers and aquifer systems;

“(b) Other activities that have or are likely to have an impact upon those aquifers and aquifer systems;

“(c) Measures of protection, preservation and management of those aquifers and aquifer systems.”

<sup>13</sup> *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1, p. 261, para. 10.

<sup>14</sup> Draft article 2, as proposed by the Special Rapporteur in his third report, reads as follows:

“Article 2 [Article 2]. *Use of terms*

“For the purposes of the present Convention:

“(a) ‘Aquifer’ means a permeable [water-bearing] geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

“(b) ‘Aquifer system’ means a series of two or more aquifers [each associated with specific geological formations,] that are hydraulically connected;

“(c) ‘Transboundary aquifer’ or ‘transboundary aquifer system’ means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

“(d) ‘Aquifer State’ means a State Party to the present Convention in whose territory any part of a transboundary aquifer or aquifer system is situated;

(Continued on next page.)

<sup>7</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518.

<sup>8</sup> *Ibid.*, para. 519.

<sup>9</sup> *Yearbook ... 2003*, vol. II (Part One), p. 117, document A/CN.4/533 and Add.1.

<sup>10</sup> *Yearbook ... 2004*, vol. II (Part One), p. 117, document A/CN.4/539 and Add.1.

water. In clarifying the change, it was noted, first, that an aquifer consists of two elements: (a) an underground geological formation, which functions as a container, and (b) the extractable water stored in it. The term “rock” was a technical term used by hydrogeologists to include not only hard rock but also gravel and sand. Since in common usage, “rock” often means hard rock, the term “geological formation” seemed more appropriate than the term “rock formation”. Secondly, to function as a container, the geological formation must be permeable, with at least a less permeable layer underlying it and a similar layer often overlaying it. Extractable water exists in the saturated zone of the formation. The water above the saturated zone of the formation is in the form of vapour and is not extractable. Thus, to avoid confusion, the term “extractable” or “exploitable” is not used.

37. Subparagraph (b) defines an “aquifer system” as a series of two or more aquifers, which better clarifies the term “aquifer system”. In the second report, a fiction that an aquifer system also includes a single aquifer was employed in order to achieve economy of words. The bracketed phrase “each associated with specific geological formations”, which could alternatively be placed in the commentary, denotes the fact that an aquifer system may consist of a series of aquifers of different categories of geological formations.

38. Subparagraphs (c) and (d) remained the same as those contained in the second report, while subparagraphs (e) and (f), defining “Recharging aquifer” and “Non-recharging aquifer” were new. Under draft article 5, it is contemplated that different rules would be applicable in respect of each category of aquifer. While water resources in a recharging aquifer, for example the Guarani aquifer (Argentina, Brazil, Paraguay and Uruguay), are renewable, such is not the case in a non-recharging aquifer in an arid zone, such as the Nubian Sandstone Aquifer (Chad, Egypt, Libya and Sudan).

39. Draft article 3,<sup>15</sup> is intended to emphasize the importance of bilateral and regional arrangements entered

into by States concerned with respect to specific aquifers. If a binding instrument were to be the preferred option, it would be cast as a framework convention. Thus, while the basic principles to be enunciated would have to be respected, the bilateral or regional arrangements would have priority.

40. Stressing that draft articles 5 and 7 were key provisions, it was observed that draft article 5<sup>16</sup> contains two basic principles found in almost all water-related treaties: the principle of equitable utilization which prescribes the right of a State to participate in an equitable manner with others in the utilization of the same activity, and the principle of reasonable utilization which prescribes the right as well as the obligation of a State in the management of a particular activity in a reasonable manner. Although they were closely interrelated, taken for granted and often mixed up, the two principles were different and have thus been dealt with separately in paragraphs 1 and 2 respectively.

41. The Special Rapporteur viewed the principle of equitable utilization in paragraph 1 as viable only in the context of a shared resource. The acceptance of the principle in paragraph 1 thus implied a recognition of the shared character of the transboundary aquifer among the aquifer States. However, there was no intention to internationalize or universalize transboundary aquifers. Concerning the role of third States in the scheme, it was noted that the utilization and management of a specific transboundary aquifer was the business of the aquifer States in whose territory the aquifer was located, and any third States were considered as having no role.

42. Paragraph 2, on reasonable utilization (that is, sustainable utilization), was divided into subparagraphs (a) and (b) to reflect the practical application of this principle in the differing circumstances of a recharging and a non-recharging aquifer. Although many groundwater experts

negotiating in good faith for the purpose of concluding an arrangement beneficial to all the parties.

“3. In the absence of an agreement to the contrary, the present Convention applies to the aquifer or aquifer system referred to in paragraph 1 only to the extent that its provisions are compatible with those of the arrangement referred to in the same paragraph.”

<sup>16</sup> Draft article 5, as proposed by the Special Rapporteur in his third report, reads as follows:

*“Article 5 [Article 3]. Equitable and reasonable utilization*

“1. Aquifer States shall, in their respective territories, utilize a transboundary aquifer or aquifer system in a manner such that the benefits to be derived from such utilization shall accrue equitably to the aquifer States concerned.

“2. Aquifer States shall, in their respective territories, utilize a transboundary aquifer or aquifer system in a reasonable manner and, in particular:

“(a) With respect to a recharging transboundary aquifer or aquifer system, shall take into account the sustainability of such aquifer or aquifer system and shall not impair the utilization and functions of such aquifer or aquifer system;

“(b) With respect to a non-recharging transboundary aquifer or aquifer system, shall aim to maximize the long-term benefits derived from the use of the water contained therein. They are encouraged to establish a development plan for such aquifer or aquifer system, taking into account the agreed lifespan of such aquifer or aquifer system as well as future needs of, and alternative water sources for, the aquifer States.”

“3. In the application of paragraphs 1 and 2, aquifer States concerned shall, when the need arises, enter into consultation in a spirit of cooperation.”

(Footnote 14 continued.)

“(e) ‘Recharging aquifer’ means an aquifer that receives a non-negligible amount of contemporary water recharge;

“(f) ‘Non-recharging aquifer’ means an aquifer that receives a negligible amount of contemporary water recharge.”

<sup>15</sup> Draft article 3, as proposed by the Special Rapporteur in his third report, reads as follows:

*“Article 3. Bilateral and regional arrangements*

“1. For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States in whose territories such an aquifer or aquifer system is located are encouraged to enter into a bilateral or regional arrangement among themselves. Such arrangement may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or use except insofar as the arrangement adversely affects, to a significant extent, the use by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent. Any State in whose territory such an aquifer or aquifer system is located is entitled to participate in the negotiation and to become a party to arrangements when such arrangements are likely to prejudice their positions *vis-à-vis* that aquifer or aquifer system.

“2. Parties to an arrangement referred to in paragraph 1 shall consider harmonizing such arrangement with the basic principles of the present Convention. Where those parties consider that adjustment in application of the provisions of the present Convention is required because of the characteristics and special uses of a particular aquifer or aquifer system, they shall consult with a view to



advocated sustainable utilization of groundwaters, the application of such a principle was viewed as feasible only for a resource which was truly renewable, such as surface water. Draft article 6<sup>17</sup> simply enumerated the relevant factors and circumstances that should be taken into account in assessing what constitutes equitable or reasonable utilization in respect of a specific aquifer.

43. On the other key draft article, draft article 7,<sup>18</sup> there continued to be objection to the threshold of significant harm. Considering the particularities of aquifers, some delegations in the Sixth Committee preferred a lower threshold. However, the Special Rapporteur viewed the concept of significant harm to be relative and capable of taking into account the fragility of any resource. Moreover, the Commission's position was well established and there seemed to be no justification to depart from the threshold. Some delegations in the Sixth Committee were also opposed to a reference to "compensation" in subparagraph 3. However, the provision was similar to paragraph 2 of article 7 of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses (hereinafter the 1997 Convention) and had been proposed then by the Commission on the basis of State practice.

<sup>17</sup> Draft article 6, as proposed by the Special Rapporteur in his third report, reads as follows:

*"Article 6. Factors relevant to equitable and reasonable utilization"*

"1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

- "(a) The natural condition of the aquifer or aquifer system;
- "(b) The social and economic needs of the aquifer States concerned;
- "(c) The population dependent on the aquifer or aquifer system in each aquifer State;
- "(d) The effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;
- "(e) The existing and potential utilization of the aquifer or aquifer system;
- "(f) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;
- "(g) The availability of alternatives, of comparable value, to a particular existing and planned utilization of the aquifer or aquifer system.

"2. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is reasonable and equitable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

<sup>18</sup> Draft article 7, as proposed by the Special Rapporteur in his third report, reads as follows:

*"Article 7 [Article 4]. Obligation not to cause harm"*

"1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States.

"2. Aquifer States shall, in undertaking other activities in their territories that have or are likely to have an impact on a transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm to other aquifer States through that aquifer or aquifer system.

"3. Where significant harm is nevertheless caused to another aquifer State, the aquifer States whose activities cause such harm shall, in the absence of agreement to such activities, take all appropriate measures in consultation with the affected State, having due regard for the provisions of articles 5 and 6, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."

44. As regards the remaining draft articles, draft articles 8 to 10 deal with issues pertaining to cooperation among aquifer States, with draft article 8,<sup>19</sup> setting out the general obligation to cooperate and recommending implementation through the establishment of joint mechanisms or commissions at bilateral or regional levels. While draft article 9<sup>20</sup> deals with one aspect of cooperation, namely regular exchange of comparable data and information, the other aspect, monitoring, is addressed in a separate and independent draft article, draft article 10,<sup>21</sup> to emphasize the importance of monitoring in managing transboundary aquifers.

<sup>19</sup> Draft article 8, as proposed by the Special Rapporteur in his third report, reads as follows:

*"Article 8 [Article 5]. General obligation to cooperate"*

"1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain reasonable utilization and adequate protection of a transboundary aquifer or aquifer system.

"2. In determining the manner of such cooperation, aquifer States are encouraged to establish joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions."

<sup>20</sup> Draft article 9, as proposed by the Special Rapporteur in his third report, reads as follows:

*"Article 9 [Article 6]. Regular exchange of data and information"*

"1. Pursuant to article 8, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular that of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system, as well as related forecasts.

"2. In the light of uncertainty about the nature and extent of some transboundary aquifer or aquifer systems, aquifer States shall employ their best efforts to collect and generate, in accordance with currently available practice and standards, individually or jointly and, where appropriate, together with or through international organizations, new data and information to identify the aquifer or aquifer systems more completely.

"3. If an aquifer State is requested by another aquifer State to provide data and information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

"4. Aquifer States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner that facilitates its utilization by the other aquifer States to which it is communicated."

<sup>21</sup> Draft article 10, as proposed by the Special Rapporteur in his third report, reads as follows:

*"Article 10. Monitoring"*

"For the purpose of being well acquainted with the conditions of a transboundary aquifer or aquifer system:

"1. Aquifer States shall agree on harmonized standards and methodology for monitoring a transboundary aquifer or aquifer system. They shall identify key parameters that they will monitor based on an agreed conceptual model of the aquifer or aquifer system. These parameters shall include extent, geometry, flow path, hydrostatic pressure distribution, quantities of flow and hydrochemistry of the aquifer or aquifer system.

"2. Aquifer States shall undertake to monitor such parameters referred to in paragraph 1 and shall, wherever possible, carry out these monitoring activities jointly among themselves and in collaboration with the competent international organizations. Where, however, monitoring activities are not carried out jointly, aquifer States shall exchange the monitored data."

45. Draft articles 16 and 17<sup>22</sup> set out procedural requirements for planned measures. Compared to the 1997 Convention, which contains elaborate procedures for planned activities, it was noted that only two draft articles were presented. From the Sixth Committee debates, there seemed to be a general wish for simpler procedural arrangements, while detailed elaboration could be left to the specific aquifer States concerned.

<sup>22</sup> Draft articles 16 and 17, as proposed by the Special Rapporteur in his third report, read as follows:

*"Article 16. Assessment of potential effects of activities"*

"When an aquifer State has reasonable grounds for believing that a particular planned activity in its territory may cause adverse effects on a transboundary aquifer or aquifer system, it shall, as far as practicable, assess the potential effects of such activity."

*"Article 17. Planned activities"*

"1. Before an aquifer State implements or permits the implementation of planned activities which may have a significant adverse effect upon other aquifer States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned activities."

"2. If the notifying State and the notified States disagree on the effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body which may be able to make an impartial assessment of the effect of the planned activities."

<sup>23</sup> Draft articles 4 and 11 to 15, as proposed by the Special Rapporteur in his third report, read as follows:

*"Article 4. Relation to other conventions and international agreements"*

"1. When the States Parties to the present Convention are parties also to the Convention on the Law of the Non-navigational Uses of International Watercourses, the provisions of the latter concerning transboundary aquifers or aquifer systems apply only to the extent that they are compatible with those of the present Convention."

"2. The present Convention shall not alter the rights and obligations of the States Parties which arise from other agreements compatible with the present Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the present Convention."

*"Article 11 [Article 7]. Relationship between different kinds of utilization"*

"1. In the absence of agreement or custom to the contrary, no utilization of a transboundary aquifer or aquifer system enjoys inherent priority over other utilization."

"2. In the event of a conflict between utilization of a transboundary aquifer or aquifer system, it shall be resolved with special regard being given to the requirements of vital human needs."

*"Article 12. Protection and preservation of ecosystems"*

"Aquifer States shall protect and preserve ecosystems within a transboundary aquifer or aquifer system. They shall also ensure adequate quality and sufficient quantity of discharge water to protect and preserve outside ecosystems dependent on the aquifer or aquifer system."

*"Article 13. Protection of recharge and discharge zones"*

"1. Aquifer States shall identify recharge zones of a transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the recharge process and also take all measures to prevent pollutants from entering the aquifer or aquifer system."

"2. Aquifer States shall identify discharge zones of a transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the discharge process."

"3. When such recharge or discharge zones are located in the territories of States other than aquifer States, aquifer States should seek the cooperation of the former States to protect these zones."

46. Draft articles 4 and 11–15,<sup>24</sup> as well as draft articles 18–25,<sup>24</sup> were considered self-explanatory. However, attention was drawn to draft article 13 on protection of recharge and discharge zones, which were located outside aquifers and were vital to their functioning. The regulation of activities in these zones would ensure that the functioning of the aquifers were not impaired. The draft article also addressed the situation in which such zones were located in third States, by making provision for cooperation, in principle non-obligatory. Attention was also drawn to draft article 18 on scientific and technical assistance to developing countries. Since the science of hydrogeology was still in its infancy and relatively advanced in the developed countries only, such a provision was necessary to ensure assistance to developing countries, where most aquifers were located.

47. As to the form of final instrument, the Special Rapporteur, at the outset of his introduction, mentioned that the presentation of the draft articles should not be considered as in any way intended to prejudge the final outcome since he had not yet made a decision on the matter.

<sup>24</sup> Draft articles 18 to 21, as proposed by the Special Rapporteur in his third report, read as follows:

*"Article 18. Scientific and technical assistance to developing States"*

"States shall, directly or through competent international organizations, provide scientific, educational, technical and other assistance to developing States for the protection and management of a transboundary aquifer or aquifer system. Such assistance shall include, *inter alia*:

"(a) Training of their scientific and technical personnel;

"(b) Facilitating their participation in relevant international programmes;

"(c) Supplying them with necessary equipment and facilities;

"(d) Enhancing their capacity to manufacture such equipment;

"(e) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

"(f) Minimizing the effects of major activities affecting transboundary aquifers or aquifer systems;

"(g) Preparing environmental impact assessments."

*"Article 19. Emergency situations"*

"1. An aquifer State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency situation originating within its territory that causes, or poses an imminent threat of causing, serious harm to other States and that results suddenly from natural causes or from human conduct."

"2. An aquifer State within whose territory an emergency situation originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency situation."

"3. Where water is critical to alleviate an emergency situation, aquifer States may derogate from the provisions of the articles in parts II to IV of the present Convention to the extent necessary to alleviate the emergency situation."

*"Article 20. Protection in time of armed conflict"*

"Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

*"Article 21. Data and information vital to national defence or security"*

"Nothing in the present Convention obliges an aquifer State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with other aquifer States with a view to providing as much information as possible under the circumstances."

While being aware of views in the Sixth Committee in favour of non-binding guidelines, the Special Rapporteur urged that at this early stage, the focus be on the substance rather than the form.<sup>25</sup>

## 2. SUMMARY OF THE DEBATE

### (a) *General comments*

48. Members of the Commission commended the Special Rapporteur for his third report and his continuing efforts to develop the topic taking into account the views of Governments, and to enrich understanding of it by consulting and seeking the scientific advice of groundwater experts. Such an approach would assure an outcome that would be both generally acceptable and responsive to the concerns of the scientific community. The importance of the topic was stressed, and attention in this regard was drawn to the report of the High-level Panel on Threats, Challenges and Change,<sup>26</sup> which alluded to the subject.

49. Concerning general matters of structure, presentation and how the consideration of the topic should be proceeded with, some members welcomed the overall structure and the draft articles presented by the Special Rapporteur, while some other members, depending on the importance that they attached to the substance of particular provisions, offered an indication that they preferred the placement of certain draft articles at the beginning or at the end, or their omission from the text. Some members also noted that the drafting of certain provisions needed to be reconsidered, since the language used was merely hortatory and did not appear suitable for a legally-binding instrument, which was their preferred option. Some other members, however, felt that such language was entirely appropriate even in a framework instrument which was

aimed at providing States guidance in the further negotiation of specific instruments. Flexibility was considered to be an essential characteristic.

50. Some members also noted that some of the principles were formulated with a high degree of generality and abstraction, thus giving rise to doubts as to whether, in practice, they would be helpful in providing sufficient guidance to States. It was pointed out, on the other hand, that there was no other way to proceed since a more detailed and prescriptive text was likely to raise more questions than answers. Noting that the 1997 Convention was used essentially as the basis for formulating the draft articles, some members also commented that they would have had a fuller appreciation of the draft articles if the reasoning behind any departure, even minor, from the language of the 1997 Convention had been provided, and if detailed commentaries had been given on the proposed draft articles. While some members proposed the referral of the draft articles, except for a few, to the Drafting Committee, the preponderant view favoured their further consideration first within the context of a working group. As noted above, the Commission established such a Working Group at its 2836th meeting.

51. Several members alluded to the paucity of State practice in the area and its impact on the work of the Commission. It was doubted whether there were sufficient State practice on which the Commission could proceed with a codification exercise. It was considered that the law in the area was still in its embryonic stages. Thus, the project would proceed largely as a matter of progressive development or would move forward, taking the 1997 Convention as a point of departure.

52. While reference to the 1997 Convention was generally perceived as inevitable, some members, bearing in mind the differences between surface and groundwaters, especially the vulnerability of aquifers, suggested a need to proceed with caution. It was noted that the topic was substantially different from that of watercourses, and that, therefore, the Convention should be taken as a guide only. Groundwaters raised sensitive issues, particularly from the perspective of environmental protection, which needed to be reflected properly in the text, also taking into account developments since the adoption of the Convention, including within the Commission itself, such as the adoption of the draft articles on the prevention of transboundary harm from hazardous activities.<sup>27</sup> Given their physical characteristics, it was asserted that the protection and preservation of aquifers needed to be emphasized in policy considerations. Sustainability should not be regarded as related merely to utilization but also to the overall protection of the ecological conditions of the aquifers. Some members also recalled that the Convention had not yet entered into force and thus far lacked universal support.

53. Some members noted that in the formulation of the draft articles, the overriding consideration was the utilization and protection of aquifers, which could effectively be accomplished through bilateral and

<sup>25</sup> Draft articles 22 to 25, as proposed by the Special Rapporteur in his third report and containing the final clauses, read as follows:

*"Article 22. Signature*

"The present Convention shall be open for signature by all States from \_\_\_\_ until \_\_\_\_ at United Nations Headquarters in New York."

*"Article 23. Ratification, acceptance, approval or accession*

"The present Convention is subject to ratification, acceptance, approval or accession by States. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations."

*"Article 24. Entry into force*

"1. The present Convention shall enter into force on the \_\_\_\_ day following the date of deposit of the \_\_\_\_ instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

"2. For each State that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the \_\_\_\_ instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the \_\_\_\_ day after the deposit by such State of its instrument of ratification, acceptance, approval or accession."

*"Article 25. Authentic texts*

"The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

"IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto, have signed this Convention.

"DONE at New York, this \_\_\_\_ day of \_\_\_\_ two thousand \_\_\_\_."

<sup>26</sup> Report of the High-level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility" (A/59/565), para. 93.

<sup>27</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 146, para. 97.



regional approaches. The Commission should therefore aim at providing, not universal solutions, but general principles which would guide and encourage bilateral or regional solutions. In this connection, some members also stressed the importance of taking into account developments at a regional level. In particular, work being carried out in respect of certain regional projects was highlighted, including by MERCOSUR in respect of the Guarani Aquifer. Mention was made of the projects being carried out with the support of the World Bank and OAS in order better to understand the physical and technical characteristics of the Guarani aquifer, as well as the work carried out by an *ad hoc* group of experts convened by the Council of MERCOSUR to establish principles and criteria for the use of the aquifer. Such work proceeded on the basis of the following considerations: (a) affirmation of territorial sovereignty, (b) the obligation not to cause significant harm, and (c) conservation through rational and sustainable utilization. Some members also stressed considerations concerning geographical proximity as being relevant, and also efforts towards regional economic integration. At the same time, it was pointed out by some other members that bilateral and regional agreements did not always provide sufficient guidance since they often tended to favour the stronger parties.

54. Concerning the Special Rapporteur's suggestion to include in the preamble an explicit reference to General Assembly resolution 1803 (XVII), some members supported such a reference once the preamble had been formulated. However, other members felt that the principle of permanent sovereignty over natural resources was central to the topic and deserved full treatment in a separate draft article. Such a reference would dispel any criticism that groundwaters were a common heritage of humankind. Yet some other members doubted that there was any role for the principle in the draft articles; if the transboundary aquifer were recognized as a shared natural resource it followed that no aquifer State could claim to have permanent sovereignty over it. It was also pointed out that there would not be any risk of undermining the principle even if such a reference were omitted.

55. Some members stressed the relative character of the concept of sovereignty and highlighted the importance of construing sovereignty for the purposes of the draft articles as not denoting absolute sovereignty. Water in a transboundary aquifer was subject not only to the sovereignty of a State in the territory in which it was located but also to the regulatory framework freely agreed upon by States which shared such an aquifer. Some other members sought to accentuate aspects of jurisdictional competence as well as the existence of an obligation to cooperate with each other, rather than whether sovereign rights were absolute or limited. Since a transboundary aquifer or aquifer system would run under different national jurisdictions, it was incumbent upon States concerned mutually to respect the sovereign rights of the other States in areas falling within their jurisdiction.

56. The relationship between the draft articles and general international law was also alluded to by some members as a relevant consideration, and it was stressed that the operation of the draft articles should be perceived, not in isolation, but in the context of the continuing application

of general international law. Such law continued to apply in respect of activities of States *vis-à-vis* their relations with other States. In particular, the underlying principles enunciated in the *Corfu Channel* case<sup>28</sup> were considered relevant in the case of transboundary aquifers.

57. The need to keep in view the relationship between the current sub-topic on groundwaters and the other related sub-topics in respect of oil and gas was highlighted by some members.

58. In relation to the overall substance of the draft articles, some members stressed that part II containing general principles was fundamental to the overall structure of the draft articles. It would be helpful if such principles could provide useful guidance for States in negotiating and concluding agreements or arrangements that could be readily accepted by the parties concerned. It was also recalled by some members that in the formulation of the draft articles on the law on the non-navigational uses of international watercourses,<sup>29</sup> the Commission had held extensive debates on questions concerning sovereignty, the principles of equitable and reasonable utilization, the obligation not to cause harm, and the threshold of significant harm. Accordingly, no useful purpose would be served in reopening these matters in the context of the present topic.

59. Some members expressed preference for a much more prominent and pronounced role for the precautionary principle while some other members considered the precautionary approach taken by the Special Rapporteur to be adequate.

60. Some members, disagreeing with the Special Rapporteur, said that they would prefer detailed provisions to be formulated on the relationship with non-aquifer States, and that their role were emphasized. Such States, particularly those in which recharge and discharge zones were located, had an obligation to cooperate and exchange information with respect to the protection of aquifers. Furthermore, some other members stressed the importance of providing for an institutional framework both for the implementation of the provisions of the draft articles and for dispute settlement. In regard to the latter, the need for separate provisions on dispute settlement was underlined.

#### (b) *Comments on specific draft articles*

61. Concerning draft article 1, on the scope of the convention, some members supported the current reformulation. However, some other members pointed to the need to delineate clearly the scope of the topic, either in the body of the article or in the commentary, specifying those situations in which groundwaters would be covered by the 1997 Convention already, as well as the relationship between transboundary and national aquifers, by stating expressly that the draft articles do not apply to national aquifers. Moreover, there was a need to include in the draft article provisions concerning the regulation of obligations of non-aquifer States.

<sup>28</sup> *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4.

<sup>29</sup> Adopted by the Commission on second reading at its forty-sixth session, in 1994 (see *Yearbook ... 1994*, vol. II (Part Two), p. 89).

62. While the draft articles as a whole contained specific provisions concerning the activities contemplated in subparagraphs (a) and (c), some members noted that there did not seem to be any detailed draft articles addressing activities covered by subparagraph (b). Some other members doubted the seemingly wide scope of subparagraph (b), as well as its placement. In regard to the former, some members sought its deletion while others suggested the need to clarify its scope, in particular the meaning of the term “impact”. It was proposed that the term should be qualified by “significant” as a threshold in order to ensure consistency with the provisions of part II of the draft articles. It would also help to avoid creating the impression that other uses which might have a negligible impact on aquifers were also covered by the regulatory framework of the draft articles. However, some other members endorsed the use of the term “impact” which, as noted by the Special Rapporteur in his third report, had a wider scope than “harm”. It was also noted that the phrase “other activities” was not sufficiently precise. Concerning placement, it was suggested that subparagraph (c) be placed before subparagraph (b) in order to emphasize the prominent role that ought to be given to the protection, preservation and management of aquifers.

63. With regard to draft article 2, on use of terms, the new definition of “aquifer” in subparagraph (a), as well as the change from “rock formation” to “geological formation” and the deletion of “exploitable”, was considered favourably by some members and there was also some support for the retention of the phrase “[water-bearing]” since it made the definition easier for a layperson to understand. Furthermore, the definition of aquifer in the 1989 Bellagio Draft Treaty on transboundary groundwaters,<sup>30</sup> which was considered more concise, made reference to “water-bearing”. On the other hand, the deletion of “water-bearing” and the clarification of the term in the commentary, as proposed by the Special Rapporteur, also found support. Some members also pointed out that the concept of water “use” or “utilization” was essential to the definition. It should be reintroduced and should also include the element of exploitability. Some other members raised questions on the usefulness of retaining the reference to “underlain by a less permeable layer” in the definition of an aquifer. It was also wondered whether the definition would still apply even if the geological formation were not saturated with water.

64. Furthermore, some members saw the need to clarify certain changes in the definitions as compared to those proposed by the Special Rapporteur in the second report.<sup>31</sup> In some instances different terms had been used, although the same meaning seemed to have been retained.

65. The notion of “aquifer system” in subparagraph (b) as consisting of a series of two or more aquifers, as suggested in the corrigendum to the third report, was considered an improvement on the earlier proposal contained in the Special Rapporteur’s second report. It accentuated the transboundary nature of the aquifer

as a source of obligations for States concerned rather than a universal source of obligations for all States. Some members considered the phrase “[each associated with specific geological formations]” in the definition of “aquifer system” to be superfluous and supported its deletion and the clarification of its meaning in the commentary, as suggested by the Special Rapporteur.

66. With regard to the definition of “transboundary aquifer” in subparagraph (c), some members doubted whether the circular approach which was followed added any substance to the definition. Both “aquifer” and “aquifer system” were already adequately defined.

67. Some doubts were also expressed regarding the distinction between a “recharging aquifer” and a “non-recharging aquifer” in subparagraphs (e) and (f) respectively. The difference between negligible and non-negligible amounts of contemporary water recharge seemed to be insignificant from a practical perspective. A recharge should not be given much weight in consideration of the sustainability of the resources. Moreover, the diversity of aquifers would make it difficult to measure negligibility in the amount of recharge. In this regard, it was suggested that such definitional questions could best be addressed in the relevant substantive draft article 5, where a less rigid distinction could be made. It was also suggested that the matter should await the discussion on whether or not separate rules would be required under draft article 5. On the other hand, the distinction was welcomed by some other members. At the same time, it was pointed out that a definition of “contemporary” water recharge would be necessary in the commentary.

68. Comments were also made regarding the need to provide definitions or explanations for terms such as “impact” in draft article 1, “significant harm” in draft article 7 *et al.*, “recharge or discharge zones” in the territories of third States in draft article 13 (3), “adverse effects” in draft article 16, “significant adverse effect” in draft article 17 and “serious harm” in draft article 19, as well as the term “uses” to distinguish the various uses of water.

69. As regards draft article 3, on bilateral and regional arrangements, some members expressed support for its general thrust since it highlighted the importance of bilateral and regional arrangements. It was asserted that in the case of groundwaters, more so than for surface water, it was pertinent to allow for more flexibility in such arrangements. Yet the wording seemed to be more strict than comparable provisions in the 1997 Convention. Although it seemed cautiously worded, some other members noted that it would give rise to problems of interpretation and implementation. In particular, it was considered important that the provisions of the present draft articles should not affect the rights and obligations under existing agreements.

70. Doubt was also expressed regarding whether draft article 3 was an improvement over the corresponding article 3 of the 1997 Convention. In this connection, some members would have preferred a text that closely followed the language of article 3 of the Convention. The use of the term “arrangement”, which was considered broader and

<sup>30</sup> R. D. Hayton and A. E. Utton, “Transboundary groundwaters: the Bellagio draft treaty”, *Natural Resources Journal*, vol. 29, No. 3 (1989), p. 663.

<sup>31</sup> See footnote 10 above.

more uncertain than the more familiar precedent-based term “agreement”, was questioned by some members. However, some other members accepted the proposed change, for the reason given by the Special Rapporteur in his report, that the cooperative framework for groundwaters remained to be properly developed and the term “arrangement” provided flexibility of participation.

71. Concerning paragraph 1, some members preferred stronger and more definitive language than a general encouragement to enter into bilateral or regional arrangements. Such obligation was critical, particularly in the context of a fragile resource such as an aquifer. It was also considered that the paragraph was overly detailed and it was suggested that the whole paragraph be recast by rephrasing the first sentence in more obligatory language. Some other members, however, viewed the obligation to encourage as appropriate since it gave States the flexibility at bilateral and regional levels to decide on mutually acceptable arrangements, particularly considering that in some situations circumstances may be such that it may not be feasible to negotiate such arrangements for particular aquifers.

72. The principle of harmonization in paragraph 2 was considered important by some members, who considered it essential that a framework convention should contain principles that would assist States in the negotiation of bilateral and regional agreements. Some members, however, were of the view that the phrase “consider harmonizing” in the paragraph was too weak and needed to be replaced. With regard to paragraph 3, it was suggested that there should be an explicit reference to compliance with the general principles set out in the draft articles. Moreover, unlike the 1997 Convention, it was not clear whether the paragraph affected arrangements already concluded by States, thereby requiring their renegotiation. It was also pointed out that in the absence of agreement, States had a right to operate independently with respect to the utilization of aquifers and were limited only by rights and obligations imposed by general international law. Some members suggested that any such utilization should nevertheless be consistent with the principles contained in part II of the draft articles.

73. Concerning draft article 4, on relation to other conventions and international agreements, some members noted that it was a step in the right direction since, in the event of conflict, it automatically gave the draft articles precedence over the 1997 Convention as well as, in certain situations, over other international agreements. Some other members noted that there was potential for dual application of the present draft articles and the Convention. Accordingly, there was a need to strive for the creation of a unified comprehensive legal regime governing both surface waters and groundwaters. However, some members expressed doubt regarding the suggested relationship between the draft articles and the Convention, noting that substantively the relationship was tenuous and that different bodies of water were under consideration. Moreover, the whole question needed closer consideration, particularly in view of the fact that the Convention had not yet entered into force. The inclusion of an additional formulation on the relationship between the draft articles and general international law,

which would be designed to assert the relevance of the latter, was also suggested. Some other members suggested a preambular provision.

74. In relation to paragraph 1, it was noted that it would be inappropriate to suggest that the provisions of the 1997 Convention would apply only to the extent that they were compatible with those of the draft articles. Such a proposition would be valid only if all States which shared an aquifer were parties to the Convention. According to some members, it would be reasonable to contemplate the draft articles’ being framed in the form of a protocol to the Convention. Such a possibility, however, did not find favour with some members, who considered it important, legally and as a matter of policy, to delink the draft articles from the Convention.

75. Although some attention was drawn to article 311, paragraph 2, of the United Nations Convention on the Law of the Sea, some members doubted whether it could serve as a precedent for paragraph 2. Moreover, instead of a reference to conformity with the present convention, it was suggested that a reference to the general principles of the present convention would be more appropriate. It was also pointed out that it was difficult to envision how the present paragraph related to draft article 3. It was thus suggested that draft articles 3 and 4 should be replaced by article 3 of the 1997 Convention. Some members expressed preference for a provision that would specify that the future instrument would not affect the rights and obligations assumed under other agreements.

76. Concerning draft article 5, on equitable and reasonable utilization, several members expressed support for the principles therein, noting that these principles were important for aquifers in view of their fragile nature. However, some other members recalled that article 5 of the 1997 Convention, which is similar to the present draft article, was problematic during the negotiations regarding the Convention. The transposition of the two principles for application to groundwaters was therefore cautioned against, some doubt being expressed regarding the applicability of these principles to groundwaters.

77. Some members recalled the necessary balance that must exist between sovereign rights of States over their natural resources and the need to safeguard the interests of other States, as well as the rights of present and future generations. Accordingly, it was suggested that the principle of permanent sovereignty over natural resources could properly be dealt with in the context of draft article 5 rather than in the preamble or in the principle of sovereign equality in draft article 8.

78. Concerning paragraph 2, some members welcomed the distinction drawn between rules applicable to recharging and non-recharging transboundary aquifers. It was noted that such a distinction would provide better protection for aquifers. On the other hand, some other members considered such a distinction to be immaterial. Some questions were raised regarding how “sustainability” would be assessed in practice. It was not clear whether the requirement in subparagraph (a) that aquifer States should “not impair the utilization and functions of such aquifer or aquifer system” entailed zero risk or some form of



graduated risk or risk threshold. Moreover, it was asserted that sustainability did not necessarily imply that renewable natural resources must be kept at a level which would provide maximum sustainable yield, as suggested by the Special Rapporteur in his report. Such interpretation, applicable in fishery resources, need not be the same in the case of groundwaters since the States concerned may not wish to exploit to the limit of exploitability, or there may be alternative sources. Some members suggested that the concept of “economic recoverability” of the aquifer could be a possible criterion. Subparagraph (b) was considered by some members to be a creative and useful attempt to give meaning to the concept of reasonable utilization in the context of a non-recharging aquifer.

79. While welcoming the wording of draft article 6, on factors relevant to equitable and reasonable utilization, some members noted that its provisions seemed more germane in the context of the 1997 Convention. Some other members noted that the obligation to preserve aquifer resources was extant not only in respect of future generations but for the present generation as well. With regard to subparagraph (a), it was questioned whether there was a material difference between the “natural condition” of the aquifers and the taking into account of the “natural factors” as characteristics of the aquifer as suggested by the Special Rapporteur in his third report. Some members welcomed the inclusion of the factors contained in subparagraphs (b) and (c). It was suggested that one of the factors to be taken into account in subparagraph (c) was water for drinking purposes. Moreover, it was suggested that there should be a reference to paragraph 1 of article 9 and paragraph 1 of article 10, which also contained relevant factors.

80. Concerning draft article 7, on the obligation not to cause harm, some members expressed support for the position of the Special Rapporteur that for purposes of consistency the threshold of significant harm should be maintained, noting also that such reference should be included in the title of the draft article. In the field of natural resources and the environment, harm could not be set in absolute terms because the right of use was always weighed against the right to protect. The threshold carried certain policy considerations aimed at achieving a balance of interests. The term “significant” meant rather more than trivial or detectable but not necessarily serious or substantial. However, some other members felt that the threshold should be lowered to a simple reference to “harm”. Any such harm to the aquifer might be difficult to reverse and could be detrimental in view of an aquifer’s nature and vulnerability. Moreover, the precautionary principle seemed to militate against the threshold of “significant” harm since the effects on groundwaters might take years before they became detectable. It was also contended that it would be useful for the draft articles as a whole to take into account developments that had taken place since the adoption of the 1997 Convention, in particular the adoption by the Commission in 2001 of the draft articles on prevention of transboundary harm from hazardous activities.<sup>32</sup> It was suggested, therefore, that there should be a greater focus on prevention before addressing the question of liability. Furthermore, some

other members asserted the necessity of addressing aspects in which non-aquifer States might cause harm to an aquifer State.

81. The retention in paragraph 2 of the phrase “... have or are likely to have an impact ...” was advocated by some members. On the other hand, it was suggested that the term “adverse” should qualify such impact. Concerning paragraph 3, some members expressed support for a provision dealing with liability in the context of aquifers. In this connection, some other members doubted whether paragraph 3 in itself without additional details were sufficient. As it was, its value as a tool in the settlement of disputes was considered insignificant. Some other members suggested its deletion, or at least clarification as to how it would operate in the context of rules of general international law. The continued application of rules of State responsibility was asserted. For example, the principles set out in the *Corfu Channel* case<sup>33</sup> would be relevant in a situation in which an aquifer served as an instrument for causing harm to a neighbouring State and where there existed the requisite degree of knowledge or imputability to the aquifer State. As at present drafted, “where appropriate” conveyed the impression that there was no obligation to provide compensation. It would be more appropriate to make clear that the obligation to discuss, rather than to provide compensation, presupposed that the obligation of prevention had been complied with. Elimination and mitigation of harm were applicable regardless of compliance with the obligation of prevention.

82. Concerning draft article 8, on the general obligation to cooperate, support was expressed for the emphasis on the general obligation to cooperate. It was noted, however, that the inclusion of “territorial integrity” as a basis of cooperation was striking and yet the rationale for its inclusion was not clear in the third report. It was stated that it would be sufficient to base such obligation on the principles of mutual benefit and good faith. Comments were also made regarding the need for a more detailed provision on the institutional framework for the implementation of the duty to cooperate.

83. In paragraph 2, the view was expressed that the use of the word “encouraged” was rather cautious, and it was suggested that bolder obligatory language should be employed. The possibility of combining this paragraph with the elements of draft article 15 was also offered, as a means of providing an administrative mechanism for implementation.

84. Some members welcomed the provisions concerning exchange of data in draft article 9. Such exchange was considered vital in facilitating the better understanding of the characteristics of an aquifer. Without such information, it would be extremely difficult to establish plans and standards for utilization of aquifers. While paragraph 2 was welcomed, the point was made that the rationale for its inclusion should have been explained fully. It was also suggested that paragraph 2 could appropriately be placed at the beginning or at the end of draft article 10. The formulation of the phrase “... aquifer

<sup>32</sup> See footnote 27 above.

<sup>33</sup> See footnote 28 above.

States shall employ their best efforts to collect ...” was considered by some members to be weak. It was also posited that the language of the paragraph as a whole seemed more suitable for a commentary than for a draft article.

85. The provisions of draft article 10, on monitoring, were welcomed by some members. It was, however, observed that paragraph 1 was too obligatory, creating the impression that a universal obligation was being established. Such a provision would be more appropriate in the context of a bilateral or regional arrangement.

86. Doubt was expressed whether draft article 12, on protection and preservation of ecosystems, was an improvement over the corresponding article 20 of the 1997 Convention. It was observed, however, that given the present state of knowledge on aquifers and their effects on the ecosystem, its language was too categorical. It was also wondered whether it applied at all to a non-rechargeable aquifer.

87. Draft article 13, on protection of recharge and discharge zones, was considered to be an important innovation. In particular, the introduction of the concept of detrimental impact was positively perceived by some members. Moreover, it was noted that the best solution would be to create direct rights and obligations of non-aquifer States and to identify the legal and practical links with other States. Some members doubted whether there were any legal basis under general international law on which an obligation to cooperate by such non-aquifer States could be grounded.

88. As regards draft article 14, on prevention, reduction and control of pollution, some members agreed with the Special Rapporteur that the precautionary principle had not yet developed as a rule of general international law, and they approved of the approach taken. However, some other members expressed regret that the Special Rapporteur had decided to take a more cautious approach regarding the precautionary principle. The language used seemed appropriate for a commentary. The principle was contained in the Rio Declaration on the Environment and Development (Rio Declaration),<sup>34</sup> the International Law Association Helsinki Rules on the Uses of the Waters of International Rivers<sup>35</sup> and Berlin Rules on Water Resources<sup>36</sup>, as well as in various treaties. The principle was well recognized as a general principle of international environmental law and needed to be stressed in the draft articles.

89. It was also noted that the assertion by the Special Rapporteur in his report that the “objectives of the articles are not to protect and preserve aquifers for the sake of aquifers, but to protect and preserve them so that humankind could utilize the precious water resources

contained therein” (para. 33) should be revised because it seemed to introduce connotations concerning the common heritage of humankind.

90. Some members expressed doubt as to whether draft article 15, on management, was an improvement over corresponding article 24 of the 1997 Convention. Since the notion of “management” was employed in a variety of ways, its use in the context of the draft articles required explanation. It was also stressed that unless particular language represented a clear improvement, the Convention language should be retained. On the other hand, it was suggested that the whole premise of draft article 15 should be reviewed. In order to avoid being faced with a default situation, the overall premise would be to require aquifer States to enter into consultations with a view to agreeing to a management plan or mechanism. Individual plans would emerge only as a fallback.

91. Some members noted that the provisions of draft article 16, on assessment of potential effects of activities, as read with draft article 17 on planned activities, were more realistic than the complicated procedures under the 1997 Convention. Such plans should take into account the interests of other aquifer States as contemplated in draft article 17. On the other hand, reservations were expressed that nine articles devoted to planned measures in the Convention could be reduced to only two draft articles. Some members felt that the language used was weak; for example, the phrase “... as far as possible ...” was preferred to “... as far as practicable ...”. The importance of timely notifications in draft article 17 was stressed, as already recognized in the *Lake Lanoux* arbitration.<sup>37</sup> It was also noted that the requirement for an environmental impact assessment should be signalled upfront without its being implied as optional.

92. While draft article 18, on scientific and technical assistance to developing countries, seemed important and attractive from a theoretical perspective since it created a legal obligation to provide assistance, some members noted that its practical application was difficult to secure. Its inclusion might therefore be more problematic than seemed at first sight. Some other members viewed the language as too obligatory.

93. Draft article 19, on emergency situations, was seen by some members as an improvement over a corresponding provision in the 1997 Convention. However, it was noted that a more incisive analysis of the reasoning behind the changes made would have provided a better understanding of the draft article.

94. It was observed that draft article 20, on protection in time of armed conflict, and draft article 21, on data and information vital to national defence or security, contributed nothing new and should not be referred to the Drafting Committee. In this regard, it was noted that draft article 20 seemed more relevant in respect of surface waters. However, some other members supported draft article 21, noting that the protection should extend to industrial secrets and intellectual property, on the

<sup>34</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 corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

<sup>35</sup> International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966* (London, 1967), p. 484.

<sup>36</sup> *Ibid.*, *Report of the Seventy-First Conference, Berlin, 16–21 August 2004* (London, 2004), p. 334.

<sup>37</sup> *Lake Lanoux*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

basis of article 14 of the draft articles on prevention of transboundary harm from hazardous activities.<sup>38</sup>

95. Concerning the final provisions, it was suggested that a provision on reservations should be included.

(c) *Comments on form of instrument*

96. Regarding the final form of instrument, some members agreed with the Special Rapporteur that a decision on the matter should be deferred until agreement had been reached on the substance. Some other members, however, observed that work could be expedited if a decision were made earlier on in consideration of the topic, since such a decision would have a bearing on matters of both drafting and substance. As it was, in some cases it appeared that there was already a bias towards a binding instrument.

97. Some members expressed preference for a binding instrument in the form of a framework convention. It was stressed that such a framework convention should contain guiding principles for use by States in the negotiation of their bilateral and regional arrangements. Some other members suggested that such an instrument could suitably be a protocol to the 1997 Convention. However, doubt was also expressed regarding such an approach. First, it was mentioned that the Convention had not yet entered into force and there seemed to be little support for it. Secondly, it was pointed out that although a relationship existed, the subject matter covered by the Convention and the present topic was substantially different. Thirdly, it was noted that the question of groundwaters affected only a certain group of States, and thus an independent convention would usefully achieve the intended results beneficial to the States concerned.

98. In view of the scarcity of information regarding State practice, some members favoured the formulation of non-binding guidelines. Such an approach would provide sufficient flexibility to aquifer States, and presented the best possibility for commanding the support of States. It was also suggested that the Commission adopted the approach followed in respect of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, whereby non-binding principles were adopted on first reading,<sup>39</sup> while reserving the right to reconsider the matter as to the final form of the instrument at the second reading in the light of the comments and observations of Governments. It was also noted that such guidelines could take the form of a resolution.

### 3. SPECIAL RAPporteur's CONCLUDING REMARKS

99. Concerning whether the topic was sufficiently advanced for codification, the Special Rapporteur recalled that the 2000 decision of the Commission to include the topic in its programme of work was based on an assessment as to its viability.<sup>40</sup> While his previous reports

might have contributed to the creation of an impression that there was insufficient evidence of State practice for codification, there had been an upsurge in practice of States on the subject matter in recent years. There were many cooperative efforts in Africa, the Americas and Europe, with State practice, agreements, arrangements and doctrine emerging, sufficient for the Commission to embark on work on the subject. The Commission would be embarking upon an exercise in the progressive development and codification of the law on groundwaters. Groundwaters represented 97 per cent of the available freshwater resources; in recent years, dependency on such waters had increased and problems were being confronted regarding their exploitation and pollution of aquifers. Since groundwaters would be one of the major issues to be discussed at the Fourth World Water Forum in Mexico in 2006, it was a challenge to the Commission to respond quickly in order to keep pace with a rapidly developing field.

100. Without prejudging the decision of the Commission on the other sub-topics relating to oil and gas, the Special Rapporteur noted that there were many similarities with groundwaters. The formulation of draft articles on groundwaters would have implications for oil and gas, and conversely State practice on oil and gas has a bearing on groundwaters. While it was feasible to embark on a first reading of draft articles on groundwaters without considering oil and gas, it would be necessary to give due attention to the relationship before completing the second reading.

101. As regards whether permanent sovereignty over natural resources should be treated in the preamble or in a separate article, the Special Rapporteur noted that there were precedents for both approaches. The preambular approach which he had suggested found precedent in the draft articles on the prevention of transboundary harm from hazardous activities as well as in the Vienna Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. On the other hand, the United Nations Convention on the Law of the Sea had a separate article, article 193, on permanent sovereignty, which he would study further.

102. On the relationship between the draft articles and general international law, the Special Rapporteur observed that it was in the nature of international law that the general international law has a parallel application to treaties. This could be affirmed in the preamble, as in the United Nations Convention on jurisdictional immunities of States and their property, the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, or in a separate article such as article 56 of the draft articles on responsibility of States for internationally wrongful acts.<sup>41</sup>

103. Concerning the precautionary principle, the Special Rapporteur noted that he was aware that it had been incorporated in various legally binding instruments. In his view, however, such provisions were neither declaratory of customary international law nor constitutive of new

<sup>38</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 166–167.

<sup>39</sup> *Yearbook ... 2004*, vol. II (Part Two), pp. 64–65, para. 175.

<sup>40</sup> See *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

<sup>41</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 30.

custom. At any rate, the important task for the Commission was to spell out the measures to be implemented for the management of aquifers that would give effect to the principle.

104. With regard to the suggestion to formulate provisions on the obligations of non-aquifer States, the Special Rapporteur stressed the need to be realistic. If a binding instrument were to be the preferred option, it would be very likely that only aquifer States would become party to such an instrument. There would be no real incentive for non-aquifer States to join such an instrument without any *quid pro quo* to justify their assumption of obligations.

105. Concerning the obligation in draft article 7 not to cause harm, the Special Rapporteur clarified that the draft article was not concerned with the question of State responsibility. Rather, it was concerned with activities not prohibited by international law, namely the utilization of transboundary aquifers. Such activities are essential and legitimate for human survival and their adverse effect is often tolerated to a certain degree, hence the need for the threshold. While paragraph 1 addressed aspects concerning the obligation of prevention, paragraph 3 dealt with the eventuality where significant harm is caused in spite of fulfilment of the duty of due diligence.

106. The Special Rapporteur acknowledged that there was no provision in the draft articles relating to institutional mechanisms and management of transboundary aquifers. Unlike the case of international watercourses, where there was a long history of international cooperation, in the case of groundwaters, the Franco-Swiss Genevese Aquifer Authority seemed to be the only fully functioning international organization. While various cooperative organizational arrangements were emerging, paragraph 2 of draft article 8 recommended the establishment of joint mechanisms and joint commissions. The Special Rapporteur also noted that while there was no objection to including a provision on disputes settlement similar to article 33 of the 1997 Convention, he perceived article 33 to be devoid of substance since it did not provide for compulsory jurisdiction. The compulsory reference to impartial fact-finding in paragraph 3 of article 33 had been reflected in paragraph 2 of draft article 17 to assist in resolving differences concerning the effect of planned activities.

107. The Special Rapporteur also responded to some comments made on specific draft articles and offered to provide in the commentary fuller explanations in his analysis of the various provisions of the draft articles.



## Chapter V

### EFFECTS OF ARMED CONFLICTS ON TREATIES

#### A. Introduction

108. The Commission at its fifty-second session (2000), identified the topic “Effects of armed conflicts on treaties” for inclusion in its long-term programme of work.<sup>42</sup> A brief syllabus describing the possible overall structure and approach to the topic was annexed to the report of the Commission to the General Assembly on the work of its fifty-second session.<sup>43</sup> In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic.

109. During its fifty-sixth session, the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic “Effects of armed conflicts on treaties” in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.<sup>44</sup> The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

#### B. Consideration of the topic at the present session

110. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/552) as well as a memorandum prepared by the Secretariat entitled, “The effect of armed conflict on treaties: an examination of practice and doctrine” (A/CN.4/550 and Corr.1–2).

111. The Commission considered the Special Rapporteur’s report at its 2834th to 2840th meetings, from 6 to 18 May 2005.

112. At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur’s suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice as well as any other relevant information.

#### 1. GENERAL REMARKS ON THE TOPIC

##### (a) *Introduction by the Special Rapporteur of his first report*

113. The Special Rapporteur observed that he had produced an entire set of draft articles providing an overall view of the topic and of the issues that it involved, in order to assist the Commission and Governments in commenting on the topic, including providing State practice. The basic

policy underlying the draft articles was to clarify the legal position and to promote and enhance the security of legal relations between States (thereby limiting the occasions on which the incidence of armed conflict had an effect on treaty relations).

114. The Special Rapporteur further pointed to the concerns expressed by writers regarding the uncertainty attending the subject; the nature of the sources presented problems, the subject was dominated by doctrine, and practice was sparse, with much of it being more than 60 years old. As regards the latter concern, in his view it was not necessarily the case that policy perspectives on the effect of armed conflict had changed qualitatively since 1920. Instead, the key change in the inter-war period had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable.

115. The Special Rapporteur explained that the draft articles were intended to be compatible with the 1969 Vienna Convention. There was a general assumption that the subject matter under examination formed a part of the law of treaties, not a development of the law relating to the use of force, its being recalled that the Convention, in article 73, had expressly excluded the subject.

116. The Special Rapporteur further acknowledged that the subject of peaceful settlement of disputes was missing from the draft articles. To his mind, it was not a good idea to look at the question of the peaceful settlement of disputes until the work on the substantive draft was near completion, since there existed a close relationship between the matters of substance and the type of dispute settlement mechanism which would be appropriate.

##### (b) *Summary of the debate*

117. Members expressed support for the Special Rapporteur’s decision to provide an entire set of draft articles. Reference was also made to the memorandum prepared by the Secretariat, which was considered extremely helpful in understanding the substance and complexity of the issues at hand.

118. Some members were of the view that the Special Rapporteur’s report was too concise in that it provided little guidance as to how the solutions proposed related to past or existing State practice. It was pointed out that a thorough analysis of available practice could prove catalytic by inducing States to produce possibly divergent practice. Similarly, the relative lack of discussion in the report of the underlying policy considerations was regretted.

<sup>42</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

<sup>43</sup> *Ibid.*, annex.

<sup>44</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.



119. Some members pointed out that the draft articles should be compatible with the purposes and principles of the Charter of the United Nations. In particular, they should take into consideration the illicit (wrongful) character of recourse to force in international relations and the fundamental distinction between aggression and legitimate individual or collective self-defence or the use of force in the context of the collective security system established by the United Nations.

120. Issue was taken with some of the views expressed in the report including the statement that “[i]t is generally recognized that municipal decisions concerning the effect of war on treaties are ‘not of great assistance’”.<sup>45</sup> It was observed that, while they were not always consistent, which could also be said of available State practice, municipal court decisions provided helpful evidence regarding State practice, the intention of parties in respect of certain kinds of treaties, and the effect of the nature of a conflict on the survival of a treaty. The importance of municipal case law was borne out by the Secretariat memorandum which referred to a number of such decisions.

121. Support was expressed for the Special Rapporteur’s desire to encourage continuity of treaty obligations in armed conflict in cases where there was no genuine need for suspension or termination, as well as for the view that the Commission should not be bound by some of the rigid doctrines of the past which would inhibit such continuity. At the same time, the view was expressed that the effect of an armed conflict on treaties would depend more on the particular provisions and circumstances in question than on any general rules that might be articulated, and that it could be more effective to identify the considerations that States must take into account rather than to lay down definitive rules or categorizations that States must always follow.

122. Support was also expressed for approaching the topic within the context of the 1969 Vienna Convention. Others felt that it was not necessary to specify the location of the topic within the broader field of international law. Reference was also made to the fact that it was in the nature of the topic that it had undergone significant developments over time owing to changes in the formalities and modalities of modern armed conflict as well as in the international legal regime governing the recourse to armed force, particularly since the Second World War.

123. Various suggestions were made as to the way forward, including referring the draft articles (or only some) to the Drafting Committee, establishing a working group to consider the more contentious articles, or simply not taking any action at that stage in order to allow the Special Rapporteur time to reflect further on the observations made in the Commission as well as any contributions that may be received from States. It was also suggested that a questionnaire be prepared for circulation among member Governments.

### (c) *Special Rapporteur’s concluding remarks*

124. The Special Rapporteur reiterated the overall goals of his report, as enumerated during his introduction, and recalled that his chosen method of work was to provide a complete set of draft articles without prejudice to their final form. However, he clarified that the recourse to draft articles should not give rise to the assumption that he was rushing to judgement. He noted that the normative form had been accompanied by elements of open-mindedness and that he had deliberately left open several issues for the formation of collective opinion within the Commission. He also recalled that the draft articles enjoyed a provisional character and had been provided with a view to soliciting information (especially as to evidence of State practice) and opinions from Governments.

125. As regards the sources employed, the Special Rapporteur admitted that more reference to doctrine was called for. As for municipal cases, he clarified that it was not that he thought that they were of little value, but only that they tended to be contradictory. He also observed that domestic case law called for careful assessment; it was necessary to distinguish between those legal decisions where the court actually adverted to public international law as an applicable law and those cases where the court approached the legal problems at hand from the standpoint of municipal law exclusively. Similarly, the practice of international tribunals, when analysed carefully, was also not always very helpful.

126. The Special Rapporteur further identified several policy questions requiring consideration in the future, including the question of the applicable *lex specialis*<sup>46</sup> which could be referred to in the draft articles, as well as the question of introducing a distinction between bilateral and multilateral treaties. To his mind, however, there seemed to be no good case for seeking to design special criteria for the two categories. The principle of intention appeared to provide the general criterion.

127. Given the preliminary nature of the first report, the Special Rapporteur opposed the referral of draft articles to the Drafting Committee or the establishment of a working group. Instead, he suggested that a request be circulated to Governments requesting information about their practice with regard to this topic and, in particular, the more contemporary practice.

## 2. ARTICLE 1. SCOPE<sup>47</sup>

### (a) *Introduction by the Special Rapporteur*

128. The Special Rapporteur explained that draft article 1 was based on the formulation of article 1 of the 1969 Vienna Convention.

<sup>46</sup> See the discussion on draft article 5, below.

<sup>47</sup> Draft article 1, as proposed by the Special Rapporteur in his report, reads as follows:

#### *“Scope*

“The present draft articles apply to the effects of an armed conflict in respect of treaties between States.”

<sup>45</sup> Para. 44 of the first report citing C. Parry, “The law of treaties”, in M. Sørensen, ed., *Manual of Public International Law*, (London, Macmillan, 1968), p. 237.

(b) *Summary of the debate*

129. Comments on article 1 were limited to suggestions for expansion of the scope of the topic. For example, several members supported the inclusion of treaties entered into by international organizations. Examples cited were regional integration treaties and treaties dealing with the privileges and immunities of the officials and staff of international organizations, especially in the context of peacekeeping operations undertaken during times of armed conflict. It was also noted that the Institute of International Law, in article 6 of its resolution II of 1985 entitled “The effects of armed conflicts on treaties”,<sup>48</sup> had included treaties establishing an international organization. Another view was that the inclusion of international organizations was not entirely necessary. Reference was further made to article 74, paragraph 1, of the Vienna Convention between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

130. It was suggested that a distinction be made between Contracting Parties, under article 2, paragraph (1) (f), of the 1986 Vienna Convention, and those which are not Contracting Parties. While some members preferred the inclusion of treaties which had not yet entered into force, others suggested that only treaties in force at the time of the conflict should be covered by the draft articles.

131. According to a further suggestion, the provision on scope could exclude the specific category of treaties prescribing the rules of warfare or rules of engagement, such as The Hague Conventions respecting the Laws and Customs of War on Land and the Geneva Conventions for the protection of war victims. As such treaties become operative only during armed conflicts, they would not fall under the categories of treaties described in draft article 7, paragraph 1, as the logic of “continue in operation during an armed conflict” in that paragraph would be inapplicable.

(c) *Special Rapporteur’s concluding remarks*

132. The Special Rapporteur, referring to the suggestion that the draft articles cover treaties with international organizations, stated that while he shared some of the doubts expressed he would not oppose their inclusion.

133. Regarding the question of the relationship of the draft articles to other areas of international law, which had been referred to by some members in the context of specific articles, the Special Rapporteur advised caution; it was necessary to avoid simply adding other topics of international law to the draft without good cause. He agreed that a certain amount of overlap existed with regard to such topics as the use of force.<sup>49</sup> He was not troubled, however, by the existence of situations where the same subject matter responded to multiple classification, although he acknowledged that care had to be taken not to affect issues of the ordinary law of treaties,

in order to avoid problems of compatibility with the law of treaties. He recalled further that some members had suggested, during the discussion on the lawful resort to the use of force (in the context of draft article 10), that account needed to be taken of the application of principles of *jus cogens*. He wondered, however, whether it were desirable to embark on a codification of *jus cogens* as a by-product of the topic under consideration. He did not even think it necessary to include a proviso for principles of *jus cogens*, since that would require defining which principles were being referred to. He also noted a suggestion that reference be made in the draft articles to principles of State responsibility. In his view, however, such principles stood in the background and were not part of the current project.

3. ARTICLE 2. USE OF TERMS<sup>50</sup>(a) *Introduction by the Special Rapporteur*

134. The Special Rapporteur recalled that draft article 2 defined the terms “treaty” and “armed conflict” in its subparagraphs (a) and (b), respectively. The definition of “treaty” followed that set out in the 1986 Vienna Convention (art. 2, para. 1 (a)) while the definition of “armed conflict” was based on the formulation adopted by the Institute of International Law in its 1985 resolution.<sup>51</sup> He recalled that when the topic had first been proposed for inclusion in the Commission’s agenda, concerns had been expressed that it would lead to a general academic exposition of the concept of armed conflict. He hoped that the Commission would be satisfied with a working definition to be applied contextually, as opposed to attempting an unnecessarily complex codification. Although not comprehensive, the Special Rapporteur was of the view that the definition adopted by the Institute was preferable since it took a contextual approach.

135. The Special Rapporteur referred to a further general question of policy, namely whether or not armed conflict should also include internal conflicts. He expressed a preference for restricting, rather than extending, the situations in which armed conflict could interrupt the treaty relations among States, and therefore favoured excluding non-international armed conflict. At the same time, he was aware of the view that internal armed conflicts could involve external elements and thereby affect the operation of treaties as much as, if not more than, international armed conflicts. The wording of subparagraph (b) had left the question unresolved.

<sup>50</sup> Draft article 2, as proposed by the Special Rapporteur in his report, reads as follows:

*“Use of terms*

“For the purposes of the present draft articles:

“(a) ‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

“(b) ‘Armed conflict’ means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.”

<sup>51</sup> See footnote 48 above.

<sup>48</sup> *Yearbook of the Institute of International Law*, vol. 61, part II (1986), p. 281.

<sup>49</sup> See the discussion on draft article 10, below.

(b) *Summary of the debate*

136. As regards subparagraph (a), it was pointed out that the term “treaty” had already been defined in three treaties: the 1969 Vienna Convention, the Vienna 1978 Convention on succession of States in respect of treaties (hereinafter the 1978 Vienna Convention and the 1986 Vienna Convention. The view was expressed that such a definition was not needed in the present draft articles.

137. Concerning subparagraph (b), agreement was expressed with the Special Rapporteur’s suggestion that the Commission should not embark on a comprehensive definition of armed conflict. The view was expressed that the threshold contained in subparagraph (b), namely the test of “nature or extent” of the conflict, was too general. The view was also expressed that the definition, which referred to the conflict as “likely to affect the operation of treaties ...”, was circular in that it was for the draft articles to determine whether the operation of a treaty were or were not to be affected.

138. As for the scope of the definition of “armed conflict”, support was expressed for the inclusion of blockades (although some members expressed doubts), as well as military occupation unaccompanied by protracted armed violence or armed operations,<sup>52</sup> even if this were not easy to reconcile with the express reference to “armed operations”. It was queried whether such express reference to “armed operations” included broader conflicts such as the Arab-Israeli conflict. Concern was also expressed that the formulation employed could apply to situations falling outside the ordinary concept of armed conflict, such as violent acts by drug cartels, criminal gangs and domestic terrorists.

139. Different views were expressed as to the appropriateness of including within the scope of the topic the effects on non-international armed conflicts on treaties. Several members spoke in favour of such inclusion, noting, *inter alia*, that the guiding criterion on this point should be that of the relevance of the draft articles in the context of the kind of armed conflicts occurring in the present era, in which the distinction between international and internal armed conflicts was often blurred. It was noted that the effects of the two types of conflicts on treaties would not necessarily be the same, and accordingly should be considered. Others expressed reservations as to making such a distinction between the two types of conflict. It was suggested that the matter could be dealt with separately, even as a new topic on its own.

140. Suggestions for reformulating the provision included: adopting a definition which simply stated that the articles applied to armed conflicts, whether or not there existed a declaration of war, without going further, or taking as a basis the definition adopted in the *Tadić* case, namely that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized

armed groups or between such groups within a State”.<sup>53</sup> It was also suggested that account should be taken of the provisions of the Rome Statute of the International Criminal Court. As for drafting, it was suggested that the words “for the purposes of the present draft articles ...” be included so as to limit the scope of the definition, that a reference to international organizations be made, and that the question of the relationship with third parties be examined within the context of subparagraph (b). Others queried whether a definition was even needed, and pointed to the fact that those multilateral treaties which contained a reference to “armed conflict” did not define it.

(c) *Special Rapporteur’s concluding remarks*

141. The Special Rapporteur observed that while a majority in the Commission had favoured including non-international armed conflict within the definition of “armed conflict”, many did not favour attempting to redefine the concept of armed conflict in the draft articles. He recalled that there were also suggestions along the lines of a simpler formulation stating that the articles applied to armed conflicts whether or not there were a declaration of war, without proceeding further.

4. ARTICLE 3. *IPSO FACTO* TERMINATION OR SUSPENSION<sup>54</sup>(a) *Introduction by the Special Rapporteur*

142. The Special Rapporteur characterized draft article 3 as being primarily expository in nature; in the light of the wording of subsequent articles, particularly draft article 4, it was not strictly necessary. Its purpose was merely to emphasize that the earlier position, according to which armed conflict automatically abrogated treaty relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether or not war was declared, did not *ipso facto* terminate or suspend treaties in force between parties to the conflict. He would, however, not oppose deletion of the provision if the Commission so desired. Its formulation was based on article 2 of the resolution adopted by the Institute of International Law in 1985.<sup>55</sup>

(b) *Summary of the debate*

143. While support was expressed for the Special Rapporteur’s proposal, some members pointed out that examples existed of instances of practice, referred to in both the Special Rapporteur’s report and the Secretariat’s memorandum, which appeared to suggest that armed conflicts

<sup>53</sup> *The Prosecutor v. Duško Tadić a/k/a “DULE”*, International Tribunal for the Former Yugoslavia, Case No. IT-94-I-A72, decision of 2 October 1995, *Judicial Reports 1994–1995*, vol. I, p. 429, para. 70. See also ILM, vol. 35, No. 1 (January 1996), pp. 37–38, para. 70.

<sup>54</sup> Draft article 3, as proposed by the Special Rapporteur in his report, reads as follows:

“*Ipsa facto termination or suspension*

“The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:

“(a) Between the parties to the armed conflict;

“(b) Between one or more parties to the armed conflict and a third State.”

<sup>55</sup> See footnote 48 above.

<sup>52</sup> Further reference was made to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, which made provision for the situation of occupation.



cause the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it was suggested that the articles should not rule out the possibility in some cases of automatic suspension or termination. Another suggestion was that the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty.

144. It was further suggested that a distinction be made between termination and suspension; an armed conflict would not *ipso facto* terminate the treaty between the parties to the armed conflict themselves, but the suspension of the operation of treaties between the parties to the armed conflict would be governed along the lines proposed by the Institute of International Law in articles 7 and 9 of its resolution of 1985.<sup>56</sup>

145. A further proposal was that the position of third parties could be clarified, particularly as to whether the situation *vis-à-vis* third parties might be different from that prevailing between parties to the conflict. One suggestion was to clarify in the text that with regard to effects on third States, the ordinary rules in the 1969 Vienna Convention would apply, such as those relating to fundamental change of circumstance and supervening impossibility of performance.

146. Agreement was also expressed with the proposal made in the Special Rapporteur's report that the phrase "*ipso facto*" be replaced with "necessarily", although some members were comfortable with the former phrase. Other suggestions included inserting a reference to international organizations in the context of draft article 3.

#### (c) *Special Rapporteur's concluding remarks*

147. The Special Rapporteur recalled that he had not strongly supported the draft article from the beginning. However, he was of the view that article 3, with improved wording (including replacing "*ipso facto*" with "necessarily"), should be kept. He noted that many members considered article 3 to be the point of departure of the whole draft and that it reflected the basic principle of continuity. He also took note of the various drafting suggestions that had been made.

148. With regard to the position of third parties, he observed that the distinction between third-party relationships and the relations between the parties to the armed conflict themselves was significant only within the framework of the criterion of intention. It was that criterion which would govern relations between belligerents and neutrals, although he conceded that the relevant practice had to be checked in order to see whether the possibility of different solutions existed. He noted that the point applied equally to draft article 4.

#### 5. ARTICLE 4. THE INDICES OF SUSCEPTIBILITY TO TERMINATION OR SUSPENSION OF TREATIES IN THE CASE OF AN ARMED CONFLICT<sup>57</sup>

##### (a) *Introduction by the Special Rapporteur*

149. The Special Rapporteur observed that there existed in the literature four basic rationales regarding the effects of armed conflicts on treaties: (1) that war was the polar opposite of peace and involved a complete rupture of relations and a return to anarchy; it followed therefore that all treaties were annulled without exception and that the right of abrogation arose from the occurrence of war regardless of the original intention of the parties; (2) that the test was compatibility with the purposes of the war or the state of hostilities, that is, that treaties remained in force subject to the necessities of war; (3) that the relevant criterion was the intention of the parties at the time they concluded the treaty; and (4) that since 1919, and especially since the appearance of the Charter of the United Nations, States no longer possessed a general competence to resort to the use of force except in the case of legitimate defence, and it followed therefore that the use of force should not be recognized as a general dissolvent of treaty obligations. In his view, the third rationale was the most workable and the most representative of the existing framework of international law.

150. Noting that draft article 4 was a key provision, the Special Rapporteur observed that modern doctrine contained two main streams of opinion: (1) that the intention of the parties is the solution to the problem of the effect of the outbreak of war, and (2) the doctrine of *caducité*, which featured prominently in French-language sources, consisting of an amalgam between the earlier and more recent positions according to which the effect of war was to terminate treaty relations, though with some important exceptions based upon intention or inferences of intention. He was, however, of the view that it was inherently contradictory to say that armed conflict was qualitatively incompatible with treaty relations and was therefore non-justiciable, while at the same time saying that there could be exceptions to that rule, the test being the object and purpose of the treaty. In the final analysis, however, both approaches seemed to his mind to end with the notion of intention, and therefore draft article 4 sought to universalize the test of intention, with regard both to the nature of the treaty itself and to the nature and extent of the armed conflict in question.

##### (b) *Summary of the debate*

151. On the four basic theories outlined by the Special Rapporteur as possibly governing the effect of armed

<sup>57</sup> Draft article 4, as proposed by the Special Rapporteur in his report, reads as follows:

"The indices of susceptibility to termination or suspension of treaties in case of an armed conflict

"1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

"(a) With the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and

"(b) The nature and extent of the armed conflict in question."

<sup>56</sup> See the discussion on draft article 10, at p. 36 below.

conflicts on treaties, several members commented on the Special Rapporteur's choice of the criterion of the intention of the parties. The view was expressed that the Special Rapporteur had not sufficiently explained why he could not support some of the other theories. For example, it was suggested that the criterion based on compatibility with the armed conflict was an important one, and that traces of it were to be found in some of the draft articles proposed by the Special Rapporteur. It was noted by some members that the principle of prohibition of the resort to the use of force was essential.

152. As for the proposed criterion of intention, while some members expressed support, others were of the view that it was vague, subjective or non-existent and that it raised complex issues regarding the application of the 1969 Vienna Convention. It was also considered problematic since there was normally no actual intent at the time of conclusion of the treaty; when concluding a treaty, States rarely reflect on the effect any possible armed conflict might have on it. This is particularly the case with treaties after the Second World War. It was suggested that if the purpose of selecting intention as the criterion was to establish a presumption, then that should be provided for in a different manner. Others were less critical of the concept, because it took into account the contextual factors in a particular situation and thereby allowed a more realistic and sensitive regulation of the matter.

153. It was suggested that while the intention of the parties was the most important criterion, there were other relevant criteria, and that the draft articles should avoid maintaining one exclusive criterion. Indeed, it was recalled that, in effect, the criteria for determining intention were the object and nature and extent of the armed conflict (in para. 2 (b)), the existence of an express provision in the treaty (art. 5, para. 1), and the object and purpose of the treaty (art. 7, para. (1), read together with para. (2) providing examples of pertinent categories of treaties). Another suggestion was that the object and purpose test could serve as the general guideline; the draft articles would simply provide that the general criteria applied when the treaty did not provide otherwise. Another opinion was that it was also important to consider subsequent actions in the application of the treaty, including those after the outbreak of the conflict.

154. As regards paragraph 2, doubts were expressed about the relevance of the two sets of criteria suggested for determining the intention of the parties. It was also suggested that the logic of subparagraph (a) was circular; it suggested that determination of the intention of the parties needed to be based on the intention of the parties. It was also noted that reference to articles 31 and 32 of the 1969 Vienna Convention was of limited use if there were no express intention at the time of conclusion of the treaty. Support was expressed for adding the nature of the treaty as an additional criterion under paragraph 2.

#### (c) *Special Rapporteur's concluding remarks*

155. The Special Rapporteur noted that the question of the criterion of intention had been the subject of much debate, and that several members had indicated major concerns, especially as regards the familiar problems of proof. At the same time, he recalled that the majority of

the opinions expressed did not propose the replacement of intention by some other major criterion. He announced his intention to undertake a fuller examination of these issues in the second report, but cautioned that there was no avoiding the concept of intention since, for better or worse, it was the basis of international agreements. He stressed the complexity of the elements of intention relating to draft article 4, as had been raised in the debate. In particular, it seemed obvious that the nature and extent of the conflict in question were necessary criteria, since the criterion of intention was applied not in the abstract but within a particular context. Hence, he maintained that a sense of proportion was called for, since there was no simple solution to the problem of proving intention.

156. The Special Rapporteur further indicated that the debate had revealed a need for greater clarity as to the relation between draft articles 3 and 4 (including the possibility that they might be amalgamated), and that article 4 needed further development as regards the effects of termination or suspension.

### 6. ARTICLE 5. EXPRESS PROVISIONS ON THE OPERATION OF TREATIES<sup>58</sup>

#### (a) *Introduction by the Special Rapporteur*

157. Draft article 5 dealt with the situation where treaties expressly applicable to situations of armed conflict remained operative in the case of an armed conflict and where the outbreak of an armed conflict did not affect the competence of the parties to the conflict to conclude treaties. The Special Rapporteur pointed to well-known examples of belligerents in an armed conflict concluding agreements between themselves during the conflict, and noted that the principles enunciated in the draft article were also supported by the relevant literature.

#### (b) *Summary of the debate*

158. General support was expressed for the provision. The point was made that while the provision was, in a sense, obvious and superfluous, it could nonetheless be included for the sake of clarity.

159. Concerning paragraph 1, reference was made to the principle enunciated in the advisory opinion of ICJ regarding the legality of the threat or use of nuclear weapons, that while certain human rights and environmental principles did not cease in times of armed conflict, their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".<sup>59</sup> It was suggested that this principle be reflected in the draft arti-

<sup>58</sup> Draft article 5, as proposed by the Special Rapporteur in his report, reads as follows:

*"Express provisions on the operation of treaties"*

"1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in the case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

"2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties."

<sup>59</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226 at p. 240, para. 25.*

cles. It was likewise suggested that reference be made to peremptory norms of international law applicable during times of armed conflict. In addition, the inclusion of the qualifier “lawful” was queried.

160. With regard to paragraph 2, the view was expressed that its relationship with paragraph 1 was not clear. It was also suggested that the reference to the “competence” of the parties to the armed conflict to conclude treaties be replaced by the word “capacity”.

(c) *Special Rapporteur’s concluding remarks*

161. The Special Rapporteur noted that the provision, which complemented article 3, was uncontroversial. As for the reference to the word “lawful” in relation to agreements made between States which were already in a situation of armed conflict, he recalled that there existed examples of situations where pairs of States which were at war with each other nonetheless entered into special agreements during the state of war, even agreements which purported to modify the application of the law of war. Hence, the term “lawful” was included in order to ensure that such agreements would be in conformity with international public policy. The issue would be further elaborated on later in the commentary. The Special Rapporteur agreed that the principle enunciated in the advisory opinion of ICJ regarding the legality of the threat or the use of nuclear arms should be reflected appropriately.

7. ARTICLE 6. TREATIES RELATING TO THE OCCASION FOR RESORT TO ARMED CONFLICT<sup>60</sup>

(a) *Introduction by the Special Rapporteur*

162. The Special Rapporteur explained that draft article 6 dealt with the specialized question of treaties relating to a situation which had occasioned resort to armed conflict. He remarked that although some earlier authorities had held the opinion that in cases where an armed conflict was caused by differences as to the meaning or status of a treaty, the treaty could be presumed to be annulled, the more contemporary view was that such a situation did not necessarily mean that the treaty in question would lose its force. The practice of States confirmed that, during the process of peaceful settlement of disputes, the existing treaty obligations remained applicable.

(b) *Summary of the debate*

163. While some agreement with the provision was expressed, some doubts were voiced as to the compatibility of draft article 6 with contemporary international law. It was noted that the subject matter of the provision depended much on the context and prevailing circumstances and that the more applicable principle would be that of the peaceful settlement of disputes. Another view was that the very fact that the Contracting Parties had to resort to armed conflict suggested that at least one of the Contracting Parties

disagreed with the substance or continuance of the treaty. Another possibility was that the provision could apply in situations where the dispute concerned the interpretation of the treaty and not the validity of the treaty in its entirety.

164. The view was also expressed that draft article 6 was, strictly speaking, not necessary in the light of draft article 3 whereby no treaty is *ipso facto* terminated or suspended by the outbreak of armed conflict; this would include a treaty whose interpretation might be the occasion for a conflict. The matter could, accordingly, equally be dealt with in the commentary to article 3.

(c) *Special Rapporteur’s concluding remarks*

165. The Special Rapporteur observed that the draft article had proved to be problematic, with justification. He explained that in his view, it was unreasonable to presume that a treaty which served as the basis for an armed conflict, and which later was the subject of some process in accordance with law, should be assumed to be annulled. He conceded, however, that the draft article was redundant in view of the earlier provisions of the draft.

166. It was further announced that the commentary to the draft article would be amended to include more apposite material, including the Eritrea-Ethiopia Boundary Commission decision of 13 April 2002 regarding delimitation of the border between the State of Eritrea and the Federal Democratic Republic of Ethiopia.<sup>61</sup>

8. ARTICLE 7. THE OPERATION OF TREATIES ON THE BASIS OF NECESSARY IMPLICATION FROM THEIR OBJECT AND PURPOSE<sup>62</sup>

(a) *Introduction by the Special Rapporteur*

167. The Special Rapporteur observed that draft article 7 dealt with the species of treaties the object and purpose of

<sup>61</sup> *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, ILM, vol. 41, No. 5 (September 2002), p. 1057.

<sup>62</sup> Draft article 7, as proposed by the Special Rapporteur in his report, reads as follows:

*“The operation of treaties on the basis of necessary implication from their object and purpose*

“1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

“2. Treaties of this character include the following:

“(a) Treaties expressly applicable in the case of an armed conflict;

“(b) Treaties declaring, creating or regulating permanent rights or a permanent regime or status;

“(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

“(d) Treaties for the protection of human rights;

“(e) Treaties relating to the protection of the environment;

“(f) Treaties relating to international watercourses and related installations and facilities;

“(g) Multilateral law-making treaties;

“(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

“(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

“(j) Treaties relating to diplomatic relations;

“(k) Treaties relating to consular relations.”

<sup>60</sup> Draft article 6, as proposed by the Special Rapporteur in his report, reads as follows:

*“Treaties relating to the occasion for resort to armed conflict*

“A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the Contracting Parties.”



which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, that is, as evidence of the object and purpose of the treaty to the effect that it would survive a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.

168. While there was a case for the inclusion of treaties for the protection of human rights, especially in the light of the inclusion of friendship, commerce and navigation and analogous agreements concerning private rights such as bilateral investment treaties, he was not entirely persuaded. Similarly, in the case of environmental law treaties, he noted that while there were some important pieces of law taken individually and some important standard-setting treaties, there was no unified law for the protection of the environment, and therefore there was no single position as to whether the incidence of armed conflict affected environmental treaties.

#### (b) *Summary of the debate*

169. A range of views were expressed in connection with paragraph 1. It was observed that the intention of the parties and the object and purpose of the treaty were different criteria and that it was difficult to establish a general criterion exactly because the applicable considerations were primarily contextual in nature. What seemed pertinent was more the type of the conflict rather than the intention of the parties. The view was also expressed that the emphasis was better placed on the nature of the treaty, rather than on its object and purpose. Others supported the criterion of object and purpose, particularly because of its connection to the 1969 Vienna Convention. Other suggestions included having a more general formulation such as: "in principle, provisions of a treaty continue to apply depending on their viability, taking into account the context of the armed conflict and depending on the position of the party on the legality of the conflict".

170. Concerning paragraph 2, while some support was expressed for the inclusion of an indicative list, several members expressed doubts. It was observed that treaties do not fall into neat categories and that, for example, bilateral treaties often include aspects of several different fields of law; that even within a particular category, some provisions of a treaty may logically be of such a nature as to be subject to suspension during armed conflict, while other provisions of the same treaty may not; that even with respect to particular types of provisions, the language of a treaty and the intention of its parties could differ from that

of similar provisions in other treaties; that State practice was not consistent in most areas and did not lend itself to yes-or-no answers as to whether a category of treaties may or may not be suspended or terminated; and that it could be difficult to reach a reasonable consensus within the Commission or among States on such a catalogue of treaties. The view was also expressed that, strictly speaking, the list was not necessary in the light of the application of the general criterion of intention; that is, if the intention were known, an indicative list was not necessary. It was further suggested that the list could be included in the commentary.

171. As regards subparagraph (a), the view was expressed that this category was unnecessary as it was already covered by draft article 5. In addition, the category in subparagraph (b) seemed ambiguous, as it was not clear what rights and obligations were "permanent" and which sets of such rights and obligations amounted to a "regime" or "status". Furthermore, some provisions of these types of treaties could be inconsistent with the obligations and rights of occupying powers in armed conflict and, as such, would need to be temporarily suspended. The view was also expressed that subparagraph (c) provided a good example of treaties which contained some provisions that should ordinarily continue during armed conflict (such as the personal status and property rights of foreign nationals), as well as other provisions which might need to be suspended under some circumstances (such as the conduct of navigation and commerce between States engaged in armed conflict).

172. The view was expressed that the category of treaties in subparagraph (d) was one in which there probably was a good basis for continuity, subject to the admonition of ICJ, in the *Legality of the Threat or Use of Nuclear Weapons*,<sup>63</sup> that such rights were to be applied in accordance with the law of armed conflict.<sup>64</sup> Doubts were expressed as to the existence of a general presumption of continuity for the entire category in subparagraph (e), in the light of the fact that many environmental treaties imposed very specific technical limitations which could be inconsistent in some situations with the legitimate requirements of military operations in armed conflict. Others supported the inclusion of the category as part of the progressive development of international law. It was also suggested that treaties relating to groundwaters could be included.

173. On the category of treaties in subparagraph (f), doubts were also expressed as to whether there could be any general presumption of continuity, given that it could be imperative in wartime to prevent or restrict air or sea traffic to or from an enemy State. Concerning subparagraph (g), it was observed that it was not self-evident what might constitute a "law-making" treaty, given the fact that all treaties create law, and that many such treaties had provisions regarding personal rights which should be continued, together with other provisions that might be incompatible with the requirements of armed conflict and might have to be temporarily suspended. Other suggestions for additional categories included

<sup>63</sup> See footnote 59 above.

<sup>64</sup> See the discussion on draft article 5, at p. 32 above.

treaties establishing international organizations and those containing new conventional rules on international crimes.

(c) *Special Rapporteur's concluding remarks*

174. The Special Rapporteur observed that draft article 7 had elicited a variety of views. He noted that it was a corollary of article 4, although he acknowledged that such connection could be more clearly spelled out in the commentary. The content of article 7 was meant to be tentative and expository. While it could be deleted, he pointed out that a major feature of the literature on the topic was the indication of categories of treaties in order to identify types of treaties which are in principle not susceptible to termination or suspension in the case of armed conflict.

175. While he noted that doubts had been expressed, he nonetheless felt that there seemed to be general support for the basic concept of article 7, namely that it was merely expository in character and that it was intended only to create a rebuttable presumption. He suggested that some of the categories were worth distinguishing as they enjoyed a firm base in State practice, for example treaties creating a permanent regime, treaties of friendship, commerce and navigation, and multilateral law-making treaties.

9. ARTICLE 8. MODE OF SUSPENSION OR TERMINATION<sup>65</sup>

(a) *Introduction by the Special Rapporteur*

176. Article 8 was described as being fairly mechanical in its operation. A discussion of the possible outcome in terms of suspension or termination necessarily raised the question of the mode of suspension or termination. While not essential, it seemed useful to include the provision.

(b) *Summary of the debate*

177. It was suggested that the possibility of partial termination or suspension of treaties in particular situations should also be envisaged in the draft article, since there existed no *a priori* requirement that a treaty be suspended or terminated as a whole. Such a possibility would, further, serve to allow for the taking into account of the context within which the draft articles were to be applied. It was also suggested that termination and suspension be distinguished. Further suggestions included considering the article together with draft article 13 (while clarifying the relationship between the two) and giving consideration to the possible inclusion of a provision analogous to that in article 57 of the 1969 Vienna Convention.

<sup>65</sup> Draft article 8, as proposed by the Special Rapporteur in his report, reads as follows:

*"Mode of suspension or termination*

"In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the law of treaties."

(c) *Special Rapporteur's concluding remarks*

178. The Special Rapporteur noted that the draft article had been relatively uncontroversial. He took note of the suggestion that the possibility of the separability of provisions be given a clearer profile in the draft article, and observed that such a possibility had, in fact, been included by reference to article 44 of the 1969 Vienna Convention. He confirmed that the issue would be given greater prominence in the draft article.

10. ARTICLE 9. THE RESUMPTION OF SUSPENDED TREATIES<sup>66</sup>

(a) *Introduction by the Special Rapporteur*

179. The Special Rapporteur explained that, like article 8, draft article 9 was mechanical in nature. Reference was made to international experience, including some peace treaties such as the Peace Treaty with Italy, where serious attempts were made to clarify the position where, as a result of a major armed conflict, there was a great residue of legal relations the survival of which was in question. In such circumstances, States had adopted practical methods for removing substantial ambiguities in their relationships.

(b) *Summary of the debate*

180. Support was expressed for the position that the resumption of suspended treaties should be favoured when the reasons for suspension no longer applied. Many members raised the same points in connection with draft article 9 as had been made in the context of article 4. For example, it was again suggested that a reference to the nature of the treaty be included in a new subparagraph 2 (c). Similarly, any changes to draft article 4 would imply consequential amendments to article 9. It was also suggested that a provision be included stipulating that, in the case of doubt as to whether a treaty were suspended or terminated as a result of an armed conflict, it would be presumed that it was only suspended, thereby leaving open the possibility for the parties to agree otherwise.

(c) *Special Rapporteur's concluding remarks*

181. The Special Rapporteur noted that article 9 was ancillary to the purposes of article 4.

<sup>66</sup> Draft article 9, as proposed by the Special Rapporteur in his report, reads as follows:

*"The resumption of suspended treaties*

"1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

"(a) With the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and

"(b) With the nature and extent of the armed conflict in question."



# 11. ARTICLE 10. LEGALITY OF THE CONDUCT OF THE PARTIES<sup>67</sup>

## (a) *Introduction by the Special Rapporteur*

182. The Special Rapporteur explained that in draft article 10 he had taken a different approach from that of the Institute of International Law in its resolution of 1985<sup>68</sup> which provided several articles on the question of the legality of the conduct of the parties to an armed conflict. He observed that the difficulty was the absence of a determination of an illegality by an authoritative organ. In the present draft article that issue was largely set aside. He explained that the character of the draft articles would change if they were to consider such questions.

## (b) *Summary of the debate*

183. Several members spoke in favour of including similar provisions to those in articles 7, 8 and 9 of the resolution of the Institute of International Law, distinguishing the rights of the State acting in individual or collective self-defence, or in compliance with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, from those of the State committing aggression.<sup>69</sup> The view was expressed that it was necessary to consider the situation in which the parties to an armed conflict had profited from an illegal war, and that resort to the sole criterion of the intention of the parties could lead to a different conclusion. Several members also expressed the view that the draft articles had to take into account developments since the Second World War, in particular as regards the prohibition of the use or threat of use of force, which constituted the cornerstone of the whole structure of the United Nations system for the maintenance of international peace and security. It was maintained that this could be done by focusing on what the effects on treaties would be of aggression or self-defence, without defining such acts. It was observed that only treaties incompatible with the exercise of the right to self-defence should be suspended or even repealed.

184. Another opinion offered was that while the question of the legality of armed conflict was not pertinent in connection with the rules of armed conflict, the same could not be said with regard to the termination or suspension of other categories of treaties. It was thus not clear that the provision conformed to the 1969 Vienna Convention, which singled out wrongdoing States for different treatment.

185. At the same time, opposition was expressed to the introduction into the draft articles of references to the

inequality of belligerent parties. It was observed that, in practice, it was difficult to pass judgement on the parties to an armed conflict, and it was noted also that the matter was not without its complexity, especially in the light of the existence of views, in the international community, that there were other forms of lawful resort to the use of force, allegedly endorsed by customary international law.

## (c) *Special Rapporteur's concluding remarks*

186. The Special Rapporteur acknowledged that the criticism of draft article 10 was justified and that the draft article accordingly needed to be redrafted. In his opinion, the matter could be resolved by means of resort to a proviso, cast in general terms, referring to the right to individual or collective self-defence. It could not be presumed that the States concerned could rely on such a proviso unless the legal conditions existed necessitating suspension or termination.

187. The Special Rapporteur stated that it was not his intention to examine the question of the validity or the voidability of treaties in terms of the Charter of the United Nations provisions relating to the use of force.

12. ARTICLE 11. DECISIONS OF THE SECURITY COUNCIL,<sup>70</sup> ARTICLE 12. STATUS OF THIRD STATES AS NEUTRALS,<sup>71</sup> ARTICLE 13. CASES OF TERMINATION OR SUSPENSION,<sup>72</sup> AND ARTICLE 14. THE REVIVAL OF TERMINATED OR SUSPENDED TREATIES<sup>73</sup>

## (a) *Introduction by the Special Rapporteur*

188. The Special Rapporteur explained that while not strictly necessary, draft article 11 was useful in an expository draft. He further recalled the content of article 75 of the 1969 Vienna Convention. Draft article 12,

<sup>70</sup> Draft article 11, as proposed by the Special Rapporteur in his report, reads as follows:

### *"Decisions of the Security Council"*

"These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations."

<sup>71</sup> Draft article 12, as proposed by the Special Rapporteur, reads as follows:

### *"Status of third States as neutrals"*

"The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict."

<sup>72</sup> Draft article 13, as proposed by the Special Rapporteur in his report, reads as follows:

### *"Cases of termination or suspension"*

"The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

"(a) The agreement of the parties; or

"(b) A material breach; or

"(c) Supervening impossibility of performance; or

"(d) A fundamental change of circumstances."

<sup>73</sup> Draft article 14, as proposed by the Special Rapporteur in his report, reads as follows:

### *"The revival of terminated or suspended treaties"*

"The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties suspended or terminated as a result of the armed conflict, on the basis of agreement."

<sup>67</sup> Draft article 10, as proposed by the Special Rapporteur in his report, reads as follows:

### *"Legality of the conduct of the parties"*

"The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations."

<sup>68</sup> See footnote 48 above.

<sup>69</sup> The text of articles 7–9 of the resolution of the Institute of International Law appears in the first report of the Special Rapporteur (para. 123).

likewise, contained a savings clause, which, although also not strictly necessary, had a pragmatic purpose. With regard to draft article 13, the Special Rapporteur pointed to the fact that the subject matter of the report overlapped with other well-recognized aspects of the law of treaties, and that the provision took such overlap into account. The Special Rapporteur limited his introduction of draft article 14 to observing that there existed a substantial amount of practice on the revival of the status of pre-war treaties.

(b) *Summary of the debate*

189. General support existed for draft articles 11–14.

190. Support was expressed for the reiteration of the rules of the 1969 Vienna Convention in draft article 13. It was further suggested that treaties which might attract a defence of waiver or impossibility of performance in a situation of non-performance should be clearly distinguished for reasons of clarity and coherence.

(c) *Special Rapporteur's concluding remarks*

191. The Special Rapporteur took note of the fact that draft articles 11–14 had not attracted any criticism. He also observed that while article 11 was a necessary proviso, it could be incorporated into a more general proviso on the Charter of the United Nations.

## Chapter VI

### RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

#### A. Introduction

192. At its fifty-second session (2000), the Commission decided to include the topic “Responsibility of international organizations” in its long-term programme of work.<sup>74</sup> The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission’s decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the report of the Commission to the General Assembly on the work of its fifty-second session. In paragraph 8 of its resolution 56/82 of 12 December 2001, the Assembly requested the Commission to begin its work on the topic “Responsibility of international organizations”.

193. At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.<sup>75</sup> At the same session, the Commission established a Working Group on the topic.<sup>76</sup> In its report,<sup>77</sup> the Working Group briefly considered the scope of the topic, the relations between the new project and the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session,<sup>78</sup> questions of attribution, issues relating to the responsibility of member States for conduct attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.<sup>79</sup>

194. At its fifty-fifth (2003) and fifty-sixth sessions (2004), the Commission considered the first<sup>80</sup> and second<sup>81</sup> reports of the Special Rapporteur. The Commission provisionally adopted articles 1–7.<sup>82</sup>

#### B. Consideration of the topic at the present session

195. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/553).

196. Following the recommendations of the Commission,<sup>83</sup> the Secretariat had circulated the relevant chapter, included in the report of the Commission to the General Assembly on the work of its fifty-second session, to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. Comments received so far from international organizations and from Governments were also before the Commission.<sup>84</sup>

197. The third report of the Special Rapporteur, like the previous two reports, followed the general pattern of the articles on responsibility of States for internationally wrongful acts. It considered matters which were addressed in chapters III and IV of part one of those articles. Thus, following the second report, which dealt with questions of attribution of conduct to international organizations, the third report dealt with the existence of a breach of an international obligation on the part of an international organization, and with the responsibility of an international organization in connection with the act of a State or another international organization.

198. In his third report the Special Rapporteur proposed draft articles 8–16: article 8 (Existence of a breach of an international obligation),<sup>85</sup> article 9 (International obligation in force for an international organization),<sup>86</sup> article 10 (Extension in time of the

<sup>83</sup> See *Yearbook ... 2002*, vol. II (Part Two), paras. 464 and 488, and *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 52.

<sup>84</sup> For comments from Governments and international organizations see *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545; and *Yearbook ... 2005*, vol. II (Part One), documents A/CN.4/547 and A/CN.4/556.

<sup>85</sup> Draft article 8 reads as follows:

“Article 8. Existence of a breach of an international obligation

“1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

“2. The preceding paragraph also applies in principle to the breach of an obligation set by a rule of the organization.”

<sup>86</sup> Draft article 9 reads as follows:

“Article 9. International obligation in force for an international organization

“An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.”

<sup>74</sup> See footnote 42 above.

<sup>75</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, paras. 461–463.

<sup>76</sup> *Ibid.*, para. 462.

<sup>77</sup> *Ibid.*, pp. 93–96, paras. 465–488.

<sup>78</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

<sup>79</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 464.

<sup>80</sup> *Yearbook ... 2003*, vol. II (Part One), p. 105, document A/CN.4/532.

<sup>81</sup> *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541.

<sup>82</sup> Draft articles 1 to 3 were provisionally adopted at the fifty-fifth session (*Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 49) and draft articles 4 to 7 were provisionally adopted at the fifty-sixth session (*Yearbook ... 2004*, vol. II (Part Two), para. 69). For the text of draft articles 1 to 7, see section C below.

breach of an international obligation),<sup>87</sup> article 11 (Breach consisting of a composite act),<sup>88</sup> article 12 (Aid or assistance in the commission of an internationally wrongful act),<sup>89</sup> article 13 (Direction and control exercised over the commission of an internationally wrongful act),<sup>90</sup> article 14 (Coercion of a State or other international organization),<sup>91</sup> article 15 (Effects of the preceding articles)<sup>92</sup> and article 16 (Decisions, recommendations

and authorizations addressed to member States and international organizations).<sup>93</sup>

199. Draft articles 8–11 corresponded to articles 12–15 in chapter III of the draft articles on responsibility of States for internationally wrongful acts which dealt with the existence of a breach of an international obligation, the requirement that the obligation be in force at the time the act occurs, the extension of the breach in time and the breach consisting of a composite act.<sup>94</sup> In the view of the Special Rapporteur, those articles on responsibility of States for internationally wrongful acts were of a general nature and reflected principles that were clearly applicable to the breach of an international obligation on the part of any subject of international law. There was no reason, therefore, to take a different approach, in this context, with regard to international organizations. However, the Special Rapporteur considered it useful to add in draft article 8 a specific paragraph dealing with the breach of an obligation under the rules of the organization.

200. With regard to draft articles 12–16, the Special Rapporteur explained that they corresponded to articles 16–19 in chapter IV of the articles on responsibility of States for internationally wrongful acts. The articles of that chapter consider cases and conditions under which a State is responsible for aid or assistance to, or direction and control of, another State in the commission of an internationally wrongful act, or for the coercion of another State to commit a wrongful act.<sup>95</sup> The Special Rapporteur explained that even though there was little practice relating to the international responsibility of international organizations in this type of situation, there was no reason to think that the requirements and approach would be any different from those relating to the responsibility of States. He noted that there might be situations in which an international organization might be responsible for the conduct of its members. These cases do not seem to fall squarely into any of the categories covered by articles 16–18 on responsibility of States for internationally wrongful acts. They involved compliance with acts of international organizations by their members. Such acts might be binding decisions or non-binding

<sup>87</sup> Draft article 10 reads as follows:

*“Article 10. Extension in time of the breach of an international obligation*

“1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

“2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

“3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

<sup>88</sup> Draft article 11 reads as follows:

*“Article 11. Breach consisting of a composite act*

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”

<sup>89</sup> Draft article 12 reads as follows:

*“Article 12. Aid or assistance in the commission of an internationally wrongful act*

“An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

“(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) The act would be internationally wrongful if committed by that organization.”

<sup>90</sup> Draft article 13 reads as follows:

*“Article 13. Direction and control exercised over the commission of an internationally wrongful act*

“An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

“(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) The act would be internationally wrongful if committed by that organization.”

<sup>91</sup> Draft article 14 reads as follows:

*“Article 14. Coercion of a State or another international organization*

“An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

“(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

“(b) The coercing international organization does so with knowledge of the circumstances of the act.”

<sup>92</sup> Draft article 15 reads as follows:

*“Article 15. Effect of the preceding articles*

“Articles 12 to 14 are without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.”

<sup>93</sup> Draft article 16 reads as follows:

*“Article 16. Decisions, recommendations and authorizations addressed to member States and international organizations*

“1. An international organization incurs international responsibility if:

“(a) It adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly; and

“(b) The act in question is committed.

“2. An international organization incurs international responsibility if it authorizes a member State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly, or if it recommends such an act, provided that:

“(a) The act fulfils an interest of the same organization; and

“(b) The act in question is committed.

“3. The preceding paragraphs apply also when the member State or international organization does not act in breach of one of its international obligations and therefore does not incur international responsibility.”

<sup>94</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26–27.

<sup>95</sup> *Ibid.*, p. 27.



recommendations or authorizations. To cover these situations, he had proposed draft article 16.

201. The Commission considered the third report of the Special Rapporteur at its 2839th to 2843rd meetings, on 17–24 May 2005. At its 2843rd meeting, on 24 May 2005, the Commission established a Working Group to consider draft articles 8 and 16. The Commission considered the report of the Working Group at its 2844th meeting, on 25 May 2005.

202. At its 2843rd meeting, the Commission referred draft articles 9–15 to the Drafting Committee. At its 2844th meeting, draft articles 8 and 16 were referred to the Drafting Committee, following the report of the Working Group.

203. The Commission considered and adopted the report of the Drafting Committee on draft articles 8–16 [15] at its 2848th meeting, on 3 June 2005 (see section C.1 below).

204. At its 2862nd and 2863rd meetings, on 2 and 3 August 2005, the Commission adopted the commentaries to the aforementioned draft articles (see section C.2 below).

### C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

#### 1. TEXT OF THE DRAFT ARTICLES

205. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

#### RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

##### PART ONE

#### THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

##### CHAPTER I

#### INTRODUCTION

##### *Article 1.<sup>96</sup> 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.<sup>97</sup> 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.

<sup>96</sup> See the commentary to this article in *Yearbook ... 2003*, vol. II (Part Two), pp. 18–19, para. 54.

<sup>97</sup> *Ibid.*, pp. 20–22.

##### *Article 3.<sup>98</sup> 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.

##### CHAPTER II<sup>99</sup>

#### ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

##### *Article 4.<sup>100</sup> General rule on attribution of conduct to an international organization*

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term “agent” includes officials and other persons or entities through whom the organization acts.<sup>101</sup>

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments, and established practice of the organization.<sup>102</sup>

##### *Article 5.<sup>103</sup> Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization*

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

##### *Article 6.<sup>104</sup> Excess of authority or contravention of instructions*

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

<sup>98</sup> *Ibid.*, pp. 22–23.

<sup>99</sup> See the commentary to this chapter in *Yearbook ... 2004*, vol. II (Part Two), chap. V, sect. C.2, para. 72.

<sup>100</sup> See the commentary to this article (*ibid.*).

<sup>101</sup> The location of paragraph 2 may be reconsidered at a later stage with a view eventually to placing all definitions of terms in article 2.

<sup>102</sup> The location of paragraph 4 may be reconsidered at a later stage with a view eventually to placing all definitions of terms in article 2.

<sup>103</sup> See the commentary to this article in *Yearbook ... 2004*, vol. II (Part Two), chap. V, sect. C.2, para. 72.

<sup>104</sup> *Ibid.*



*Article 7.<sup>105</sup> Conduct acknowledged and adopted by an international organization as its own*

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III<sup>106</sup>

BREACH OF AN INTERNATIONAL OBLIGATION

*Article 8.<sup>107</sup> Existence of a breach of an international obligation*

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

*Article 9.<sup>108</sup> International obligation in force for an international organization*

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

*Article 10.<sup>109</sup> Extension in time of the breach of an international obligation*

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

*Article 11.<sup>110</sup> Breach consisting of a composite act*

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV<sup>111</sup>

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

*Article 12.<sup>112</sup> Aid or assistance in the commission of an internationally wrongful act*

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter international organization is internationally responsible for doing so if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.

*Article 13.<sup>113</sup> Direction and control exercised over the commission of an internationally wrongful act*

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter international organization is internationally responsible for that act if:

(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that organization.

*Article 14.<sup>114</sup> Coercion of a State or another international organization*

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) The coercing international organization does so with knowledge of the circumstances of the act.

*Article 15 [16].<sup>115</sup> Decisions, recommendations and authorizations addressed to member States and international organizations*

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or it recommends that a member State or international organization commit such an act; and

(b) That State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international

<sup>105</sup> *Ibid.*

<sup>106</sup> The commentary to this chapter appears in section C.2 below.

<sup>107</sup> The commentary to this article appears in *ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> The commentary to this chapter appears in section C.2 below.

<sup>112</sup> The commentary to this article appears in *ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* The figure in square brackets refers to the corresponding article in the third report of the Special Rapporteur.

organization to which the decision, authorization or recommendation is directed.

*Article 16 [15].<sup>116</sup> Effect of this chapter*

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES  
THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-  
SEVENTH SESSION

206. The text of the draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-seventh session is reproduced below.

### CHAPTER III

#### BREACH OF AN INTERNATIONAL OBLIGATION

(1) Draft articles 4–7 of the present draft address the question of attribution of conduct to an international organization. According to draft article 3, paragraph 2, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct “constitutes a breach of an international obligation of that organization”. This condition is examined in the present chapter.

(2) As specified in draft article 3, paragraph 2, conduct of an international organization may consist of “an action or omission”. An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action which is inconsistent with what the international organization is required to do, or not to do, under international law.

(3) To a large extent, the four articles included in the present chapter correspond, in their substance and wording, to articles 12–15 on responsibility of States for internationally wrongful acts.<sup>117</sup> Those articles express principles of a general nature that appear to be applicable to the breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present draft articles, although available practice relating to international organizations is limited with regard to the various issues addressed in this chapter.

*Article 8. Existence of a breach of an international obligation*

**1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.**

<sup>116</sup> The commentary to this article appears in section C.2 below. The figure in square brackets refers to the corresponding article in the third report of the Special Rapporteur.

<sup>117</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

**2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.**

*Commentary*

(1) The wording of paragraph 1 corresponds to that of article 12 on responsibility of States for internationally wrongful acts,<sup>118</sup> with replacement of the term “State” by “international organization”.

(2) With regard to States, the term “international obligation” means an obligation under international law “regardless of its origin”. As mentioned in the commentary to draft article 12 on responsibility of States for internationally wrongful acts, this is intended to convey that “[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order”.<sup>119</sup>

(3) An international obligation may be owed by an international organization to the international community as a whole, to one or several States, whether members or non-members, to another international organization or other international organizations or to any other subject of international law.

(4) For an international organization, most obligations are likely to arise from the rules of the organization, which are defined in draft article 4, paragraph 4, of the present draft as meaning “in particular, the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments, and established practice of the organization”. While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present draft. The wording in paragraph 2, which refers to an obligation “established by a rule of the international organization”, is intended to refer to any obligation arising from the rules of the organization.

(5) The question may be raised as to whether all the obligations arising from rules of the organization are to be considered as international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.<sup>120</sup> Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization,

<sup>118</sup> *Ibid.*, p. 54. See the related commentary, pp. 54–57.

<sup>119</sup> *Ibid.*, p. 55 (para. (3) of the commentary).

<sup>120</sup> The theory that the “rules of the organization” are part of international law has been expounded particularly by Matteo Declewa, *Il diritto interno delle Unioni internazionali* (Padua, Cedam, 1962) and Giorgio Balladore Pallieri, “Le droit interne des organisations internationales”, *Recueil des cours de l'Académie de droit international de La Haye, 1969–II*, vol. 127, p. 1. For a recent reassertion, see Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002), pp. 576–577.

once it has come into existence, does not form part of international law.<sup>121</sup> Another view, which finds support in practice,<sup>122</sup> is that international organizations which have achieved a high degree of integration are a special case. A further view, which was shared by some members of the Commission, would draw a distinction according to the source and subject matter of the rules of the organization, and would exclude, for instance, certain administrative regulations from the domain of international law.

(6) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply.

(7) The rules of an organization may devise specific treatment of breaches of obligations, and also with regard to the question of the existence of a breach. This does not need to be stated in article 8, because it could be adequately covered by a final provision of the draft, which would point to the possible existence of special rules on any of the matters covered by the draft. These special rules do not necessarily prevail over principles set out in the present draft.<sup>123</sup> For instance, with regard to the existence of a breach of an international obligation, a

special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

(8) As explained in the commentary to article 12 on responsibility of States for internationally wrongful acts, the reference in paragraph 1 to the character of the obligation concerns the “various classifications of international obligations”.<sup>124</sup>

(9) Existing obligations of an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from certain conduct. In this case, the conduct of member States would not *per se* cause a breach of the obligation. The breach would consist in the failure, on the part of the international organization, to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. This combination was acknowledged by the European Court of Justice in a case, *Parliament v. Council*, concerning a treaty establishing cooperation that was concluded by the European Community and its member States, on the one side, and several non-member States, on the other. The Court found that:

In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP [African, Caribbean and Pacific Group] States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.<sup>125</sup>

### **Article 9. International obligation in force for an international organization**

**An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.**

#### *Commentary*

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in article 13 on responsibility of States for internationally wrongful acts,<sup>126</sup> the term “State” is simply

from the assumption that the rules of the international organization in question are not part of international law.

<sup>124</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 56–57 (para. (11) of the commentary).

<sup>125</sup> Case C-316/91. Judgment of 2 March 1994, *European Court Reports*, 1994-I, p. 625 at pp. 661–662.

<sup>126</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 57. See also the related commentary, pp. 57–59. Resolution 1/2004 adopted in Berlin by the International Law Association is similarly worded: “An act of an international organization does not constitute a breach

<sup>121</sup> Among the authors who defend this view are L. Focsaneanu, “Le droit interne de l’Organisation des Nations Unies”, *Annuaire français de droit international*, vol. 3 (1957), p. 315, P. Cahier, “Le droit interne des organisations internationales”, *Revue générale de droit international public*, vol. 67 (1963), p. 563, and J. A. Barberis, “Nouvelles questions concernant la personnalité juridique internationale”, *Recueil des cours de l’Académie de droit international de La Haye*, 1983-I, vol. 179, pp. 145 *et seq.*, at pp. 222–225. The distinction between international law and the internal law of international organizations was also upheld by Rudolf Bernhardt, “Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen”, *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

<sup>122</sup> As a model of this type of organization one could cite the European Community, for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member States and which their courts are bound to apply.

... By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”

Case 6/64, Judgment of 15 July 1964, *European Court Reports*, vol. X (1964), p. 585.

<sup>123</sup> The International Law Association stated in this regard: “The characterization of an act of an international organization as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the international organization’s internal legal order.” (“Final Report of the Committee on Accountability of International Organisations”, part three, section one, adopted by resolution No. 1/2004), *Report of the Seventy-First Conference, Berlin, 16–21 August 2004* (see footnote 36 above), p. 199. This paragraph appears to start



replaced by “international organization” in the title and text of draft article 9.

**Article 10. Extension in time of the breach of an international obligation**

**1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.**

**2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.**

**3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.**

*Commentary*

Similar considerations to those made in the commentary to draft article 9 apply in the case of draft article 10. The text corresponds to that of article 14 on responsibility of States for internationally wrongful acts,<sup>127</sup> with the replacement of the term “State” by “international organization”.

**Article 11. Breach consisting of a composite act**

**1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series, and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Commentary*

The observation made in the commentary to draft article 9 also applies with regard to draft article 11. This corresponds to article 15 on responsibility of States for internationally wrongful acts,<sup>128</sup> with the replacement of the term “State” by “international organization” in paragraph 1.

(Footnote 126 continued.)

of an international obligation unless the Organization is bound by the obligation in question at the time the act occurs.” (*Report of the Seventy-First Conference, Berlin, 16–21 August 2004* (see footnote 36 above), p. 199).

<sup>127</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 59, and the related commentary, pp. 59–62.

<sup>128</sup> *Ibid.*, p. 62, with the related commentary at pp. 62–64.

**CHAPTER IV**

**RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION**

(1) Articles 16–18 on responsibility of States for internationally wrongful acts<sup>129</sup> consider the cases in which a State assists or aids, directs and controls, or coerces another State in the commission of an internationally wrongful act. Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State. Thus, even if available practice with regard to international organizations is limited, there is some justification for including, in the present draft, provisions that are parallel to articles 16–18 on responsibility of States for internationally wrongful acts.

(2) The pertinent provisions on responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) Relations existing between an international organization and its member States or international organizations allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16–18 on responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members’ conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization’s responsibility will also be examined in the present chapter.

(4) The question of an international organization’s international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following cases: *M. & Co.*<sup>130</sup> before

<sup>129</sup> *Ibid.*, pp. 65–69.

<sup>130</sup> *M. & Co. v. the Federal Republic of Germany*, Application No. 13258/87, Decision of 9 February 1990, European Commission of Human Rights, *Decisions and Reports*, vol. 64, p. 138.

the European Commission of Human Rights, *Cantoni*,<sup>131</sup> *Matthews*<sup>132</sup> and *Senator Lines*<sup>133</sup> before ECHR, and *H.v.d.P.*<sup>134</sup> before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not, “in any way, be construed as coming within the jurisprudence of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto”.<sup>135</sup>

(5) Several cases concern the relations between the European Community and its member States. In *M. & Co.* the European Commission of Human Rights held:

The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities ... This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted *quasi* as Community organs and are to that extent beyond the scope of control exercised by the Convention organs.<sup>136</sup>

(6) A different view was endorsed recently by a WTO panel in *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, which:

accepted the European Communities’ explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, “act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general”.<sup>137</sup>

This approach implies making an exception for the relations between the European Community and its member States, to the effect that in the presence of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(7) The issue was recently before ECHR in *Bosphorus Hava Yollari Turizm ve Ticaret AS*. The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings:

whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of Article 1 of the Convention [for the Protection of Human Rights and Fundamental Freedoms], when

that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC [European Community] Regulation.<sup>138</sup>

In its unanimous judgement on the merits of 30 June 2005, the Grand Chamber of the Court held that:

In the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the “jurisdiction” of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci, personae* and *materiae* with the provisions of the Convention.<sup>139</sup>

For the purposes of the present chapter, it seems preferable at the current stage of judicial developments not to assume that a special rule has come into existence to the effect that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community.

#### **Article 12. Aid or assistance in the commission of an internationally wrongful act**

**An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:**

**(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and**

**(b) The act would be internationally wrongful if committed by that organization.**

#### *Commentary*

The application to an international organization of a provision corresponding to draft article 16 on responsibility of States for internationally wrongful acts<sup>140</sup> is not problematic.<sup>141</sup> Draft article 12 introduces only a few changes: the reference to the case in which a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization; in consequence, certain changes have been made in the rest of the text.

<sup>131</sup> *Cantoni v. France*, Application No. 17862/91, Judgment of 15 November 1996, ECHR, *Reports of Judgments and Decisions*, 1996–V, p. 1614.

<sup>132</sup> *Matthews v. the United Kingdom*, Application No. 24833/94, Grand Chamber, Judgment of 18 February 1999, ECHR, *Reports of Judgments and Decisions*, 1999–I, p. 251.

<sup>133</sup> *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application No. 56672/00, Grand Chamber, Decision of 10 March 2004, ECHR, *Reports of Judgments and Decisions*, 2004–IV, p. 335.

<sup>134</sup> *H.v.d.P. v. the Netherlands*, Communication No. 217/1986, decision of 8 April 1987, *Official Records of the General Assembly, Forty-Second Session, Supplement No. 40 (A/42/40)*, p. 185.

<sup>135</sup> *Ibid.*, p. 186 (para. 3.2).

<sup>136</sup> *M. & Co. v. Germany* (see footnote 130 above), p. 144.

<sup>137</sup> WTO, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs: Complaint by the United States*, Report of the Panel, 15 March 2005 (WT/DS/174/R), para. 7.725.

<sup>138</sup> *Bosphorus Hava Yollari ve Ticaret AS v. Ireland*, Application No. 45036/98, Decision of 13 September 2001 (unpublished), para. A.

<sup>139</sup> *Ibid.*, Grand Chamber, decision of 30 June 2005, ECHR, *Reports of Judgments and Decisions*, 2005–VI, para. 137.

<sup>140</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 65. See the related commentary, pp. 65–67.

<sup>141</sup> The ILA Berlin resolution stated: “There is also an internationally wrongful act of an international organization when it aids or assists a State or another international organization in the commission of an internationally wrongful act by that State or other international organization.” (*Report of the Seventy-First Conference, Berlin, 16–21 August 2004* (see footnote 36 above), pp. 200–201). This text does not refer to the conditions listed in article 12 under (a) and (b).



**Article 13. Direction and control exercised over the commission of an internationally wrongful act**

**An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:**

**(a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and**

**(b) The act would be internationally wrongful if committed by that organization.**

*Commentary*

(1) The text of draft article 13 corresponds to draft article 17 on responsibility of States for internationally wrongful acts,<sup>142</sup> with changes similar to those explained in the commentary to draft article 12. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term “State” has been replaced with “State or another international organization” in the reference to the entity which is directed and controlled.

(2) If one assumes that the Kosovo Force (KFOR) is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the Government of France’s preliminary objections in *Legality of Use of Force* before ICJ, when the French Government held that: “NATO is responsible for the ‘direction’ of KFOR and the United Nations for ‘control’ of it.”<sup>143</sup> A joint exercise of direction and control was probably envisaged.

(3) In the relations between an international organization and its member States and international organizations, the concept of “direction and control” could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary to article 17 on responsibility of States for internationally wrongful acts explains that “Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State”,<sup>144</sup> that “the term ‘controls’ refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern”,<sup>145</sup> and that “the word ‘directs’ does not encom-

pass mere incitement or suggestion but rather connotes actual direction of an operative kind”.<sup>146</sup> If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could determine, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the decision is not given discretion to adopt conduct which, while complying with the decision, would not constitute an internationally wrongful act.

(4) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of draft article 13, this provision would overlap with draft article 15 of the present draft. The overlap would be only partial; it is sufficient to point out that draft article 15 also covers the case where a binding decision requires a member State or international organization to take an act which is not unlawful for that State or international organization. In any case, the possible overlap between draft articles 13 and 15 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

**Article 14. Coercion of a State or another international organization**

**An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:**

**(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and**

**(b) The coercing international organization does so with knowledge of the circumstances of the act.**

*Commentary*

(1) The text of draft article 14 corresponds to draft article 18 on responsibility of States for internationally wrongful acts,<sup>147</sup> with changes similar to those explained in the commentary to draft article 12. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from “Coercion of another State” to “Coercion of a State or another international organization”.

(2) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary to draft article 18 on responsibility of States for internationally wrongful acts stresses that:

<sup>142</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 67. See also the related commentary, pp. 68–69.

<sup>143</sup> *I.C.J. Pleadings, Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections of the French Republic (5 July 2000), p. 33, para. 46. A similar view with regard to the relations between NATO and KFOR was held by Alain Pellet, “L’imputabilité d’éventuels actes illicites: responsabilité de l’OTAN ou des États membres”, in C. Tomuschat, ed., *Kosovo and the International Community: A Legal Assessment* (The Hague, Kluwer Law International, 2002), pp. 193 *et seq.*, at p. 199.

<sup>144</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 68 (para. (6) of the commentary).

<sup>145</sup> *Ibid.*, p. 69 (para. (7) of the commentary to article 17).

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.* See also the related commentary, pp. 69–70.

Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State.<sup>148</sup>

(3) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between draft article 14 and draft article 15. The overlap would be only partial, given the different conditions set by the two provisions, and especially the fact that according to draft article 15 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either draft article 14 or draft article 15. This would not give rise to any inconsistency.

**Article 15 [16]. Decisions, recommendations and authorizations addressed to member States and international organizations**

**1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.**

**2. An international organization incurs international responsibility if:**

**(a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and**

**(b) That State or international organization commits the act in question in reliance on the authorization or recommendation.**

**3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.**

*Commentary*

(1) The fact that an international organization is a subject of international law, which is distinct from the organization's members, opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and it would circumvent one of its international obligations. As was noted by the delegation of Austria during the debates in the Sixth Committee: ...[A]n international organization should not

be allowed to escape responsibility by 'outsourcing' its actors."<sup>149</sup>

(2) The Legal Counsel of WIPO considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote:

[I]n the event a certain conduct, in which a member State engages in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law.<sup>150</sup>

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization's members.

(4) The existence on the part of the international organization of a specific intention of circumventing is not required. Thus, when an international organization requests its members to employ certain conduct and this would imply the circumvention of one of the organization's international obligations, that organization could not avoid its responsibility by showing the absence of any intention to circumvent its obligation.

(5) In the case of a binding decision, paragraph 1 does not stipulate as a pre-condition, for the international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party's being injured would then be high. It appears preferable, therefore, to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if the threshold of international responsibility is advanced, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS*, ECHR considered the conduct of member States of the European Community when implementing binding Community acts and observed:

[A] State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases ... confirm this. Each case (in particular,

<sup>149</sup> *Official Records of the General Assembly, Fifty-Ninth Session, Sixth Committee, 22nd meeting (A/C.6/59/SR.22) and corrigendum, para. 24.*

<sup>150</sup> Comments and observations received from Governments and international organizations, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, p. 52, sect. N.5.

<sup>148</sup> *Ibid.*, p. 69 (para. (2) of the commentary).

*Cantoni*, p. 1626, § 26) concerned a review by this Court of the exercise of State discretion for which Community law provided.<sup>151</sup>

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries:

... it appeared essential to find the point where the member State could be said to have so little “room for manoeuvre” that it would seem unreasonable to make it solely responsible for certain conduct.<sup>152</sup>

Should, on the contrary, the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

(8) Paragraph 2 considers the case in which an international organization circumvents one of its international obligations by recommending to a member State or international organization the commission of a certain act or by authorizing a member State or international organization to commit such an act. The effects of recommendations and authorizations may differ, especially according to the organization concerned. The reference to these two types of acts is intended to cover all non-binding acts of an international organization which are susceptible of influencing the conduct of member States or international organizations.

(9) For international responsibility to arise, the first condition in paragraph 2 is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the recommendation or authorization in question is not binding, and may not prompt any conduct which conforms to the recommendation or authorization, a further condition laid out in paragraph 2 is that, as specified under (a), the act which is recommended or authorized is actually committed.

(10) Moreover, as specified under (b), the act in question has to be committed “in reliance on that authorization or recommendation”. This condition implies a contextual analysis of the role that the recommendation or authorization actually plays in determining the conduct of the member State or international organization.

(11) Reliance on the recommendation or authorization should not be unreasonable. Responsibility of the recommending or authorizing international organization cannot arise if, for instance, the recommendation is outdated and not intended to apply to the current circumstances, because of the substantial changes that have intervened since the adoption.

(12) While the authorizing or recommending international organization would be responsible if it requested the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization or recommendation is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

... insofar as “Opération Turquoise” is concerned, although that operation was “authorized” by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to “Opération Turquoise”.<sup>153</sup>

(13) Paragraph 3 makes it clear that, unlike draft articles 12–14, draft article 15 does not base the international responsibility of the international organization which takes a binding decision, or authorizes or recommends such a decision, on the unlawfulness of the conduct of the member State or international organization to which the decision, authorization or recommendation is addressed. As was noted in the commentaries to draft articles 13 and 14, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the cases covered in those provisions and those to which draft article 15 applies. However, the consequence would only be the existence of alternative bases for holding an international organization responsible.

#### *Article 16. Effect of this chapter*

**This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.**

#### *Commentary*

Draft article 16 is a “without prejudice” clause relating to the whole chapter. It corresponds in part to draft article 19 on responsibility of States for internationally wrongful acts.<sup>154</sup> The latter provision intends to leave unprejudiced “the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State”. References to international organizations have been added in draft article 16. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on responsibility of States for internationally wrongful acts and not by the present draft, the wording of the clause has been made more general.

<sup>151</sup> *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, decision of 30 June 2005 (see footnote 139 above), para. 157.

<sup>152</sup> *Official Records of the General Assembly* (see footnote 149 above), para. 66.

<sup>153</sup> Unpublished letter. “Opération Turquoise” was established by Security Council resolution 929 (1994).

<sup>154</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 70, and the related commentary, pp. 70–71.



## Chapter VII

### DIPLOMATIC PROTECTION

#### A. Introduction

207. At its forty-eighth session (1996), the Commission identified “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>155</sup> In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to examine the topic further and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session (1997), the Commission, pursuant to General Assembly resolution 51/160, established at its 2477th meeting a Working Group on the topic.<sup>156</sup> The Working Group submitted a report at the same session, which was endorsed by the Commission.<sup>157</sup> The Working Group attempted (a) to clarify, as far as possible, the scope of the topic and (b) to identify issues that should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic, which the Commission recommended be used as the basis for the submission of a preliminary report by the Special Rapporteur.<sup>158</sup>

208. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.<sup>159</sup>

209. In paragraph 8 of its resolution 52/156, of 15 December 1997, the General Assembly endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

210. At its fiftieth session (1998), the Commission had before it the preliminary report of the Special Rapporteur.<sup>160</sup> At the same session, the Commission established an open-ended Working Group to consider possible conclusions that might be drawn on the basis of the discussion on the approach to the topic.<sup>161</sup>

211. At its fifty-first session (1999), the Commission appointed Mr. Christopher John Robert Dugard Special

Rapporteur for the topic,<sup>162</sup> after Mr. Bennouna was elected a judge of the International Tribunal for the Former Yugoslavia.

212. At its fifty-second session (2000), the Commission had before it the Special Rapporteur’s first report<sup>163</sup> containing draft articles 1–9. The Commission deferred its consideration of chapter III to the next session, due to lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.<sup>164</sup> The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5–8 to the Drafting Committee, together with the report of the informal consultation.

213. At its fifty-third session (2001), the Commission had before it the remainder of the Special Rapporteur’s first report on draft article 9, as well as his second report.<sup>165</sup> Due to lack of time, the Commission was able to consider only those parts of the second report covering draft articles 10 and 11, and deferred to the next session consideration of the remainder of the report, concerning draft articles 12 and 13. At the same session the Commission decided to refer draft articles 9–11 to the Drafting Committee.

214. At the same session, the Commission also established an open-ended informal consultation on article 9, chaired by the Special Rapporteur.

215. At its fifty-fourth session (2002), the Commission had before it the remainder of the second report of the Special Rapporteur, concerning draft articles 12 and 13, as well as his third report,<sup>166</sup> covering draft articles 14–16. At that session, the Commission decided to refer draft article 14 (a), (b), (d) (to be considered in connection with paragraph (a)) and (e), to the Drafting Committee. It further decided to refer draft article 14 (c) to the Drafting Committee, to be considered in connection with subparagraph (a).

216. During these sessions, the Commission also considered the report of the Drafting Committee on draft articles 1–7 [8]. It adopted articles 1–3 [5], 4 [9], 5 [7], 6

<sup>155</sup> *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and annex II, addendum 1, p. 137.

<sup>156</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

<sup>157</sup> *Ibid.*, para. 171.

<sup>158</sup> *Ibid.*, pp. 62–63, paras. 189–190.

<sup>159</sup> *Ibid.* p. 63, para. 190.

<sup>160</sup> *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 309.

<sup>161</sup> The conclusions of the Working Group appear in *ibid.*, vol. II (Part Two), p. 49, para. 108.

<sup>162</sup> *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 17, para. 19.

<sup>163</sup> *Yearbook ... 2000*, vol. II (Part One), p. 205, document A/CN.4/506 and Add.1.

<sup>164</sup> The report of the informal consultations is contained in *ibid.*, vol. II (Part Two), pp. 85–86, para. 495.

<sup>165</sup> *Yearbook ... 2001*, vol. II (Part One), p. 97, document A/CN.4/514.

<sup>166</sup> *Yearbook ... 2002*, vol. II (Part One), p. 49, document A/CN.4/523 and Add.1.

and 7 [8]. The Commission also adopted the commentaries to the aforementioned draft articles.<sup>167</sup>

217. The Commission also established an open-ended informal consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

218. At its fifty-fifth session (2003), the Commission had before it the fourth report of the Special Rapporteur.<sup>168</sup> The Commission considered the first part of the report, concerning draft articles 17–20, at its 2757th to 2762nd, 2764th and 2768th meetings, from 14 to 23 May and on 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, on 15, 16 and 18 July 2003.

219. At its 2762nd meeting, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2.<sup>169</sup> The Commission considered the report of the Working Group at its 2764th meeting.

220. The Commission decided, at its 2764th meeting, to refer article 17 to the Drafting Committee, as proposed by the Working Group,<sup>170</sup> and also articles 18–20. Subsequently, it further decided, at its 2777th meeting, to refer articles 21 and 22 to the Drafting Committee also.

221. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.<sup>171</sup>

222. At its fifty-sixth session (2004), the Commission had before it the fifth report of the Special Rapporteur.<sup>172</sup> The Commission considered the report at its 2791st to 2796th meetings, from 3 to 11 May 2004. In response to a request from the Commission, the Special Rapporteur prepared a memorandum<sup>173</sup> on the relevance of the clean hands doctrine to the topic. Owing to a lack of time, the Commission deferred consideration of the memorandum to the following session.

223. At its 2794th meeting, on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, on 11 May 2004, that the Drafting Committee should consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

224. Also at its fifty-sixth session, the Commission adopted on first reading a set of 19 draft articles together with commentaries on diplomatic protection.<sup>174</sup> At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

## B. Consideration of the topic at the present session

225. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/546). The Commission considered the report at its 2844th to 2846th meetings, from 25 to 31 May 2005.

### 1. CLEAN HANDS DOCTRINE

#### (a) Introduction by the Special Rapporteur

226. The Special Rapporteur noted that while the importance of the clean hands doctrine in international law could not be denied, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant its inclusion in the draft articles on the topic. His conclusion was that it did not obviously belong to the field of diplomatic protection and that it should not, therefore, be included in the draft articles.

227. He observed that it had been argued in previous sessions of the Commission that the clean hands doctrine should be included in the draft articles because it was invoked in the context of diplomatic protection in order to preclude a State from exercising diplomatic protection if the national it was seeking to protect had suffered injury as a result of his or her own wrongful conduct. Three arguments had been made in support of that position.

228. First, it was contended that the doctrine did not belong to the realm of inter-State disputes, that is, those involving direct injury by one State to another rather than injury to a national. In response, the Special Rapporteur provided a brief survey of the jurisprudence of ICJ.<sup>175</sup> to illustrate the fact that, while the Court had never asserted that the doctrine belonged to the realm of a State claim either for direct or for indirect injury, the clean hands doctrine had most frequently been raised in the context of

<sup>167</sup> The text of the draft articles with the relevant commentaries appear in *ibid.*, vol II (Part Two), pp. 67–76, paras. 280–281.

<sup>168</sup> *Yearbook ... 2003*, vol. II (Part One), p. 3, document A/CN.4/530 and Add. 1.

<sup>169</sup> *Ibid.*, vol. II (Part Two), p. 27, paras. 90–92.

<sup>170</sup> *Ibid.*, para. 92.

<sup>171</sup> The text of the draft articles with the relevant commentaries appear in *ibid.*, pp. 35–41, para. 153.

<sup>172</sup> *Yearbook ... 2004*, vol. II (Part One), p. 43, document A/CN.4/538.

<sup>173</sup> Subsequently issued as the sixth report of the Special Rapporteur (*Yearbook ... 2005*, vol. II (Part One), p. 1, document A/CN.4/546).

<sup>174</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 18, para. 59.

<sup>175</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 at pp. 163–164, paras. 63–64; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at pp. 176–178, paras. 27–30; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466 at pp. 488–489, paras. 61–63; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, p. 12 at p. 38, paras. 45–47; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 at p. 76, para. 133; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 159, para. 35 (dissenting opinion of Judge *ad hoc* Van den Wyngaert); and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 14, at pp. 392–394 (paras. 268–272 of the dissenting opinion of Judge Schwebel). See also the sixth report of the Special Rapporteur, para. 5.



inter-State claims for direct injury to a State. In no case had the Court relied on or upheld the doctrine. It had, instead, always found the doctrine inapplicable. Likewise, in no case had it stated or suggested that the argument was inapplicable in inter-State claims and that it applied only to cases of diplomatic protection.

229. Secondly, it was suggested that if the individual seeking diplomatic protection had himself violated the domestic law of the respondent State or international law, then the State of nationality could not protect him. In response, the Special Rapporteur observed that once a State took up a claim of its national in relation to a violation of international law, the claim became that of the State, in accordance with the Vattelien fiction recognized in the *Mavrommatis Jerusalem Concessions* case,<sup>176</sup> and the misconduct of the national ceased to be relevant; only the misconduct of the plaintiff State itself might become relevant. He cited the examples of the *LaGrand*<sup>177</sup> and *Avena*<sup>178</sup> cases, where the foreign nationals had committed atrocious crimes but their misconduct had not been raised by the respondent State to defend itself against the charges of failure to grant them consular access. In addition, the State of nationality would seldom protect one of its nationals who had behaved improperly or illegally in a foreign State, because in most circumstances no internationally wrongful act would have been committed.

230. Thirdly, it was contended that the clean hands doctrine had been applied in cases involving diplomatic protection. In response, the Special Rapporteur noted that relatively few cases could be cited in favour of the applicability of the clean hands doctrine in the context of diplomatic protection, and that, upon analysis, those that were cited did not support the case for its inclusion.<sup>179</sup> He noted further that while some writers nevertheless maintained that the clean hands doctrine belonged in the context of diplomatic protection, they offered no authority to support their views; and many other writers were highly sceptical about the doctrine. In addition, during the debate in the Sixth Committee of the General Assembly at its fifty-ninth session, most delegations had made no comment on the clean hands doctrine, and those that had commented had agreed that the clean hands doctrine should not be included in the draft articles on diplomatic protection.

#### (b) Summary of the debate

231. General support was expressed for the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles. The doctrine had been raised primarily in the context of claims for direct State injury, which was beyond the scope of diplomatic protection,<sup>180</sup> and the few cases falling within the

scope of diplomatic protection did not constitute sufficient practice to warrant codification. Nor could its inclusion be justified as an exercise in the progressive development of international law. Furthermore, support was expressed for the Special Rapporteur's suggestion in his sixth report (para. 16) that it was more appropriate for the doctrine to be invoked at the stage of the examination of the merits, since it related to the attenuation or exoneration of responsibility rather than admissibility; and it was suggested that such a possibility could be expressly recognized in the draft articles. Another suggestion was to insert a proviso stating that the draft articles were without prejudice to the application of general international law to questions of admissibility.

232. Others were of the view that the Special Rapporteur had gone too far in suggesting that the clean hands doctrine could lead to exoneration of responsibility at the stage of the merits, and preferred that it be limited to attenuation. It was pointed out that the application of the doctrine, or that of good faith, could yield different results in different situations, and would not necessarily deny the complaining party the right to seek in every single instance a suitable remedy, even if its own wrongful conduct had elicited the wrongful response. Reference was also made to article 39 of the draft articles on responsibility of States for internationally wrongful acts.<sup>181</sup>

233. Notwithstanding their support for the Special Rapporteur's conclusions, some members took issue with the Special Rapporteur's reasoning. For example, the Commission was cautioned against stretching too far the *Mavrommatis*<sup>182</sup> principle that an injury to a national is an injury to the State itself; it would not be incongruous to consider that the "clean hands" of the individual could constitute a precondition for diplomatic protection, exactly as the exhaustion of local remedies was up to the private individual and not the State.

234. In addition, some members maintained that in referring to the consular notification cases (*LaGrand* and *Avena*),<sup>183</sup> by way of illustrating the point that the "unclean" hands of the individuals concerned played no role in diplomatic protection, the Special Rapporteur was employing too vague a conception of the clean hands doctrine because he failed to examine the relationship between the unlawful act of the individual and the internationally wrongful act of the State. The question was whether the individual who benefited from diplomatic protection was himself or herself responsible for the breach of the rule of international law that the host State was accused of violating.

235. According to another view, the lack of practice did not necessarily preclude the adoption of some version of the doctrine by way of progressive development of the law. The key difficulty involved proper identification of the doctrine, as there existed at least the two following different legal positions described by the same phrase:

<sup>176</sup> *Mavrommatis Jerusalem Concessions*, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5, p. 12.

<sup>177</sup> See footnote 175 above.

<sup>178</sup> *Ibid.*

<sup>179</sup> See *Ben Tillett (Belgium v. Great Britain)*, C. G. Fenwick, *Cases on International Law* (Chicago, Callaghan, 1935) p. 181; and *Virginus* in J. B. Moore, *A Digest of International Law* (Washington D.C., United States Government Printing Office, 1906), vol. II, p. 895. See also the sixth report of the Special Rapporteur, paras. 12–13.

<sup>180</sup> See the draft articles on diplomatic protection adopted by the Commission on first reading (footnote 174 above), arts. 1 and 15.

<sup>181</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 109.

<sup>182</sup> See *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12.

<sup>183</sup> See footnote 175 above and the sixth report of the Special Rapporteur, para. 9.

(a) where the alleged illegality would, in principle, form part of the merits, and (b) where it is invoked *ex parte* by a respondent State simply by way of prejudice as a principle of international public policy constituting a bar to the admissibility of the claim. Each case called for contextual analysis and careful characterization.

(c) *Special Rapporteur's concluding remarks*

236. The Special Rapporteur observed that the clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It was to be distinguished from the *tu quoque* argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and was instead to be confined to cases in which the applicant State had acted improperly in bringing a case to court. He further acknowledged the various criticisms that had been raised regarding his treatment of the doctrine in his report, and observed that some members had rightly noted that the report omitted a consideration of the doctrine in the case concerning *Certain Phosphate Lands in Nauru*.<sup>184</sup>

2. OTHER ISSUES

(a) *Summary of the debate*

237. As regards the draft articles adopted on first reading in 2004,<sup>185</sup> the view was expressed that the draft articles had been prematurely transmitted to the General Assembly, since the draft dealt only with the conditions for the exercise of diplomatic protection. No guidance was given on questions such as who could exercise such protection, how it should be exercised, what were the consequences of its exercise, how to evaluate harm in cases involving the exercise of diplomatic protection, and the justification of the rule, under article 2 of the draft articles, that only a State had the right to exercise diplomatic protection, while an individual had no actual right to be compensated, even if the State responsible discharged its obligations in terms of compensation, as well as the general question of the degree of control that an individual should have in respect of an international claim, that is, the extent to which an individual or legal person could require a Government to make a claim in the first place.

238. In addition, reservations were again expressed as to the resort to the Mavrommatis principle in the draft articles. In particular, while there was agreement with the position that diplomatic protection was a right of the State, it was maintained that the State's right to ensure respect for international law in the person of its national was an outdated concept. While it may have been relevant in 1924—at the time of the *Mavrommatis Palestine Concessions* decision—it seemed unacceptable, 80 years later, to adhere to a fiction that had been created in response

to a specific historical context while ignoring subsequent developments in the law, particularly as regards the status of individuals, and their protection, under international law. Under that view, the Commission had missed an opportunity to clarify that when a State exercised its right to exercise diplomatic protection, it did so on behalf of its national and not in order to ensure respect for its own right in the person of that individual.

(b) *Special Rapporteur's concluding remarks*

239. Regarding the suggestion that the draft articles include a consideration of the consequences of diplomatic protection, the Special Rapporteur recalled that the draft articles adopted on first reading focused on what was the accepted scope of diplomatic protection, both in the Sixth Committee and among most academic writers, that is, the nationality of claims and the exhaustion of local remedies. He observed further that article 44 of the draft articles on responsibility of States for internationally wrongful acts had also contemplated only these two issues,<sup>186</sup> and that the commentary to that provision had made it clear that these matters would be taken up in the supplementary study on diplomatic protection.<sup>187</sup>

240. In addition, the Special Rapporteur was of the view that it was not necessary to deal with the consequences of diplomatic protection since they were already covered by the articles on the responsibility of States for internationally wrongful acts, with one exception, namely, whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection. While he agreed that that was an important issue, the options open to the Commission were either simply to codify well-established rules (even if that meant adopting what many members regarded as a retrogressive rule: that the State was not obliged to transfer money to the injured person) or to engage in progressive development and enunciate a new rule whereby the State was obliged to pay over to the injured individual money that it had received by way of compensation. In the light of the Commission's decision not to adopt a provision compelling States to exercise diplomatic protection on behalf of an individual, he had not detected a general willingness on the part of the Commission to engage in progressive development in respect of the payment of monetary compensation received by the State. His preference, therefore, was neither expressly to codify what many regarded as an unfortunate principle nor to attempt to develop progressively a new principle that would be unacceptable to States, but rather to leave the matter open in the draft articles so as to allow for further development in the law.

241. As regards the Mavrommatis principle, the Special Rapporteur recalled that it was generally acknowledged to be a fiction, with serious implications for the individual. For example, because the claim for diplomatic protection was seen to be that of the State and not of the individual, it was generally accepted that the State enjoyed discretion as to whether or not to bring the claim. He recalled that in his first report<sup>188</sup> he had proposed making it obligatory

<sup>184</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 255, paras. 37–38. See also *Preliminary Objections of the Government of Australia* (December 1990), I.C.J. Pleadings, vol. I, part V, chap. 2, sect. I, pp. 162–163, paras. 400–406.

<sup>185</sup> See footnote 174 above.

<sup>186</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29.

<sup>187</sup> *Ibid.*, p. 121, footnotes 683 and 687.

<sup>188</sup> See footnote 163 above.

for States to exercise diplomatic protection where a norm of *jus cogens* had been violated in respect of the individual, but the proposal had been rejected on the ground that that would have meant engaging in progressive development. He acknowledged that the Mavrommatis principle was inconsistent and flawed in that, for example, it was

not easy to reconcile with the principle of continuous nationality or with the exhaustion of local remedies rule. Yet, notwithstanding its flaws, the Mavrommatis principle was the basis of customary international law on the subject of diplomatic protection and for this reason it had been retained.

## Chapter VIII

### EXPULSION OF ALIENS

#### A. Introduction

242. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic of “Expulsion of aliens” for possible inclusion in the Commission’s long-term programme of work,<sup>189</sup> which took place subsequently at the fifty-second session (2000).<sup>190</sup> A brief syllabus describing the possible overall structure of and approach to the topic was annexed to the report of the Commission to the General Assembly on the work carried out at the session.<sup>191</sup> In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the decision to include the topic in the long-term programme of work.

243. During its fifty-sixth session, the Commission decided, at its 2830th meeting held on 6 August 2004, to include the topic “Expulsion of aliens” in its current programme of work, and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.<sup>192</sup> The General Assembly, in paragraph 5 of its resolution 59/41, endorsed the decision of the Commission to include the topic in its agenda.

#### B. Consideration of the topic at the present session

244. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/554). The Commission considered the Special Rapporteur’s report at its 2849th to 2852nd meetings, from 11 to 15 July 2005.

##### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR

245. The Special Rapporteur observed that the expulsion of aliens was an old question closely linked to the organization of human societies in the form of States. It remained of current interest because of the paradox between the existence of a globalized world, in terms of technology and economy, and barriers of political sovereignty operating like a filter between those aliens who had the right to stay on the territory of a foreign country and those who did not. The subject raised important questions of international law and, because of the diversity of practices which it had generated on every continent, lent itself to codification. Expulsion of aliens affected all regions of the world and, accordingly, there existed a significant body of national legislation

which made it possible to ascertain general principles. Some such principles had already been incorporated into existing international human rights conventions.

246. It seemed to the Special Rapporteur that a preliminary report was necessary to set out his understanding of the subject to the Commission. Its purpose was simply to provide an overall view of the subject, while highlighting the legal problems which it raised and the methodological difficulties relating to its consideration. The Special Rapporteur proposed a work plan (in annex I of his report) outlining the general plan of his future reports.

247. The report provided a basic sketch of the concept of the expulsion of aliens followed by a basic exposition of the concept of the “right to expel” in international law. In the Special Rapporteur’s view, such customary international law right, inherent in the sovereignty of States, was not in question. The reasons for expulsion, however, could vary and not all were permissible under international law; such expulsion of an alien brought into play rights, particularly fundamental human rights, to the violation of which international law attached legal consequences.

248. In preparing the report, the Special Rapporteur had been confronted with questions of terminology, that is, whether to speak of “expulsion” of aliens, which when looking at national legislation was a term covering a more limited phenomenon than removing aliens. Nevertheless, his tentative preference was to keep the term “expulsion”, even if it had to be defined broadly. Similarly, it remained to be considered whether the reference to “aliens” was sufficiently accurate. In his opinion, it did cover all the categories of persons under consideration.

249. The Special Rapporteur sought guidance on a number of questions of methodology, in particular as to what treatment was to be given to existing conventional rules, found in a number of human rights treaties. His inclination was to formulate a complete regime, bearing in mind that, although treaty law would offer elements which might be included in the draft articles, a number of those rules arose initially from national legislation and also international jurisprudence developed in the context of global and regional human rights judicial instances.

250. The Special Rapporteur further requested that the Secretariat prepare a compilation of applicable national and international instruments, texts and jurisprudence on the topic.

<sup>189</sup> *Yearbook ... 1998*, vol. II (Part Two), para. 554.

<sup>190</sup> *Yearbook ... 2000*, vol. II (Part Two), para. 729.

<sup>191</sup> *Ibid.*, annex, p.142.

<sup>192</sup> *Yearbook ... 2004*, vol. II (Part Two), para. 364.



## 2. SUMMARY OF THE DEBATE

(a) *General comments*

251. The Special Rapporteur was commended for his preliminary report. Several members commented on the importance of the subject, not least because it affected the lives of large numbers of people around the world. It was observed that, as a constant and normal social phenomenon, the movement of people and national restrictions on such movement had important political, economic and social repercussions for international relations. The task for the Commission was to consider carefully all the rules on the topic existing in customary international law, in treaties and international agreements, State practice and internal laws, to develop them further where possible or where appropriate, and to codify them for clearer and better application. Support was further expressed for the Special Rapporteur's formulation of the key issue underlying the topic, that is, how to reconcile the right to expel with the requirements of international law, particularly those relating to the protection of fundamental human rights.

252. According to one view, there existed a general problem with the Commission's approach to commencing new topics—not limited to the topic under consideration—which was reminiscent of the collective preparation of a textbook, that is, first defining the scope of the topic as well as the basic expressions and key concepts, followed by a process of identifying existing customary or treaty rules on the matter. While such questions had to be considered, it was necessary first to consider the interests involved in the expulsion of aliens and to identify the values that were affected by the typical cases of such expulsions, in short describing the factual problems arising from the expulsion of aliens. Without such a preliminary consideration, it was difficult to foresee the intended direction of a legislative intervention in the field, resulting in drafts containing excessive generalities.

(b) *The concept of the expulsion of aliens (scope and definitions)*

253. For many members, one of the central questions of the topic concerned the scope of the future study. The issue was considered problematic because of the connections between expulsion and admission of aliens, especially with regard to the return of irregular immigrants. It was maintained that an attempt by the Commission to address questions relating to immigration or emigration policies would negatively affect the prospects of the Commission's work. According to another view, the central area of study was less the issue of expulsion or refusal of entry, and more that of the control that a State exercises over its territory. Expulsion was merely a modality for the exercise of such control.

254. While support existed for taking a broad approach to the topic, specific suggestions were made as to its limits. Hence, a preference was expressed for limiting the scope of the study to those measures which concerned resident aliens, with the possible inclusion of aliens who had stayed irregularly over a certain span of time. It was also suggested that the topic cover the removal of foreign nationals who had entered illegally or whose presence

had become illegal, as well as the removal of foreigners who were lawful in the country. Others preferred the drawing of a distinction between the expulsion of aliens who were legally present in a country and those who were not—a distinction recognized both in State practice and in relevant international agreements.<sup>193</sup> It was common for States to expel aliens solely on the basis of their illegal entry or presence. It was thus proposed that the topic either should not cover the removal of persons who were not lawfully present or, if it were decided to include such persons, to stipulate clearly that States have the right of expulsion without the need for other justification. It was also observed that account had to be taken of the fact that different categories of aliens existed, and that some such categories enjoyed special status under the law of the foreign State in which they were residing. Reference was also made to the situation of illegal aliens whose presence in the territory of the host State was tolerated.

255. As regards questions to be excluded from the scope of the topic, it was suggested that the issues of refoulement, non-admission of asylum-seekers or refusal of admission for regular aliens should not be considered. Likewise, agreement was expressed with the Special Rapporteur's preference to exclude internally displaced persons and people in transit. It was also suggested that the topic should not cover measures of expulsion taken by a State *vis-à-vis* its own nationals of an ethnic, racial or religious origin which was different from that of the majority of the population.

256. It was queried whether the Special Rapporteur intended to include large-scale population expulsions, particularly in situations of armed conflict. While references in the report seemed to suggest that such mass expulsions were to be covered, doubts were expressed as to the appropriateness of doing so. It was pointed out that the question of expulsion from occupied territories and during periods of armed conflict was covered by international humanitarian law, and it was suggested that a "without prejudice" clause could eventually be included so as to cover the obligations of States under international humanitarian law relating to civilians. Others were of the view that, in the light of their importance, consideration should be given to questions of the forced exit of people in times of armed conflict. It was also suggested that international displacement of people at the outset of the creation of new States or dismemberment of a State or during periods of grave natural calamities should likewise not be considered.

257. General support was expressed for the Special Rapporteur's preference for retaining "expulsion" to be applied in a broad sense. It was noted that the term was commonly used to describe the removal of an alien from the territory of a State, either voluntarily under threat of forced removal or forcibly. Another view was that even as a purely descriptive term, "expulsion" was of limited accuracy because it covered what was, in fact, a large variety of situations.

<sup>193</sup> See, for example, Convention relating to the Status of Refugees, art. 32, and the International Covenant on Civil and Political Rights, art. 13.



258. As regards the tentative definition of “expulsion” in paragraph 13 of the report,<sup>194</sup> the view was expressed that it was too narrow since it did not include stateless persons and because it implied that expulsion consisted in a formal measure aimed at turning an individual out of a territory. Reference was made to existing case-law recognizing the fact that an “expulsion” might be considered to have taken place even in exceptional cases where the alien leaves a country without being directly and immediately forced or officially ordered to do so.<sup>195</sup> It was also noted that many of the legitimate actions resulting in the transfer of a foreign national out of the jurisdiction of the receiving State were taken under laws relating to immigration or laws for temporary entry for business or tourist purposes. It was further suggested that the term “expulsion” should be viewed broadly so as to cover the situation of aliens being prevented from entering within the jurisdictional control of the State concerned, for example on the high seas or on board an aircraft of the expelling State in a third State without necessarily having physically crossed the border.

259. According to another view, the definition of “expulsion” in paragraph 13 was too broad in that it could be read to include the transfer of an alien to the authorities of another Government for law enforcement purposes, such as extradition for the purpose of prosecution, as well as the expulsion of diplomatic personnel. A preference was expressed for excluding such actions from the scope of the topic since transfers for law enforcement purposes involved an entirely different set of issues, legal norms and policy considerations. Similarly, diplomatic personnel were already adequately covered by their own laws and institutions.

260. Concerning the term “alien”, it was pointed out that there existed a number of distinct categories of persons residing in territories other than that of their nationality and subject to different legal regimes. These included political refugees (whose status in Latin America was governed by the 1954 Convention on Territorial Asylum), asylum-seekers and refugees (regulated by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol), migrant workers (whose rights were protected by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), and stateless persons (covered by the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness).

#### (c) *The right to expel*

261. With regard to the question of the sovereign “right” of the State to expel aliens, it was observed that such right was generally recognized under international law, albeit subject to certain limits, mostly in the context of human rights law (as discussed in the next section). The view was expressed that such right gave rise to many questions, including whether it is an inalienable right of the State, and whether it could be resorted to only

in certain situations (such as for purposes of national security, or for the maintenance of public order). The key was how to reconcile such right with the limits imposed on it by international law. At the same time, it was noted that any such limitations on the right of the State should be clearly defined in line with existing limits arising from treaties and custom universally recognized in times of war and peace.

262. Others expressed doubts as to the approach in the report of giving such *a priori* status to States’ right to expel, while putting human rights standards into the perspective. It was conceded that there existed situations where the State might be justified in expelling aliens, but there was still no reason to describe such right in as forceful a way as was done in the report. A preference was further expressed for not using qualifiers, such as “absolute” or “discretionary”, when referring to the State’s “right” to expel.

#### (d) *Grounds for expulsion*

263. It was observed that the right of a State to expel was necessary as a means of protecting the rights of the society which existed within the territory of the State. However, while a State had a wide discretion in exercising its rights to expel aliens, this discretion was not absolute and had to be balanced against existing fundamental human rights protections, including, for example, article 13 of the International Covenant on Civil and Political Rights, which provided, *inter alia*, that “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law ...”. Similarly, customary international law demanded that the State must not abuse its rights by acting arbitrarily in taking its decision to expel an alien, nor act unreasonably in carrying out the expulsion. The State of nationality of an expelled alien could assert the right to inquire into the reasons for his expulsion.<sup>196</sup> The reasons for the expulsion would have to be stated before an international tribunal when the occasion demanded it. Expulsion was not to be carried out with hardship or violence or unnecessary harm to the alien involved. Compulsion and detention of an alien under an expulsion order had to be avoided, except in cases where the alien refused to leave or tried to escape from control of the State authorities. The alien had also to be given a reasonable time to settle his or her personal affairs before leaving the country,<sup>197</sup> and to be allowed to choose the country to which he or she wished to apply for admission.

264. At the same time, it was conceded that the position under customary international law remained uncertain, since many municipal systems provided that the authorities of a country could deport aliens without having to provide reasons. Doubts were also expressed as to the requirement, mentioned in the Special Rapporteur’s report, that “the State resorting to expulsion is bound to invoke the grounds used to justify it” (para. 16). It was not clear that, in the absence of a dispute or of another State or

<sup>194</sup> “[A] legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory”.

<sup>195</sup> See *International Technical Products Corporation v. The Government of the Islamic Republic of Iran* (1985), *Iran-United States Claims Tribunal Reports*, vol. 9, p. 10.

<sup>196</sup> See *Boffolo* (1903), UNRIAA, vol. X (Sales No. 1960.V.4), p. 528.

<sup>197</sup> See *Kenneth P. Yeager v. The Islamic Republic of Iran*, *Iran-United States Claims Tribunal Reports* (1987), vol. 17, p. 92; see also *International Law Reports*, vol. 82 (1990), p. 179, at pp. 196–197.

institution's raising issues, the territorial sovereign had an original duty to invoke grounds of justification.

265. It was further suggested that the study should consider a set of issues, other than the absence of admissible motives, which equally related to the question as to whether a given expulsion was consistent with international law. These included: (a) taking into account provisions in international human rights conventions requiring a decision on expulsion to be taken "in accordance with law",<sup>198</sup> which covered not only procedure but also the conditions for expulsion, (b) the application of the principle of non-discrimination so as to invalidate, as a matter of international law, decisions on expulsion taken on a discriminatory basis,<sup>199</sup> (c) balancing a State's interest in expelling with the individual's right to private and family life,<sup>200</sup> and (d) considering the question of the risk that an individual's rights might be infringed in the State of destination.<sup>201</sup> According to another suggestion, consideration could also be given to the situation where the alien had been awarded the right of residence, or was otherwise domiciled, as another limitation on expulsion.

#### (e) *Rights related to expulsion*

266. It was noted that contemporary international law recognized the rights of individuals to just and fair procedures for expulsion and placed requirements and obligations on the State to ensure such procedures.<sup>202</sup> It was suggested that the act of expulsion must be formal in order for the person concerned to be afforded an opportunity to appeal. It was also suggested that particular consideration be given to procedural guarantees with regard to individual expulsions, including remedies, especially those remedies capable of preventing expulsion, since it would be difficult for an alien who had been expelled to a distant country to resort effectively to an available remedy and to have such an expulsion measure effectively repealed. Other suggestions included: specifying that such fundamental guarantees applied to the entire process of expulsion, and not only to the procedure for the examination of individual cases; specifying the obligation of the expelling State to notify the alien concerned of the decision to expel and granting the alien the right to appeal against such decision; requiring that the implementation of the decision

to expel not be inhumane, degrading or humiliating for the person being expelled; requiring the establishment of procedures applicable to all decisions of expulsion relating, *inter alia*, to: due process of law, non-discriminative access to justice, access to legal aid for those who need it, protection of personal property, protection of investments and respect for applicable international obligations. It was also noted that the lawfulness of the expulsion was to be measured against the degree to which it complied with the procedures laid down under the domestic law of the expelling State, although it was not clear whether a sufficient number of States did regulate, through their national legislation, the procedures used for expelling aliens.

267. Opposition was expressed as to the existence of the "right" of collective expulsion. It was maintained that, in the twenty-first century, collective expulsions should be treated as *prima facie* prohibited. At best, a clear presumption in favour of their prohibition had to be established. It was added that while an expulsion may involve a group of people sharing similar characteristics, the decision to expel should nonetheless be taken at the level of the individual and not the group. Another view was that the term "collective" required further precision as it was not clear how many individuals would constitute a "collective" expulsion. Others maintained that such issues should be considered separately from that of the treatment of migrant workers, in which case the relevant international treaties would prevail. Similarly, it was suggested that the Special Rapporteur consider existing bilateral repatriation agreements as possible models for establishing regulations in this area.

268. Some members agreed with the Special Rapporteur's suggestion that some consideration be given to the question of the consequences, under international law, of an expulsion of aliens, in terms of State responsibility and diplomatic protection. Other members expressed reservations since such matters were taken into account by other topics both previously and currently before the Commission. It was suggested that, in the initial phases of consideration of the topic, the focus be placed instead on the basic questions of the rights and duties of States with respect to expulsion, leaving for a later stage the question of whether to attempt to elaborate on the consequences for breaches of those duties.

#### (f) *Methodological issues*

269. Many members expressed support for the Special Rapporteur's proposal that the focus be on drafting articles covering all aspects of expulsion, and not merely on providing a set of residual principles. It was maintained that a simple body of general principles would not be fully operational, nor would it be particularly useful or effective. It was suggested that a future set of draft articles could include a provision allowing for the application of treaties—whether universal or regional—giving further protection to the individuals concerned. Others expressed concern as to what an exhaustive regime would involve. It was suggested that the topic should not cover other settled rules, and that the task should be limited to bridging the gaps where these could be clearly identified.

<sup>198</sup> International Covenant on Civil and Political Rights, art. 13; American Convention on Human Rights: "Pact of San José, Costa Rica", art. 22, para. 6; and the African Charter on Human and Peoples' Rights, art. 12, para. 4.

<sup>199</sup> See *Shirin Aumeeruddy-Cziffra and 19 other women of Mauritius v. Mauritius*, decision of 9 April 1981, *Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 40 (A/36/40)*, annex XIII.

<sup>200</sup> See, for example, *Berrehab v. The Netherlands*, Application no. 10730/84, ECHR, Judgment of 21 June 1988, *Series A: Judgments and Decisions*, vol. 138, p. 3; and *Slivenko v. Latvia*, Application no. 48321/99, ECHR, Judgment of 9 October 2003, *Reports of Judgments and Decisions*, 2003-X, p. 229, at pp. 263–264, para. 113.

<sup>201</sup> See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; and the American Convention on Human Rights: "Pact of San José, Costa Rica", art. 22, para. 8.

<sup>202</sup> See, for example, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. See also the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, art. 7, General Assembly resolution 40/144 of 13 December 1985.

270. The Special Rapporteur was further encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law at both global and regional levels, as well as of national laws and practice.

### 3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

271. The Special Rapporteur noted no basic disagreement in the Commission with regard to the approach being taken to the subject, with the exception of the suggestion that the study commence with a consideration of the issues and interests at stake. In response, the Special Rapporteur noted that some of these issues had been raised in the introductory part of his report, and that it was the well-established practice of the Commission to study a topic with a view to identifying rules of customary international law or those rules pertaining to the progressive development of international law.

272. As for the points of agreement in the Commission, the Special Rapporteur noted that support existed for: retaining the current title of the topic, while defining its two component terms; the proposition that the central problem of the subject concerned reconciling the right to expel with the requirements of international law, in particular with the rules of international human rights law; carefully delimiting the scope of the topic; and not considering questions of refusal of admission and immigration, movements of population or situations of decolonization or self-determination, nor the position of the occupied territories in the Middle East. Many members also expressed support for the methodology proposed in the report, namely that a comprehensive legal regime be drawn up recognizing, where necessary, the provisions of existing international conventions. He also acknowledged those who suggested that the topic be undertaken on the basis of a comparative analysis and criticism of national legislation in the area, and drawing on the jurisprudence of

global, regional and human rights instances. The general outline proposed by the Special Rapporteur had, likewise, been approved by most members of the Commission, with the reservation that some answers to particular questions needed to be provided.

273. The Special Rapporteur further provided a detailed overview of the discussion. He agreed with those members who suggested that "expulsion" be defined so as not necessarily to require the taking of a formal act in all cases. In addition, the qualifications suggested by the Commission on the concept of "alien" would be covered in the provision on scope, which would include a clear indication of the different categories of persons to be covered. To his mind, that would include persons residing in the territory of a State of which they did not have nationality, with the distinction being made between persons in a regular situation and those in an irregular situation (including those who have been residing for a long time in the State seeking to expel them). The topic would also cover refugees, asylum-seekers, stateless persons and migrant workers in the definition. He also accepted the suggestion that the question of the expulsion of stateless persons to a State where they maintained residence be considered separately.

274. On the other hand, as had been pointed out in the debate, it would be difficult to include in the topic denial of admission. Another category not covered by the scope would be persons whose nationality status changed because of a change in the status of the territory where they were resident, in the context of decolonization. He noted further that, while his preference was not to enter into questions of the nationality of persons expelled during an armed conflict, he did not intend totally to discard the rules of armed conflict from the topic because international humanitarian law included precise rules on expulsion of aliens.



## Chapter IX

### UNILATERAL ACTS OF STATES

#### A. Introduction

275. In its report to the General Assembly on the work of its forty-eighth session (1996), the Commission proposed to the Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.<sup>203</sup>

276. In paragraph 13 of resolution 51/160 of 16 December 1996, the General Assembly, *inter alia*, invited the Commission to examine further the topic “Unilateral Acts of States” and to indicate its scope and content.

277. At its forty-ninth session (1997), the Commission established a Working Group on the topic which reported to the Commission on the admissibility and feasibility of a study on the topic, its possible scope and content, and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.<sup>204</sup>

278. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño as Special Rapporteur on the topic.<sup>205</sup>

279. In paragraph 8 of its resolution 52/156 of 15 December 1997, the General Assembly endorsed the Commission’s decision to include the topic in its work programme.

280. At its fiftieth session (1998), the Commission had before it and considered the Special Rapporteur’s first report on the topic.<sup>206</sup> As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

281. The Working Group reported to the Commission on issues relating to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.<sup>207</sup>

282. At its fifty-first session (1999), the Commission had before it and considered the Special Rapporteur’s second report on the topic.<sup>208</sup> As a result of its discussion,

the Commission decided to reconvene the Working Group on Unilateral Acts of States.

283. The Working Group reported to the Commission on issues relating to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic, as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and enquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission’s study of the topic.

284. At its fifty-second session (2000), the Commission considered the third report of the Special Rapporteur on the topic,<sup>209</sup> together with the text of the replies received from States<sup>210</sup> to the questionnaire on the topic, which was circulated on 30 September 1999. The Commission decided to refer revised draft articles 1–4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

285. At its fifty-third session (2001), the Commission considered the fourth report of the Special Rapporteur<sup>211</sup> and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice in formulating and interpreting unilateral acts.<sup>212</sup>

286. At its fifty-fourth session (2002), the Commission considered the fifth report of the Special Rapporteur,<sup>213</sup> as well as the replies received from States<sup>214</sup> to the questionnaire on the topic, which was circulated on 31 August 2001.<sup>215</sup> The Commission also established an open-ended Working Group.

<sup>203</sup> *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and p. 133, annex II.

<sup>204</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 64, para. 194 and pp. 64–65, paras. 194 and 196–210.

<sup>205</sup> *Ibid.*, p. 66, paras. 212 and p. 71, para. 234.

<sup>206</sup> *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

<sup>207</sup> *Ibid.*, vol. II (Part Two), pp. 158–159, paras. 192–201.

<sup>208</sup> *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1.

<sup>209</sup> *Yearbook ... 2000*, vol. II (Part One), p. 247, document A/CN.4/505.

<sup>210</sup> *Ibid.*, p. 265, document A/CN.4/511.

<sup>211</sup> *Yearbook ... 2001*, vol. II (Part One), p. 115, document A/CN.4/519.

<sup>212</sup> *Ibid.*, vol. II (Part Two), paras. 29 and 254. The text of the questionnaire is available on the Commission website [http://untreaty.un.org/ilc/sessions/53/english/unilateral\\_acts\\_questionnaire\(e\).pdf](http://untreaty.un.org/ilc/sessions/53/english/unilateral_acts_questionnaire(e).pdf).

<sup>213</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2.

<sup>214</sup> *Ibid.*, document A/CN.4/524.

<sup>215</sup> See footnote 212 above.

287. At its fifty-fifth session (2003), the Commission considered the sixth report of the Special Rapporteur.<sup>216</sup>

288. The Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held six meetings.

289. During the same session, the Commission considered and adopted the recommendations contained in parts one and two of the report of the Working Group on the scope of the topic and the method of work.<sup>217</sup>

290. At its fifty-sixth session (2004), the Commission considered the seventh report of the Special Rapporteur.<sup>218</sup>

291. At its 2818th meeting, on 16 July 2004, the Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held four meetings.

292. At its 2829th meeting, on 5 August 2004, the Commission took note of the oral report of the Working Group.

293. The Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for an in-depth analysis. It also established a grid which would permit the use of uniform analytical tools.<sup>219</sup> Individual members of the Working Group took up a number of studies, which would be effected in accordance with the established grid. It was agreed that these studies should be transmitted to the Special Rapporteur before 30 November 2004. It was decided that the synthesis, based exclusively on these studies, would be entrusted to the Special Rapporteur who would take them into consideration in order to draw the relevant conclusions in his eighth report.<sup>220</sup>

## B. Consideration of the topic at the present session

294. At the present session, the Commission had before it the Special Rapporteur's eighth report (A/CN.4/557) which it considered at its 2852nd–2855th meetings on 15 and 19–21 July 2005.

### 1. INTRODUCTION BY THE SPECIAL RAPporteur OF HIS EIGHTH REPORT

295. Introducing his eighth report on unilateral acts of States, the Special Rapporteur reminded the Commission that the working group chaired by Mr. Pellet had selected and discussed several examples of State practice in accordance with the list of criteria it had established.

296. The Special Rapporteur also alluded to the discussions in the Sixth Committee, where the need to establish a definition of unilateral acts and some general rules that could apply to them had been mentioned. Any such definition should be flexible enough to allow States some room for manoeuvre.

297. The report offered a fairly detailed presentation of 11 examples or types of unilateral acts of various kinds. The examples were a fairly broad and representative sample of unilateral acts, ranging from a diplomatic note on recognition of one State's sovereignty over an archipelago to statements by the authorities of a United Nations host country about tax exemptions and other privileges and immunities.

298. The examples selected also contained statements of general application, renouncing sovereignty over a Territory, or protesting about the legal regimes applicable to the territorial seas of Caspian Sea States.

299. The report also presented the conclusions drawn from the cases discussed. It was noted that the acts varied widely in form, content, authors and addressees. The addressees could be specific States, international organizations, groups of States or the international community as a whole.

300. The Special Rapporteur hoped that the discussion of the acts analysed in his report would be constructive, and that they might lead to a definition of unilateral acts of States such as had been called for in the Sixth Committee.

## 2. SUMMARY OF THE DEBATE

301. Several members voiced satisfaction over the examples analysed in the eighth report and said that the topic was one of constant interest to them. Some, however, said that the conclusions should have been set out in greater detail.

302. Some members thought it was evident from the study of the examples cited in the eighth report that the existence of unilateral acts producing legal effects and creating specific commitments was now beyond dispute, a point that could be corroborated by international jurisprudence.<sup>221</sup>

303. On the other hand, for some members the diversity of effects and the importance of the setting in which acts occurred made it very difficult to arrive at a "theory" or "regime" of unilateral acts. Some other members, however, thought that it was possible to establish such a regime. It was pointed out that while some factors, such as the timing or, perhaps, the form of acts, did not appear to play a decisive role, others, such as the essence of an act, who performed it and on what authority, seemed to be crucial features. That being so, the part played by the addressees, their reactions and the reactions of third parties should not be overlooked. It was pointed out, therefore, that the

<sup>216</sup> *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/534.

<sup>217</sup> *Ibid.*, vol. II (Part Two), paras. 303–308.

<sup>218</sup> *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542.

<sup>219</sup> The grid included the following elements: date, author/organ, competence of author/organ, form, content, context and circumstances, aim, addressees, reactions of addressees, reactions of third parties, basis, implementation, modification, termination/revocation, legal scope, decision of a judge or an arbitrator, comments and literature, *ibid.*, vol. II (Part Two), para. 247 and footnote 516.

<sup>220</sup> *Ibid.*, para. 247.

<sup>221</sup> See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22 at p. 71; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 266–267; *Nuclear Tests (New Zealand v. France), ibid.*, p. 457 at pp. 471–472; *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 21.



practice studied so far, supplemented perhaps by further study of other acts (for example those on which there was ICJ case law, such as the *Frontier Dispute (Burkina Faso v. Republic of Mali)*,<sup>222</sup> might provide the basis for a formal definition that nevertheless retained some flexibility. It might thus be possible to consider enlarging the circle of persons who could enter into commitments binding on the State beyond that defined by article 7 of the 1969 Vienna Convention by studying cases of declarations of other members of the executive, as well as legislative acts and judicial decisions. A position should also be reached on certain questions of terminology (the difference between unilateral acts in the strict sense and conduct) and questions relating to the form of unilateral acts (such as written or oral statements). The consequences of unilateral acts and the question of responsibility in the event that the resulting obligations were breached could be studied later on.

304. The value of the topic, it was said, was that it showed States the extent to which they could be bound by their own voluntary commitments. It was therefore necessary to identify the conditions under which constraints arose, in order to avoid “surprises”.

305. Consequently, establishing a definition (which could extend to several draft articles, all as precise as possible), the Commission should study the capacity and authority of the author of a unilateral act. It would be premature to study State conduct which might have consequences equivalent to those of unilateral acts.

306. As regards the validity of unilateral acts, one of the hardest aspects of the topic and one bound up with the capacity and authority of the author, it would be helpful to make a comparison with the relevant provisions of the 1969 Vienna Convention in order to determine the hierarchy and distribution of authority between international and domestic law as regards the formulation and performance of international commitments.

307. A summary of the Commission’s work on the subject was suggested, in the form of a declaration accompanied by general or preliminary conclusions and covering all the points which had been accepted by consensus. The starting point for such conclusions could be that international law attributed certain legal effects to acts freely undertaken by States without other States necessarily being involved. The conclusions could also address the form (written or unwritten) of unilateral acts, their effects, their considerable variety, their relationship to the principle of good faith, when they were performed and when they produced effects, and the conduct by which States evidenced an intent entailing legal consequences.

308. It was pointed out that other factors also needed to be taken into account in arriving at such preliminary conclusions, such as addressees’ reactions and the domestic procedures for performance of the unilateral act.

309. It was also important not to overlook the need to ensure that States were still free to make political

statements at any time without feeling constrained by the possibility of having to accept legal commitments.

310. Another view expressed was that so-called unilateral acts were so diverse, and so various and complex in nature, that they could not be codified in the form of draft articles. It would not be possible to compile an exhaustive list, and the value of such an undertaking was therefore questionable. It might even be wondered whether the underlying notion of a legal act was sufficiently universal and well recognized. An “expository” study of the topic would thus be the best way to proceed, since the setting in which acts were performed was crucial to their identification. Not even the existence of international jurisprudence responding to particular needs or arguments in each case was sufficient justification for taking a fundamentally theoretical approach to unilateral acts. Producing draft articles could lead to misunderstandings and further confuse an already complicated and difficult topic.

311. It was also pointed out that unilateral acts could be identified as such only *ex post facto*. They were in essence a triggering mechanism which could result in rights (but not obligations) being attributed to third States. That was what distinguished them from treaties, which operated in a strictly reciprocal framework. In fact, they appeared at a necessary but insufficient threshold for the establishment of an appropriate analytical model. Where that threshold, by nature vague and variable, actually lay would be extremely difficult to determine.

312. On the other hand, it was observed that the task at hand was precisely to determine exactly where the threshold lay, uncertain and difficult though it appeared to be to grasp beyond what point States would be bound. Even if that point were to be identified *ex post facto*, it would at least not be identified arbitrarily. But the important thing was to establish, by means of codification, a mechanism for identifying such acts even before the fact. It was, moreover, untrue to say that States could not impose obligations on other States by means of unilateral acts. Acts having to do with the delimitation of maritime areas proved the contrary. The opinion was also expressed that, in essence, the Commission needed to define the lawfulness or validity of unilateral acts.

313. It was also pointed out that States’ intentions were still crucial. While the intent to enter into commitments or create legal obligations depended on the circumstances and the setting, it could often be identified only by the form it took. On the other hand, the fact that form *per se* did not appear to be decisive in the identification of a unilateral act differentiated unilateral acts from international treaties.

314. According to some members, it would in any event be difficult to agree on general rules, and the Commission should therefore aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter.

315. It was also pointed out that, besides States’ intentions and the conditions, the authorization, the authority or the competence and capacity of the author and the deciding factors which gave an act its legal effect, if the topic

<sup>222</sup> *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

was to be thoroughly studied, consideration must be given to the revocability of a unilateral act. If such acts were not accepted by other States or did not raise any legitimate expectations for these States, or were not treated by other States as a basis for valid legal engagements, they could in theory be revoked at will.

316. Some members remarked that the unilateral acts *par excellence* that ought to be examined were autonomous acts qualifying as sources of international law, and not those stemming from a customary source. The term autonomous acts should not be confused with auto-normative acts (imposing obligations on the author) and hetero-normative acts (imposing obligations on other States).

### 3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

317. Summarizing the discussion, the Special Rapporteur mentioned the great difficulty of identifying unilateral acts as sources of international law. Although some members saw no value in codifying unilateral acts, the establishment of principles for identifying the legal regime applicable to such acts would without question make for greater certainty and stability in international relations. Besides, guaranteed confidence and stability needed to be kept in balance with States' freedom of action.

318. When taking States' freedom of action into consideration, it went without saying that there were political acts by which States did not intend to enter into legal obligations. Although it was sometimes difficult to tell the two kinds of acts apart, it was nevertheless true that the intent of the State to commit itself was an important feature of the identification.

319. The fact that by a unilateral act a relation may be established with one or more States does not mean that we are necessarily in the presence of an act of conventional character.

320. The conduct of the State should also be considered in relation to the unilateral act, though that could be done at a later stage.

321. Reaching a common position on the definition did not seem easy; at all events, a number of factors or elements unrelated to the act itself would have to be taken into consideration.

322. On the question of legal effects, these, although highly diverse (promises, renunciation, recognition and so on), needed to be considered in the light of their conformity with international law.

323. The 1969 Vienna Convention might provide a framework and guidance for the formulation of a number of principles on unilateral acts, but they should not be transposed or reproduced wholesale, given the difference in kind between treaties and unilateral acts.

324. The Special Rapporteur had deliberately reached only limited conclusions in his report; they were the outcome of a study of specific practical cases, and could be supplemented and fleshed out by studies of further cases

or by the comments and observations of Commission members.

325. The Special Rapporteur concluded by suggesting that he would be entirely in favour of the proposal that he should submit general conclusions or proposals the following year.

326. The Working Group on Unilateral Acts could consider the points that had arisen out of the debate, and put forward recommendations as to the orientation and substance of the proposals which would thus reflect the outcome of several years' work on the subject by the Commission.

### 4. CONCLUSIONS OF THE WORKING GROUP

327. The open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet, was reconstituted on 11 May 2005.

328. The Working Group held four meetings, on 11 and 18 May, 1 June and 25 July 2005. The first three meetings were devoted to an analysis of specific cases in accordance with the grid established at the fifty-sixth session of the Commission (2004)<sup>223</sup> and the conclusions that could be drawn from that analysis.

329. At its 2855th meeting, on 21 July 2005, at the conclusion of the debate on the topic "Unilateral acts of States", the Commission requested the Working Group to consider the points raised in the debate on which there was general agreement which might form the basis of preliminary conclusions or proposals on the topic that the Commission could consider at its fifty-eighth session. The Working Group began its consideration of elements that could be included in preliminary conclusions without prejudice to their subsequent qualification.

330. At its 2859th meeting, on 28 July 2005, the Commission took note of the oral report of the Working Group.

331. The Working Group acknowledged that while it could be stated in principle that the unilateral conduct of States could produce legal effects, whatever form that unilateral conduct might take, it would attempt to establish some preliminary conclusions in relation to unilateral acts *sensu stricto*. The Working Group also briefly considered questions relating to the variety of unilateral acts and their effects, the importance of circumstances in assessing their nature and effects, their relationship to other obligations of their authors under international law and the conditions of their revision and revocability.

332. The Working Group stands ready to assist the Special Rapporteur, if necessary, in the formulation and development of preliminary conclusions, which could then be submitted to the Commission at its fifty-eighth session (2006), together with illustrative examples of practice drawn from the notes prepared by members of the Working Group.

<sup>223</sup> See footnote 219 above.

## Chapter X

### RESERVATIONS TO TREATIES

#### A. Introduction

333. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission to include in its agenda the topic “The law and practice relating to reservations to treaties”.

334. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet as Special Rapporteur for the topic.<sup>224</sup>

335. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.<sup>225</sup>

336. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission’s consideration of the topic; they related to the title of the topic, which should now read “Reservations to treaties”, the form of the results of the study, which should be a guide to practice in respect of reservations, the flexible way in which the Commission’s work on the topic should be carried out, and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.<sup>226</sup> In the view of the Commission, these conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

337. Also at its forty-seventh session, in accordance with its earlier practice,<sup>227</sup> the Commission authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.<sup>228</sup> The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission’s conclusions, inviting it to continue

its work along the lines indicated in its report and also inviting States to answer the questionnaire.<sup>229</sup>

338. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur’s second report on the topic.<sup>230</sup> The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.<sup>231</sup>

339. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>232</sup>

340. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission’s preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

341. From 1998 up to its fifty-sixth session in 2004, the Commission considered seven more reports<sup>233</sup> by the Special Rapporteur, provisionally adopting 69 draft guidelines and the commentaries thereto.

342. At its fifty-sixth session the Commission, at its 2822nd meeting, on 23 July 2004, after having considered the ninth report of the Special Rapporteur,<sup>234</sup> decided to refer draft guidelines 2.6.1 (Definition of objections to reservations) and 2.6.2 (Objection to the late formulation

<sup>229</sup> As at 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

<sup>230</sup> *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>231</sup> *Ibid.*, vol. II (Part Two), p. 83, para. 136 and footnote 238.

<sup>232</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

<sup>233</sup> Third report, *Yearbook ... 1998* (vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report, *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1; fifth report, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report, *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; and ninth report, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544. For a detailed historical presentation, see *Yearbook ... 2004*, vol. II (Part Two), pp. 97–98, paras. 257–269.

<sup>234</sup> See the above footnote.

<sup>224</sup> See *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

<sup>225</sup> *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

<sup>226</sup> *Ibid.*, vol. II (Part Two), p. 108, para. 487.

<sup>227</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

<sup>228</sup> See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires sent to States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II–III.



of widening of the scope of a reservation) to the Drafting Committee.

## B. Consideration of the topic at the present session

343. At the current session, the Commission had before it the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1–2) on the validity of reservations and the concept of the object and purpose of the treaty.

344. The Commission considered part of the tenth report of the Special Rapporteur at its 2854th and 2856th–2859th meetings, on 20 and 22–28 July 2005.

345. At its 2859th meeting, the Commission decided to send draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4 (Non-specified reservations authorized by the treaty) to the Drafting Committee. The Commission also decided to send draft guidelines 1.6 and 2.1.8, which had already been provisionally adopted,<sup>235</sup> to the Drafting Committee with a view to their revision in the light of the terms selected. The Commission also decided to continue its consideration of the tenth report during its fifty-eighth session (2006).

346. At its 2842nd meeting, on 20 May 2005, the Commission considered and provisionally adopted draft guidelines 2.6.1 (Definition of objections to treaties) and 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation).

347. These draft guidelines had already been sent to the Drafting Committee at the fifty-sixth session (2004).

348. At its 2865th meeting, on 4 August 2005, the Commission adopted the commentary relating to the aforementioned draft guidelines.

349. The text of the draft guidelines and the commentary thereto are reproduced in section C.2 below.

### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS TENTH REPORT

350. The Special Rapporteur introduced his tenth report by explaining that he had initially planned to include an introduction summing up developments since the ninth report:<sup>236</sup> a first part which would have dispatched once and for all the problem of formulation and the procedure for objections and reservations to treaties, and a second part on the validity of reservations. For lack of time, and having already begun work on the latter question, to which he had given priority, it had not been possible to adhere to that plan. Accordingly, the report had begun *in medias res*, with the section on the validity of reservations.

351. The Special Rapporteur had first sought to defend the expression “validity of reservations” before addressing,

in the first part of his report, the principle derived from the *chapeau* of article 19 of the 1969 Vienna Convention and the problems raised by express or implicit prohibitions of reservations, covered in subparagraphs (a) and (b) of that article of the Convention. The other questions addressed in the report related to the compatibility of reservations with the object and purpose of the treaty, stipulated in article 19 (c) (validity or invalidity of reservations relating to the application of internal law, customary rules or the rules of *jus cogens*).

352. The last part of the report addressed the determination of the validity of reservations and the consequences thereof.

353. Returning to the phrase “validity of reservations” used in his report, the Special Rapporteur recalled that the replies from States in the Sixth Committee to the question that the Commission had put to them concerning that expression had been inconclusive, having been split between those States which had doubts about the expression and those that accepted it.

354. The Special Rapporteur clearly preferred the words “validity/invalidity”, which were entirely neutral, to the other terms proposed, such as “admissibility/inadmissibility”, “permissibility/impermissibility” or “opposability/non-opposability”, which had strong doctrinal connotations.

355. The doctrinal battle pitted the proponents of permissibility, who thought that a reservation could be intrinsically invalid by being contrary to the object and purpose of the treaty, against the advocates of opposability, for whom the reservations regime was governed in its entirety by the reactions of other States. In using one or the other of these expressions, the Commission would be taking a position in favour of one of these schools, which did not do justice to the complex reality of the regime of reservations.

356. Although Mr. Derek Bowett had urged the Commission to use the terms “permissible/impermissible”<sup>237</sup> and the Commission had initially followed his lead, the Special Rapporteur thought that a reservation could be valid or invalid on grounds other than “permissibility”.

357. Furthermore, the French terms “*licéité/illicéité*” which are translated in English as “permissibility/impermissibility” could be misleading, given their relationship to the topic of State responsibility. It was unreasonable to affirm that a reservation not valid for reasons of form or substance entailed the responsibility of the State or international organization that had formulated it, and no precedent to that effect existed in State practice. Such a reservation would simply be null and void.

358. The Commission should therefore revert to the neutral terms “validity/invalidity”, including in the draft guidelines that had already been adopted (1.6 and 2.1.8), in which the words “permissible/impermissible” had been left in square brackets.

<sup>235</sup> See *Yearbook ... 1999*, vol. II (Part Two), p. 126, and *Yearbook ... 2002*, vol. II (Part Two), p. 27.

<sup>236</sup> See footnote 233 above.

<sup>237</sup> See D. W. Bowett, “Reservations to non-restricted multilateral treaties”, *British Year Book of International Law, 1976–1977*, pp. 67–92.



359. The section of the report entitled “The presumption of validity of reservations” was based on the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, which established the general principle that the formulation of reservations was permitted. However, the freedom to formulate a reservation was not unlimited. In the first place, it was limited in time (signature of the treaty or expression of consent to be bound by it). In addition, by its nature a treaty could require that a reservation should be unanimously accepted. Moreover, States could themselves limit the power to formulate reservations to a treaty, as envisaged in article 19, subparagraphs (a) and (b).

360. Consequently, the right to formulate reservations was not an absolute right. That was suggested by the very title of article 19, since the fact that a reservation was formulated did not mean that it was “made”, that is, that it would actually produce effects. This was suggested by the wording of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions (“a reservation established with regard to another party in accordance with articles 19, 20 and 23”). Compliance with article 19 was *one* of the conditions for the validity of a reservation, but it was not the sole condition, and it seemed therefore that neither the permissibility school (which focused on article 19 to the exclusion of all other considerations) nor the opposability school (which was interested solely in article 20) provided an account of the legal regime of reservations in all its enormous complexity.

361. The freedom to formulate reservations being the basic principle, the Special Rapporteur had considered whether it might be useful to make the presumption of validity of reservations the subject of a separate draft guideline. However, he had decided not to in order to keep the Guide to Practice user-friendly. He had chosen to reproduce article 19 of the 1986 Vienna Convention (because it included international organizations) in its entirety in draft guideline 3.1.<sup>238</sup>

362. Although that solution was not ideal, given that article 19 was poorly drafted, he had thought it better to reproduce the article as it stood than to “correct” it.

363. Section B of the report dealt with reservations prohibited, either expressly or implicitly, by the treaty, which corresponded to article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions. It appeared from the *travaux préparatoires* for those Conventions that a treaty could prohibit *all* reservations or only certain reservations. The first case appeared simpler, although it was still necessary to decide whether or not a unilateral declaration constituted a reservation. However,

that was a problem of the definition of reservations and not of validity.

364. The second case was more frequent: a treaty might prohibit reservations to specific provisions of the treaty or prohibit categories of reservations, which was much more complicated.

365. The three cases of prohibitions were covered by article 19 (a), and that was exactly what was stated in draft guideline 3.1.1.<sup>239</sup>

366. Moreover, all those cases concerned reservations that were expressly prohibited and not implicit prohibitions. The latter category referred in particular to treaties concluded between a limited number of parties and the constituent instruments of international organizations (art. 20).

367. The term “specified reservations” was not as simple as it appeared. It nevertheless followed that reservations formulated by virtue of a reservation clause that did not specify what reservations were permitted, were subject to the test of compatibility with the object and purpose of the treaty.

368. For all those reasons, it was very important that the Commission should define the term “specified reservations” in draft guideline 3.1.2.<sup>240</sup>

369. He had tried to provide a definition that was neither too lax nor excessively strict, which would be tantamount to likening the notion to “negotiated reservations”.<sup>241</sup>

370. The Special Rapporteur recalled that the Commission had met with all the human rights treaty bodies with the exception of the Committee on the Elimination of Discrimination against Women, which was based in New York. He had proposed that a one- or two-day seminar should be organized in 2006 on the subject of reservations to human rights treaties, particularly so that the Commission could review its preliminary conclusions regarding reservations to the normative multilateral treaties, including the treaties with respect to human rights, which the Commission had adopted at its forty-ninth meeting in 1997.<sup>242</sup>

<sup>238</sup> The draft guideline reads as follows:

“3.1 *Freedom to formulate reservations*

“A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

“(a) The reservation is prohibited by the treaty;

“(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

“(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

<sup>239</sup> The draft guideline reads as follows:

“3.1.1 *Reservations expressly prohibited by the treaty*

“A reservation is prohibited by the treaty if it contains a particular provision:

“(a) Prohibiting all reservations;

“(b) Prohibiting reservations to specified provisions;

“(c) Prohibiting certain categories of reservations.”

<sup>240</sup> The draft guideline reads as follows:

“3.1.2 *Definition of specified reservations*

“For the purposes of guideline 3.1, the expression “specified reservations” means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.”

<sup>241</sup> See the fifth report of the Special Rapporteur, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, p. 174, para. 164.

<sup>242</sup> See footnote 232 above.

371. Introducing the second part of his report, the Special Rapporteur explained that it dealt with reservations that were incompatible with the object and purpose of the treaty. That condition was an element of the flexible system stemming from the advisory opinion of ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>243</sup> and of the 1969 Vienna Convention. By virtue of that clarification, the right of States to make reservations was balanced by the requirement to preserve the “core contents” or *raison d’être* of the treaty. The criterion of compatibility with the object and purpose of the treaty applied only to reservations, as States were not required to justify their objections under article 20 of the 1969 Vienna Convention, even though they often did so. The compatibility of a reservation with the object and purpose of the treaty was a customary norm, although it was not a peremptory norm of international law. A reservation expressly prohibited by a treaty could not be considered valid on the pretext that it was compatible with the object and purpose of the treaty. As expressly authorized by the treaty, specified reservations were automatically valid and were not subject to the test of compatibility with the object and purpose of the treaty.

372. The same did not hold for two other cases, namely reservations that were implicitly authorized and those that were expressly authorized but not specified. In both cases, it was clear that a State or an international organization could formulate reservations that were not contrary to the object and purpose of the treaty. The *travaux préparatoires* for the 1969 Vienna Convention and case law (the 1977 ruling of the Arbitral Tribunal in the *English Channel* case)<sup>244</sup> seemed to substantiate that argument, which had first been set out insofar as implicitly authorized reservations were concerned by the Special Rapporteur on the law of treaties, Sir Humphrey Waldock in his fourth report.<sup>245</sup> The two cases formed the subject of two separate draft guidelines, 3.1.3<sup>246</sup> and 3.1.4<sup>247</sup> respectively, which the Special Rapporteur preferred to the version consisting of a single draft guideline combining the two hypotheses.

373. The Special Rapporteur then took up the definition of the concept of the object and purpose of the treaty, which was one of the most sensitive issues of the law of

treaties. That concept, which legal writers were virtually unanimous in qualifying as highly subjective, appeared not only in article 19 of the 1969 and 1986 Vienna Conventions but in several other provisions of those instruments; clearly it had the same meaning throughout the Conventions.

374. That was why the competence of the interpreter of the concept had assumed great significance. The subjectivity of the notion was not, however, sufficient reason for abstaining from an effort to define it; other legal notions (“public morals”, “reasonable”, “good faith”) were equally subjective or changed over time and did not pose insurmountable problems in their application.

375. In order to guide the (necessarily subjective) interpretation of the notion of good faith, the Special Rapporteur had endeavoured to rely on case law and doctrine without hoping to achieve absolute certainty. He believed that the object and purpose were one and the same notion and not two separate concepts; draft guideline 3.1.5<sup>248</sup> merely sought to provide a useful definition of the notion. It was a very general guideline, but he did not believe it was possible to go much further.

376. Draft guideline 3.1.6<sup>249</sup> sought to offset the general character of guideline 3.1.5 by suggesting a method for determining the object and purpose of the treaty, which was prompted by the principles applicable to the interpretation of treaties set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions. In that connection, the Special Rapporteur believed that the object and purpose of the treaty were not fixed at the time the treaty was concluded, and that the subsequent practice of the parties should therefore be borne in mind, although he was aware that there were views to the contrary.

377. As another way of addressing concerns about the general character of draft guidelines 3.1.5 and 3.1.6, the Special Rapporteur had proposed a large number of guidelines in the section of his report on application of the criterion.

378. The Special Rapporteur admitted that he was not claiming to have covered all possible cases or hypotheses, which was not in fact the purpose of codification; he had endeavoured to include the most useful cases, but the draft guidelines could always be supplemented if members of the Commission had other examples.

<sup>243</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I. C. J. Reports 1951*, p. 15.

<sup>244</sup> *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

<sup>245</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 6, para. 4.

<sup>246</sup> The draft guideline reads as follows:

“3.1.3 *Reservations implicitly permitted by the treaty*

“Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.”

<sup>247</sup> The draft guideline reads as follows:

“3.1.4 *Non-specified reservations authorized by the treaty*

“Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.”

<sup>248</sup> The draft guideline reads as follows:

“3.1.5 *Definition of the object and purpose of the treaty*

“For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d’être*.”

<sup>249</sup> The draft guideline reads as follows:

“3.1.6 *Determination of the object and purpose of the treaty*

“1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

“2. For that purpose, the context includes the preamble and annexes. Recourse may also be had in particular to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties].”

379. The situations considered were fairly heterogeneous but offered a representative sample of reservations. He was also aware that reservations could fall into several of the categories envisaged, in which case it would be necessary to combine the rules included in the draft guidelines.

380. Turning to the different categories of reservations, the Special Rapporteur recalled that dispute settlement clauses had consistently been found to be not contrary to the object and purpose of the treaty according to the case law of ICJ. However, that view had not been shared by human rights treaty bodies,<sup>250</sup> which held that the rules for monitoring the implementation of the treaties constituted guarantees for securing the rights set forth in the treaties and were thus essential to their object and purpose.

381. Draft guideline 3.1.13<sup>251</sup> sought to reconcile the two apparently contrasting views.

382. As to the problems associated with reservations to general human rights treaties, guideline 3.1.12<sup>252</sup> was sufficiently flexible to allow interpreters a degree of leeway.

383. A question that frequently arose, particularly in the field of human rights, concerned reservations formulated to safeguard the application of internal law. The answer to that question was much more nuanced than the categorical views expressed by some would imply; it seemed to the Special Rapporteur that it was impossible to deny a State the right to formulate a reservation in order to preserve the integrity of its internal law if the State did not undermine the object and purpose of the treaty. That was spelled out in draft guideline 3.1.11.<sup>253</sup>

384. Reservations relating to the application of internal law must not be confused with vague and general reservations that by their very nature made it impossible for other States to understand or assess them. Indeed, such reservations were contrary to the object and purpose of the treaty, which was exactly what draft guideline 3.1.7<sup>254</sup> said.

385. The Special Rapporteur had begun his consideration of reservations relating to provisions embodying customary norms with the judgment of ICJ in the *North Sea Continental Shelf* case.<sup>255</sup> States made reservations to such provisions in order to avoid the consequences of “conventionalization” of the customary rule. In addition, as practice showed, States also made reservations to codification treaties. Draft guideline 3.1.8<sup>256</sup> sought to enunciate the fundamental principles deriving from case law and practice in that regard.

386. The situation was different with reservations to provisions setting forth norms of *jus cogens* or non-derogable rules. The Special Rapporteur was convinced that such reservations were prohibited only if one acknowledged that *jus cogens* produced its effect outside the confines of articles 53 and 64 of the 1969 and 1986 Vienna Conventions.

387. Consequently the invalidity of such reservations derived *mutatis mutandis* from the principle set forth in article 53 of the 1969 Vienna Convention. That was the sense of draft guideline 3.1.9.<sup>257</sup>

388. As to reservations to non-derogable rules, while such rules often set out principles of *jus cogens*, the Special Rapporteur proposed draft guideline 3.1.10,<sup>258</sup> which had been inspired by the practice of the human rights treaty

<sup>250</sup> See General Comment No. 24, Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 122; and Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, *ibid.*, *Fifty-Fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, p. 260; and *Loizidou v. Turkey*, ECHR, Application No. 15318/89, Judgment of 18 December 1996, *Reports of Judgments and Decisions, 1996-VI*.

<sup>251</sup> The draft guideline reads as follows:

“3.1.13 *Reservations to treaty clauses concerning dispute settlement or the monitoring of implementation of the treaty*

“A reservation to a treaty clause concerning dispute settlement or the monitoring of implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

“(a) The provision to which the reservation relates constitutes the *raison d’être* of the treaty; or

“(b) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.”

<sup>252</sup> The draft guideline reads as follows:

“3.1.12 *Reservations to general human rights treaties*

“To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it.”

<sup>253</sup> The draft guideline reads as follows:

“3.1.11 *Reservations relating to the application of domestic law*

“A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be

formulated only if it is not incompatible with the object and purpose of the treaty.”

<sup>254</sup> The draft guideline reads as follows:

“3.1.7 *Vague, general reservations*

“A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.”

<sup>255</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

<sup>256</sup> The draft guideline reads as follows:

“3.1.8 *Reservations to a provision that sets forth a customary norm*

“1. The customary nature of a norm set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation to that provision.

“2. A reservation to a treaty provision which sets forth a customary norm does not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm.”

<sup>257</sup> The draft guideline reads as follows:

“3.1.9 *Reservations to provisions setting forth a rule of jus cogens*

“A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.”

<sup>258</sup> The draft guideline reads as follows:

“3.1.10 *Reservations to provisions relating to non-derogable rights*

“A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the

(Continued on next page.)



bodies and the case law of the Inter-American Court of Human Rights.<sup>259</sup>

## 2. SUMMARY OF THE DEBATE

389. Several members praised the theoretical and practical importance of the tenth report, which was extremely detailed, analytical and rich.

390. It was noted that invalid reservations could not by definition achieve the result desired by the State that made them. At the same time, the invalidity of a reservation generally invalidated ratification of the treaty itself.

391. It was also noted that the problems with terminology were not solely linguistic, given that the terms used had different meanings in different languages. In addition, some members were opposed to the use of the terms “permissible/impermissible”, which were associated with the notion of responsibility. The term “validity” did not appear to be as neutral as it was claimed to be, but reflected a subjective value judgement that operated *a posteriori* and had to do with the existence or absence of legal consequences of the act in question and not with the process of completion or formulation. It was recalled in that connection that in the Sixth Committee several arguments had been put forward in opposition to the use of the term “validity” to qualify reservations. The terms “permissible/impermissible”, meanwhile, managed to convey the sense the Commission wished to give to reservations at the current stage and were neutral, notwithstanding their association with a particular school of thought.

392. The view was also expressed that the question of validity was essential in the regime of reservations and constituted its basis in principle. However, the very definition of validity posed problems, especially with regard to what determined it. Since validity was a quality that determined compliance with the reference norm, namely the Vienna regime, it was obvious that the determination of validity occurred after the reservation was formulated, by other States or, where appropriate, by a judicial body. The variables inherent in validity also comprised the reference norm (the Vienna regime), the *de facto* situation (formulation of the reservation) and the possible reaction to the reservation, expressed either in the form of an objection or through a third body, judge or arbitrator. The question of validity was linked to a substantive problem, which was the limitations *ratione materiae* of the freedom to formulate reservations under article 19 of the 1969 and 1986 Vienna Conventions.

393. It was also pointed out that the very concept of the validity of an act was one of the requirements for its “legality” or its “permissibility” and that it retained the necessary neutrality. Nevertheless, some members wondered whether, given the significance of objections in assessing validity, it might be possible to contemplate including the

draft guidelines on objections in the section of the Guide to Practice dealing with the validity of reservations.

394. The view was also expressed that the question of the validity of reservations should be considered together with the question of the legal consequences of invalid reservations. The question of the separability or inseparability of invalid reservations from the act expressing a State’s consent to be bound to a treaty remained fundamental.

395. It was pointed out that as the term “validity” was essentially related to requisite conditions, the term “admissibility” might be more acceptable and less restrictive, because a reservation that was permitted or accepted was not necessarily valid.

396. Several members nevertheless expressed a preference for the terms “validity/invalidity”.

397. It was pointed out that the meaning of the term “validity” included the quality of the elements of a legal order that had to meet all conditions as to form and substance required by that order for legal effects to be produced by an act. It was the conformity of the act with those conditions that made it possible to determine whether it was valid. That was why the Commission should not lose sight of those conditions and should deal only with the legal effects of the act. From that standpoint the mere formulation of a reservation had nothing to do with its validity, which was determined after the prerequisite conditions had been met. Consequently, the words “and effects” should be deleted from draft guideline 1.6 with a view to its revision, given that validity was simply the ability of the reservation to produce effects.

398. Another point of view held that it was premature to take a decision on the question of validity at the current stage, before consideration of the effects of reservations, which could have an impact on the international responsibility of States.

399. Other members, however, expressed doubts as to the use of the term “validity” in draft guidelines that had already been adopted.

400. With regard to draft guideline 3.1, it was noted that the title did not accurately reflect its content. It would seem justified to use the text of article 19 of the 1986 Vienna Convention in order to indicate the conditions of validity. The fact, however, that this provision reiterated the conditions *ratione temporis* which the formulation of a reservation must meet, and did so immediately after the section of the draft guidelines on procedure, might seem somewhat strange. The concept of the presumption of validity of reservations seemed to some members neither convincing nor useful. It was pointed out that article 19 of the 1969 and 1986 Vienna Conventions established, at the most, the presumption of freedom to formulate reservations, which was substantially different from the presumption of validity of reservations.

401. Other members observed that the title of the draft guideline ought to read “The right to formulate reservations” for both linguistic and substantive reasons,

(Footnote 258 continued.)

importance which the parties have conferred upon the rights at issue by making them non-derogable.”

<sup>259</sup> *Restrictions to the Death Penalty* (arts. 4.2 and 4.4 of the American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3.



since it sought to define a right that was nevertheless dependent on certain conditions established by the Vienna regime. According to another view, the title that might best correspond to the content of article 19 was “limits to the freedom to formulate reservations”.

402. With regard to draft guideline 3.1.1, it was noted that the term “expressly” in the title did not appear in the wording of article 19. It was rare, but not impossible, for treaties not to permit reservations by implication, as was the case, for example, with the Charter of the United Nations. The wording of the draft guideline should also be revised because the *chapeau* did not entirely correspond to the provisions that followed. Furthermore, if a treaty permitted only certain reservations, it was clear that other reservations were prohibited. It should also be made clear that if a treaty prohibited reservations to specific provisions or certain types of reservations, only those reservations were expressly prohibited. In order not to introduce a high degree of subjectivity, the Commission should limit itself to implicit prohibitions or authorizations that could logically and reasonably be deduced from the intention of the parties at the time they concluded the treaty. Others took the view that this guideline should be limited to express prohibitions.

403. It was further noted that it was difficult to establish every type of prohibited reservation with certainty. The case was also mentioned of a treaty prohibiting any reservations except those expressly authorized by it; it was felt that such a situation should be covered by the draft guidelines.

404. With regard to draft guideline 3.1.2, it was suggested that according to article 19 (b) of the 1969 and 1986 Vienna Conventions, one needed to determine whether the treaty permitted only specific reservations and, if so, to determine whether or not a reservation that was formulated fell into that category. Questions were also raised as to the relevance of the term “authorized”. The last part of the sentence in the English version, in any event, was not clear or seemed far too elliptic.

405. It was felt that the categories of prohibited reservations established by the Special Rapporteur were useful; however, in practice, which was rich and varied, it often proved difficult to distinguish among the different categories.

406. The view was expressed that in the case of a general authorization of reservations, the other parties could always object to them, and that expressly authorized reservations were also subject to the test of compatibility with the object and purpose of the treaty.

407. It would appear to be extremely difficult to distinguish implicitly prohibited reservations with certainty, as they were indeterminate by nature. They should be dealt with in a separate draft guideline.

408. Several members expressed their preference for two separate draft guidelines, 3.1.3 and 3.1.4.

409. With regard to draft guideline 3.1.4, the view was expressed that the Commission should opt for clearer

wording affirming that reservations were subject to the criterion of compatibility with the object and purpose of the treaty if there was a general authorization or if the treaty did not contain any provisions on reservations.

410. Several members stressed the notion that the object and purpose of the treaty played a central role in the law of treaties as a whole. The 1969 and 1986 Vienna Conventions were silent on the meaning of that notion. States expected the Commission to address that problem. The Special Rapporteur was commended for his efforts to define that nebulous and elusive concept. The object appeared to be the content of the treaty, while the purpose had to do with the end the treaty sought to achieve. Any reservation contrary to those two notions was not permitted.

411. While draft guideline 3.1.5 represented an attempt at clarification, the term “*raison d'être*” in the text provided little clarification. This term was also seen by others as too restrictive, leading to the result that only very few reservations would be prohibited. It was suggested that in endeavouring to pinpoint the concept the terms “object” and “purpose” should not be separated. It was the object and purpose of the treaty that made it possible to say what the essential provisions of the treaty were, and not vice versa.

412. The view was also expressed in respect of both draft guidelines 3.1.5 and 3.1.13 that a reservation to a “secondary” provision that was linked to the *raison d'être* of the treaty could be equally risky. Distinguishing between the essential provisions of a treaty became a dangerous and random exercise.

413. Another point of view maintained that if determining the meaning of the notion of the object and purpose of the treaty was part of the interpretation of treaties, it could not be governed by pre-established definitions or rules. From that perspective it became very difficult to pinpoint notions such as “*raison d'être*” or “core content”, which were equally vague, elusive or uncertain. Treaties expressed the intention of the States that had concluded them, and one could only conjecture as to the real meaning of that intention, as the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had made clear.<sup>260</sup> The notion of the object and purpose of the treaty was determined subjectively by each State. Very often it was questionable as to whether a treaty had a specific object and purpose, since it was the outcome of a complex process of negotiations or exchanges. Accordingly, some members wondered whether a definition of that notion were possible or even necessary. In any event, it would be extremely difficult to define; there would always be a part that would remain a mystery.

414. As to the categories of examples of provisions cited by the Special Rapporteur, some members wondered what his criteria had been, given that the importance of such provisions varied from treaty to treaty, depending on the interests of the concluding States. Distinguishing human rights treaties was equally difficult, in part because

<sup>260</sup> See footnote 243 above.

of the difficulty in defining exactly what constituted such treaties and also because there were other categories of treaties that were also based on common interests.

415. It was pointed out that it might be useful to make express the *rationales* that the Special Rapporteur's examples sought to illustrate, namely cases where the reservation undermined either the legitimate expectations of the parties or the nature of the treaty as a common undertaking.

416. With regard to draft guideline 3.1.6, the view was expressed that articles 31 and 32 of the 1969 and 1986 Vienna Conventions mentioned therein gave an important role to the object and purpose in the interpretation of the treaty. It was also pointed out that agreements relating to the treaty (art. 31, para. 2) or subsequent practice could be included. The Commission should not attempt to find a general rule for determining the object and purpose of the treaty, as the two concepts varied in accordance with the great diversity of treaties as well as with the necessarily subjective idea that the parties had of them.

417. Other members questioned the usefulness of draft guidelines 3.1.5 and 3.1.6.

418. It was pointed out that the Commission ought to approach the question covered in draft guideline 3.1.7 from the standpoint of procedure and ask whether a reservation drafted in vague and general terms could be said to intend to exclude or modify the legal effect of certain provisions of the treaty in their application to the reserving State. Attention was also drawn to the importance of context and specific circumstances.

419. Several members stressed the usefulness of draft guideline 3.1.8.

420. With regard to draft guideline 3.1.9, the view was expressed that there might be cases in which a reservation to a provision setting forth a rule of *jus cogens* was possible and not necessarily incompatible with the object and purpose of the treaty, for reasons identical to those put forward in the case of customary rules (draft guideline 3.1.8). The prohibition of such reservations should be categorical only if the reserving State, by modifying the legal effect of such a provision, intended to introduce a rule that was contrary to *jus cogens*. The view was also expressed that the draft guideline was not really necessary because a reservation contrary to *jus cogens* would be automatically incompatible with the object and purpose of the treaty.

421. Several members stressed the usefulness of draft guideline 3.1.9.

422. Draft guideline 3.1.11 needed to be worded more precisely. The Commission should indicate that the reservation would be acceptable only if it were formulated in respect of a specific provision that was fundamental to internal law. It was even suggested that the draft guideline should be combined with draft guideline 3.1.7, given their similarity.

423. Several key provisions of draft guideline 3.1.12 were said to relate also to the exercise of protected rights. Moreover, the two criteria seemed to be too general to be really useful.

424. Draft guideline 3.1.13 was said to be more restrictive than article 19, subparagraph (c), of the 1969 and 1986 Vienna Conventions. It was also noted that the two cases mentioned (dispute settlement and monitoring of the implementation of the treaty) were sufficiently different and warranted two separate draft guidelines.

425. The proposal to hold a "seminar" was welcomed by several members. It was proposed that the seminar should focus in particular on the problem of the compatibility of reservations with the object and purpose of the treaty and, subsequently, on the role of human rights treaty bodies in determining compatibility.

426. Some members expressed a desire that the debate on the section of the report dealing with the compatibility of reservations with the object and purpose of the treaty be continued during the fifty-eighth session (2006) and in the meantime reserved their position with respect to the issues raised by this section of the report.

### 3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

427. At the conclusion of the debate, the Special Rapporteur expressed his satisfaction that so many of his draft guidelines had been favourably received in such a constructive manner by most members of the Commission. Referring to a few negative views based on theoretical positions, he recalled that the function of the exercise that the Commission had undertaken was not to create a work of doctrine in the abstract, but rather to provide States with coherent answers to the whole range of questions they might raise with regard to reservations.

428. He observed that some of the criticisms that had been directed at him, however brilliant in theoretical terms, had not included concrete proposals for draft guidelines that could replace those that his critics would delete. The draft guidelines, together with the commentary thereto, still constituted the surest way to guide practitioners and States. In undertaking that useful pedagogical exercise, the Commission should not be guided by abstract considerations that had to do with the allegedly progressive or conservative character of proposals, but should instead adopt a pragmatic, moderate, "happy medium" attitude, while recalling that the 1969 and 1986 Vienna Conventions, within the framework of which the exercise was taking place, were extremely flexible even if they tended to reflect a high degree of tolerance where reservations were concerned.

429. It was in that spirit that he had prepared the tenth report and proposed the 14 draft guidelines.

430. With regard to the question of validity, he was of the view that the Commission was dealing not only with a purely terminological question or a problem posed by differences in the French and English languages. Having

noted the relatively varied positions of members on that subject, he remained convinced that the Commission should not wait until it considered the effects of reservations to define their validity; he also believed that validity could not be assimilated into permissibility. In addition, given that validity was a question not only of substance but also of form, either the third section of the Guide to Practice should be preceded by a very general guideline that would specify that a reservation was considered to be valid if it fulfilled the conditions of substance and form established in the 1969 and 1986 Vienna Conventions<sup>261</sup> and spelled out in the Guide to Practice, or else the title of the third part of the Guide should be modified. In his view, the French term “*validité*” applied both to conditions of form (dealt with in the second chapter of the Guide to Practice) and to those of substance, whereas draft guideline 3.1 as currently worded dealt only with the conditions of substance covered by article 19. Conversely, the English term “permissibility” (and not “admissibility”) adequately defined the content of article 19. He therefore proposed that “Validity of reservations” should be retained as the title of the third part of the Guide to Practice, on condition that the expression was understood to cover both conditions of form and conditions of substance, and that only the latter would be dealt with in that part of the Guide (with conditions of form dealt with in the second part); meanwhile, draft guideline 3.1 could be entitled “Permissibility of reservations” in English and “*Validité substantielle des réserves*” in French.

431. With regard to draft guidelines 1.6 and 2.1.8 (already adopted), the Commission could replace the word “permissibility” with “validity” in the former and the word “impermissible” with the word “invalid” in the latter. In the first paragraph of draft guideline 2.1.8, the first sentence would begin “When, in the opinion of the depositary, a reservation is manifestly invalid ...”, subject to an appropriate modification of the commentary.

432. Concerning draft guideline 3.1 and the observations made regarding its title, the Special Rapporteur agreed that it should be worded more clearly; that, however, was a drafting problem which the Drafting Committee could address.

433. He also thought that the wording of draft guideline 3.1.1 could be improved. However, he was not convinced that the possibility of implicitly prohibited reservations should be included, as such reservations had more to do with article 19, subparagraph (c); in other words, they were invalid because they were incompatible with the object and purpose of the treaty, and not because they were implicitly prohibited.

434. He noted that draft guidelines 3.1.2, 3.1.3 and 3.1.4 had been generally endorsed, even though they would benefit from editorial improvements.

435. Accordingly, the Special Rapporteur proposed that the Commission should send draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4 to the Drafting Committee, together with draft guidelines 2.1.8 and 1.6 (already adopted), the

latter two with a view to their amendment in the light of the terms selected.

436. The Special Rapporteur thought that the other draft guidelines contained in the tenth report should be considered again at the fifty-eighth session, given that the Commission had not been able to discuss them in depth due to lack of time. He was nevertheless of the view that the Commission must absolutely define the notion of the “object and purpose” of the treaty (draft guidelines 3.1.5 and 3.1.6). The Special Rapporteur reiterated his desire to organize a meeting with the human rights treaty bodies during the fifty-eighth session, although he was aware of certain practical difficulties (not all bodies met at the same time) and budgetary constraints.

### C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

#### 1. TEXT OF THE DRAFT GUIDELINES

437. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.<sup>262</sup>

#### RESERVATIONS TO TREATIES

##### GUIDE TO PRACTICE

##### 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.

#### 1. Definitions

##### 1.1 Definition of reservations

“Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

<sup>262</sup> See the commentary to guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1], *Yearbook ... 1998*, vol. II (Part Two), pp. 99–108; the commentary to guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6, *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126; the commentary to guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5], *Yearbook ... 2000*, vol. II (Part Two), pp. 108–123; the commentary to guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8], *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–195; the commentary to guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.4 [2.1.3 bis, 2.1.4], 2.1.5, 2.1.6 [2.1.6, 2.1.8], 2.1.7, 2.1.8 [2.1.7 bis], 2.4, 2.4.1, 2.4.2 [2.4.1 bis] and 2.4.7 [2.4.2, 2.4.9], *Yearbook ... 2002*, vol. II (Part Two), pp. 28–47; the commentary to the explanatory note and to guidelines 2.5, 2.5.1, 2.5.2, 2.5.3, 2.5.4 [2.5.5], 2.5.5 [2.5.5 bis, 2.5.5 ter], 2.5.6, 2.5.7 [2.5.7, 2.5.8], 2.5.8 [2.5.9], 2.5.9 [2.5.10], 2.5.10 [2.5.11] and 2.5.11 [2.5.12], *Yearbook ... 2003*, vol. II (Part Two), pp. 70–92; and the commentary to guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13, *Yearbook ... 2004*, vol. II (Part Two). The commentaries to guidelines 2.6, 2.6.1 and 2.6.2 appear in section 2 below.

<sup>261</sup> Arts. 21 (establishment), 19 (substance), 20 (opposition) and 23 (form) of the 1969 and 1986 Vienna Conventions.



### 1.1.1 [1.1.4]<sup>263</sup> *Object of reservations*

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

### 1.1.2 *Instances in which reservations may be formulated*

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the law of treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

### 1.1.3 [1.1.8] *Reservations having territorial scope*

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

### 1.1.4 [1.1.3] *Reservations formulated when notifying territorial application*

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

### 1.1.5 [1.1.6] *Statements purporting to limit the obligations of their author*

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

### 1.1.6 *Statements purporting to discharge an obligation by equivalent means*

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

### 1.1.7 [1.1.1] *Reservations formulated jointly*

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

### 1.1.8 *Reservations made under exclusionary clauses*

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

## 1.2 *Definition of interpretative declarations*

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

### 1.2.1 [1.2.4] *Conditional interpretative declarations*

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

### 1.2.2 [1.2.1] *Interpretative declarations formulated jointly*

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

## 1.3 *Distinction between reservations and interpretative declarations*

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

### 1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

### 1.3.2 [1.2.2] *Phrasing and name*

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

### 1.3.3 [1.2.3] *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify 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 its author.

## 1.4 *Unilateral statements other than reservations and interpretative declarations*

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

### 1.4.1 [1.1.5] *Statements purporting to undertake unilateral commitments*

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty, constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

### 1.4.2 [1.1.6] *Unilateral statements purporting to add further elements to a treaty*

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

<sup>263</sup> The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.



#### 1.4.3 [1.1.7] *Statements of non-recognition*

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

#### 1.4.4 [1.2.5] *General statements of policy*

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

#### 1.4.5 [1.2.6] *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

#### 1.4.6 [1.4.6, 1.4.7] *Unilateral statements made under an optional clause*

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.4.7 [1.4.8] *Unilateral statements providing for a choice between the provisions of a treaty*

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

### 1.5 *Unilateral statements in respect of bilateral treaties*

#### 1.5.1 [1.1.9] *"Reservations" to bilateral treaties*

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.5.2 [1.2.7] *Interpretative declarations in respect of bilateral treaties*

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

#### 1.5.3 [1.2.8] *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

### 1.6 *Scope of definitions*

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

### 1.7 *Alternatives to reservations and interpretative declarations*

#### 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] *Alternatives to reservations*

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

#### 1.7.2 [1.7.5] *Alternatives to interpretative declarations*

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

## 2. *Procedure*

### 2.1 *Form and notification of reservations*

#### 2.1.1 *Written form*

A reservation must be formulated in writing.

#### 2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

#### 2.1.3 *Formulation of a reservation at the international level*

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; 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 having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

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

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

2.1.4 [2.1.3 bis, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

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

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

2.1.5 *Communication of reservations*

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

3. The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

4. Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 *Functions of depositaries*

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] *Procedure in case of manifestly [impermissible] reservations*

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the

contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ...<sup>264</sup>

2.3.1 *Late formulation of a reservation*

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 *Acceptance of late formulation of a reservation*

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 *Objection to late formulation of a reservation*

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 *Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

2.3.5 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 *Procedure for interpretative declarations*

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text

<sup>264</sup> Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

**[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level**

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

**2.4.3 Time at which an interpretative declaration may be formulated**

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

**2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty**

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

**2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty**

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

**2.4.6 [2.4.7] Late formulation of an interpretative declaration**

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

**[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations**

1. A conditional interpretative declaration must be formulated in writing.

2. Formal confirmation of a conditional interpretative declaration must also be made in writing.

3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

4. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization, or a treaty which creates an organ that has the capacity to accept a reservation, must also be communicated to such organization or organ.]

**2.4.8 Late formulation of a conditional interpretative declaration<sup>265</sup>**

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

**2.4.9 Modification of an interpretative declaration**

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

**2.4.10 Limitation and widening of the scope of a conditional interpretative declaration**

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

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

**2.5.1 Withdrawal of reservations**

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 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.

<sup>265</sup> This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

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 [2.1.6, 2.1.8] 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.

#### 2.5.12 *Withdrawal of an interpretative declaration*

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

#### 2.5.13 *Withdrawal of a conditional interpretative declaration*

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

#### 2.6.1 *Definition of objections to reservations*

“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 former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

#### 2.6.2 *Definition of objections to the late formulation or widening of the scope of a reservation*

“Objection” may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

#### 2. TEXT OF THE DRAFT GUIDELINES ON RESERVATIONS TO TREATIES AND THE COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FIFTY-SEVENTH SESSION

438. The texts of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-seventh session are reproduced below.

### 2.6 *Formulation of objections to reservations*

#### *Commentary*

(1) Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

—Article 20, paragraph 4 (b), mentions “in passing” the potential authors of an objection;

—Article 20, paragraph 5, gives ambiguous indications as to the period during which an objection may be formulated;

—Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (b), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;



—Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

—Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

(2) Each of these provisions should be retained and, where necessary, clarified and supplemented in this section of the Guide to Practice, which should nevertheless give a preliminary definition of the word “objection”, which is not defined in the 1969 and 1986 Vienna Conventions—a gap that needs to be filled. This is the aim of draft guidelines 2.6.1–2.6.x.<sup>266</sup>

### 2.6.1 Definition of objections to reservations

**“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 former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.**

#### Commentary

(1) The aim of draft guideline 2.6.1 is to provide a generic definition applicable to all the categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions. For this purpose, the Commission has taken as a model the definition of reservations provided in article 2, paragraph 1 (d), of the Conventions and reproduced in guideline 1.1 of the Guide to Practice, adapting it to objections.

(2) This definition contains five elements:

—The first concerns the nature of the act (“a unilateral statement”);

—The second concerns its name (“however phrased or named”);

—The third concerns its author (“made by a State or an international organization”);

—The fourth concerns when it should be made (when expressing consent to be bound<sup>267</sup>); and

—The fifth concerns its content or object, defined in relation to the objective pursued by the author of the reservation (“whereby it purports to exclude or to modify the legal effect of certain provisions of the

treaty in their application to that State or international organization”<sup>268</sup>).

(3) However, the Commission considered that the definition of objections should not necessarily include all these elements, of which some are specific to reservations and some deserve to be further clarified for the purpose of the definition of objections.

(4) It appeared, in particular, that it would be better not to mention the moment when an objection can be formulated; the matter is not clearly resolved in the 1969 and 1986 Vienna Conventions, and it would be preferable to examine it separately and seek to respond to it in a separate draft guideline.<sup>269</sup>

(5) Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

(6) With regard to the first element, the provisions of the 1969 and 1986 Vienna Conventions leave not the slightest doubt: an objection emanates from a State or an international organization and can be withdrawn at any time.<sup>270</sup> However, this does not resolve the very sensitive question as to which categories of States or international organizations can formulate an objection.

(7) At this stage, the Commission does not consider it necessary to include in the definition the detail found in article 20, paragraph 4 (b), of the 1986 Vienna Convention, which refers to a “contracting State”<sup>\*</sup> and a “contracting organization”<sup>\*</sup>.<sup>271</sup> There are two reasons for this:

(a) On the one hand, article 20, paragraph 4 (b), settles the question of whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question of whether it is possible for a State or an international organization that is not a contracting party in the meaning of article 2 (f) of the Convention to make an objection; the possibility that such a State or organization might formulate an objection cannot be ruled out, its being understood that the objection would not produce the effect provided for in article 20, paragraph 4 (b), until the State or organization has become a “contracting party”. Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to “a State or an international organization objecting to

<sup>268</sup> 1986 Vienna Convention, art. 2, para. 1 (d); see also draft guideline 1.1.1 [1.1.4].

<sup>269</sup> The Commission proposes to examine this question at its next session.

<sup>270</sup> See articles 20, paragraph 4 (b), 21, paragraph 3, and 22, paragraphs 2–3 (b) of the 1969 and 1986 Vienna Conventions. On this subject, see: R. Baratta, *Gli effetti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 341, and R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3 (1970), p. 293 at p. 313. It does not follow, however, that, like a reservation, an objection cannot be formulated jointly by several States or international organizations. This possibility will be considered at a later date.

<sup>271</sup> Article 20, paragraph 4 (b), of the 1969 Vienna Convention speaks only of the “contracting State”.

<sup>266</sup> The Commission reserves the right to move these draft guidelines to chapter 1 (Definitions) when it puts the “finishing touches” to the Guide to Practice.

<sup>267</sup> See also draft guideline 1.1.2.

a reservation” without further elaboration; this aspect deserves to be studied separately;

(b) On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation; it would not seem helpful to make the definition of objections more cumbersome by proceeding differently.

(8) With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term “treaty”,<sup>272</sup> which “means an international agreement ... whatever its particular designation”.<sup>273</sup> Likewise, a reservation is defined therein as “a unilateral statement, however phrased or named”,<sup>274</sup> and the Commission used the same term to define interpretative declarations.<sup>275</sup> The same should apply to objections; here again, “it is the intention that counts”. The question remains, however, as to what this intention is; this problem is at the heart of the definition proposed in draft guideline 2.6.1.

(9) At first sight, the word “objection” has nothing mysterious about it. In its common meaning, it designates a “reason which one opposes to a statement in order to counter it”.<sup>276</sup> From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the “opposition expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject”.<sup>277</sup> The same work defines “objection to a reservation” as follows: “Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States”.<sup>278</sup>

(10) This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions,

<sup>272</sup> The appropriateness of describing a single word as a “term” may be questionable, but as this terminological inflection is enshrined in custom it does not seem advisable to question it.

<sup>273</sup> Art. 2, para. 1 (a), of the 1969 Vienna Convention. See also, for example, the Judgment of 1 July 1994 of ICJ in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, I.C.J. Reports 1994, p. 112 at p. 120, para. 23: “[I]nternational agreements may take a number of forms and be given a diversity of names.”

<sup>274</sup> Art. 2, para. 1 (d) of the 1969 Vienna Convention.

<sup>275</sup> See draft guideline 1.2 and the commentary thereon in *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103 (in particular, paras. (14)–(15) of the commentary); see also the examples of “renaming” in this commentary and in the commentary on draft guideline 1.3.2 [1.2.2] (Phrasing and name), *ibid.*, pp. 109–111.

<sup>276</sup> *Grand Larousse encyclopédique*, vol. 7 (Paris, Larousse, 1963).

<sup>277</sup> J. Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 763.

<sup>278</sup> *Ibid.*, p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation. This possibility is reflected in the last phrase of the definition in draft guideline 2.6.1, according to which, in making an objection, the author may seek “to exclude the application of the treaty as a whole, in relations with the reserving State or organization”. In such a case, the intention of the author of the unilateral statement to object to the reservation is in no doubt.

(11) This might not be true of all categories of reactions to a reservation, which might show misgivings on the part of their authors without amounting to an objection as such.

(12) As the court of arbitration which settled the dispute between France and the United Kingdom of Great Britain and Northern Ireland concerning the delimitation of the continental shelf in the *English Channel* case stated in its decision of 30 June 1977:

Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.<sup>279</sup>

In this case, the court did not expressly take a position on the nature of the United Kingdom’s “reaction”, but it “acted as if it were an objection”,<sup>280</sup> namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.

(13) The award has been criticized in that regard,<sup>281</sup> but it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows: “The Government of the United Kingdom are unable to accept reservation (b).”<sup>282</sup> The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

(14) As the Franco-British court of arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the 1969 and 1986 Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example:

In 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to ECHR. By making this reservation, Portugal intended to exclude the sweeping expropriation and

<sup>279</sup> *English Channel* (see footnote 244 above), p. 66, para. 39.

<sup>280</sup> P. H. Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”, *Annuaire français de droit international*, vol. 24 (1978), p. 29 at p. 45.

<sup>281</sup> *Ibid.*

<sup>282</sup> *English Channel* (see footnote 244 above), p. 33, para. 40.

nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.<sup>283</sup>

(15) The following examples can be interpreted in the same way:

- The communications whereby a number of States indicated that they did not regard “the statements<sup>[284]</sup> concerning paragraph (1) of article 11 [of the Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People’s Republic as modifying any rights or obligations under that paragraph”,<sup>285</sup> the communications could be seen as interpretations of the statements in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;<sup>286</sup>
- The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, in which the United States Government says that it understands the reservation “to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth); *to the extent that the reservation is intended to apply\** other than to the extradition of Colombian nationals by birth, the Government of the United States

*objects to the reservation*”<sup>287</sup>; this is an example of a “conditional acceptance” rather than an objection strictly speaking; or

- The communications of Greece, Norway and the United Kingdom concerning the declaration of Cambodia on the Convention on the International Maritime Organization.<sup>288</sup>

(16) Such “quasi-objections” have tended to proliferate in recent years with the growth of the practice of the “reservations dialogue”. What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but they may—and often do—open a dialogue that might indeed lead to an objection, although it might also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child clearly falls into the first category and undoubtedly constitutes an objection:

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*.<sup>\*</sup> The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.<sup>289</sup>

(17) Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed toward the same purpose, can be considered

<sup>283</sup> J. Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg, Council of Europe Publishing, 1999), p. 106; footnotes omitted.

<sup>284</sup> These statements, in which the parties concerned explained that they considered “that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State”, they expressly termed “reservations” (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2004*, vol. I (United Nations publication, Sales No. E.05.V.3), pp. 90–92).

<sup>285</sup> *Ibid.*, p. 93 (Australia); see also pp. 93–94 (Canada), p. 94 (Denmark, France), p. 95 (Malta), p. 96 (New Zealand) and p. 97 (Thailand, United Kingdom).

<sup>286</sup> *Ibid.*, statements by Greece (p. 95), Luxembourg (p. 95) and the Netherlands (pp. 95–96), or the United Republic of Tanzania (p. 97) or the more ambiguous statement by Belgium (p. 93). See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention (*ibid.*, vol. II (United Nations publication, Sales No. E.05.V.3), p. 360) or the reaction of Norway to the corrective “declaration” of France dated 11 August 1982 regarding the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation (*Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 2000*, p. 81, footnote 1).

<sup>287</sup> *Multilateral Treaties ...* (see footnote 284 above), pp. 450–451. Colombia subsequently withdrew the reservation (*ibid.*, p. 451, note 11).

<sup>288</sup> *Ibid.*, vol. II (footnote 286 above), p. 9, note 12.

<sup>289</sup> *Ibid.*, vol. I (footnote 284 above), p. 318. The full text of this objection reads as follows:

“The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.

“The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

“In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*.<sup>\*</sup> The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

“The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].”

For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden, and the communications of Belgium and Denmark (*ibid.*, pp. 317–322). Malaysia subsequently withdrew part of its reservations (p. 331, note 27).”



an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia, and suggests instead a waiting stance:

Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law *cannot be made without further clarification*. \*

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question *if*\* the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless*\* Malaysia ..., *by providing additional information or through subsequent practice*\*, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].<sup>290</sup>

Here again, rather than a straightforward objection, the statement can be considered to be a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

(18) Such statements pose problems comparable to those raised by communications in which a State or an international organization "reserves its position" regarding the validity of a reservation made by another party, particularly with regard to its validity *ratione temporis*. For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserve[s] all rights regarding the reservations made by the Government of Venezuela on ratifying [the Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".<sup>291</sup> The same could be said of the statement of the United Kingdom to the effect that it was "not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of

a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety".<sup>292</sup> Similarly, the nature of the reactions of several States<sup>293</sup> to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe is not easy to determine. These States, using a number of different formulas, communicated to the Secretary-General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government's reservations".<sup>294</sup> It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance. In contrast, an objection involves taking a formal position seeking to prevent the reservation from having the effects intended by its author.

(19) It does not follow that reactions, of the type mentioned above,<sup>295</sup> which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization, are prohibited or even that they produce no legal effects. However, such reactions are not objections within the meaning of the 1969 and 1986 Vienna Conventions and their effects relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue" that the other parties to the treaty try to start up with the author of the reservation. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.<sup>296</sup>

(20) As to the first point—the description of the reaction—the most prudent solution is certainly to use the noun

<sup>292</sup> *Multilateral Treaties* ..., vol. I (see footnote 284 above), p. 192. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid.*, pp. 188–189); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant has more the appearance of an interpretation of the reservations in question (*ibid.*).

<sup>293</sup> Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (paragraph 2 of draft guideline 1.4.6 [1.4.6–1.4.7]), but the example given by Polakiewicz (see footnote 283 above, p. 107) is nonetheless striking by analogy.

<sup>294</sup> Statement of Luxembourg. The text of these different statements is reproduced in the judgment of 23 March 1995 of ECHR in the case of *Loizidou v. Turkey* (Preliminary Objections), Series A, vol. 310, pp. 12–13, paras. 18–24.

<sup>295</sup> Commentary to the present draft guideline, paras. (13)–(17) above.

<sup>296</sup> See in this respect the "Model response clauses to reservations" appended to recommendation No. R (99) 13, adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word "objection". On the disadvantages of vague and imprecise objections, see Horn, *op. cit.*, (footnote 291 above), pp. 184–185; see also pages 191–197 and 221–222.

<sup>290</sup> *Ibid.*, pp. 317–318. See also the reaction of Sweden to Canada's reservation to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, *ibid.*, vol. II (footnote 286 above), p. 468.

<sup>291</sup> *Ibid.*, vol. II, pp. 268–269. See also the examples given by F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, T.M.C. Asser Institute, Swedish Institute of International Law, Studies in International Law, No. 5, 1988), p. 318 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf) and p. 336.



“objection” or the verb “to object”. Other terms such as “opposition/to oppose”,<sup>297</sup> “rejection/to reject”,<sup>298</sup> and “refusal/to refuse” must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions such as “the Government of ... does not accept the reservation ...”<sup>299</sup> or “the reservation formulated by ... is impermissible/unacceptable/inadmissible”.<sup>300</sup> Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is “prohibited by the treaty”,<sup>301</sup> “entirely void”<sup>302</sup> or simply “incompatible with the object and purpose”<sup>303</sup> of the treaty, which is extremely frequent. In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and 1986 Vienna Conventions; in such cases, a reservation cannot be formulated, and when a contracting party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

(21) The fact remains that in some cases States intend their objections to produce effects other than those expressly provided for in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions. The question that then arises is whether, strictly speaking, these can be called objections.

(22) This provision envisages only two possibilities:

(a) Either “the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation”, which is the “minimum” effect of an objection;

(b) Or, if the State or international organization formulating an objection to a reservation clearly states that such is its intention, in accordance with the provisions of

article 20, paragraph 4 (b), the treaty does not enter into force between itself and the reserving State or organization; this is generally known as the “maximum” effect of an objection.<sup>304</sup>

(23) However, there is in practice an intermediate stage between the “minimum” and “maximum” effects of the objection, as envisaged by this provision, since there are situations in which a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21, paragraph 3.<sup>305</sup>

(24) Similarly, the objecting State may intend to produce what is described as a “super-maximum” effect,<sup>306</sup> consisting in the determination not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. This was the case, for example, with Sweden’s objection of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol to the Convention on the Rights of the Child with regard to the sale of children, child prostitution and the use of children in pornography:

This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.<sup>307</sup>

(25) The Commission is aware that the validity of such objections has been questioned.<sup>308</sup> However, it sees no need to take a position on this point for the purpose of defining objections; the fact is that the authors intend their objection to produce such effects, intermediate or “super-maximum”, and this is all that matters at this stage. Just as the definition of reservations does not

<sup>297</sup> See the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child (footnote 289 above).

<sup>298</sup> See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties ...*, vol. I (footnote 284 above), p. 95).

<sup>299</sup> See, for example, the objections of the Australian Government to various reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, p. 129) and of the Government of the Netherlands to numerous reservations to the Convention on the High Seas (*ibid.*, vol. II (footnote 286 above), p. 275). See also the British objection to French reservation (b) to article 6 of the Convention on the Continental Shelf (footnote 282 above).

<sup>300</sup> See, for example, the reaction of Japan to reservations made to the Convention on the High Seas (*Multilateral Treaties ...*, vol. II (footnote 286 above), p. 275), or that of Germany to the Guatemalan reservation to the Convention relating to the Status of Refugees (*ibid.*, vol. I (footnote 284 above), pp. 368–369).

<sup>301</sup> See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea (*ibid.*, vol. II (footnote 286 above), pp. 312–314).

<sup>302</sup> See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (*ibid.*, vol. I (footnote 284 above), p. 598).

<sup>303</sup> See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, p. 263), and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child (*ibid.*, p. 318).

<sup>304</sup> See R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena* (University of Murcia, 2004), pp. 279–280; and Horn, *op. cit.* (footnote 291 above), pp. 170–172.

<sup>305</sup> See, for example, Canada’s objection to Syria’s reservation to the 1969 Vienna Convention: “Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable” (*Multilateral Treaties ...*, vol. II (footnote 286 above), p. 356). For other examples and for a discussion of the permissibility of this practice, see below. See also R. W. Edwards Jr., “Reservations to treaties”, *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 400.

<sup>306</sup> See B. Simma, “Reservations to human rights treaties: some recent developments”, in G. Hafner, ed., *Liber Amicorum—Professor Ignaz Seidl-Hohenveldern: in honour of his 80th birthday* (The Hague, Kluwer, 1998), p. 659 at pp. 667–668; and Riquelme Cortado, *op. cit.* (footnote 304 above), pp. 300–305.

<sup>307</sup> *Multilateral Treaties ...*, vol. I (footnote 284 above), p. 348; see also Norway’s objection of 30 December 2002 (*ibid.*).

<sup>308</sup> The argument for their validity can be based on the position adopted by the organs of the European Convention on Human Rights and General Comment No. 24 of the Human Rights Committee (see footnote 250 above), but is hardly compatible with paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights, adopted in 1997 (see footnote 232 above) or with the principle *par in parem non habet jurisdictionem*. “To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties” (*English Channel case* (see footnote 244 above), p. 42, para. 60).

prejudge their validity,<sup>309</sup> so, in stating in draft guideline 2.6.1 that, by objecting, “the ... State or the ... organization purports to exclude or to modify the legal effects of the reservation”, the Commission has endeavoured to take a completely neutral position with regard to the validity of the effects that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.

(26) This being so, despite the contrary opinion of some writers,<sup>310</sup> no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific reservation is expressly authorized by a treaty,<sup>311</sup> the other contracting parties are always free to reject it and even not to enter into treaty relations with its author. A statement drafted as follows: “The Government ... intends to formulate an objection to the reservation made by ...”,<sup>312</sup> is as valid and legally sound as a statement setting forth a lengthy argument.<sup>313</sup> There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author, and the Commission envisages adopting a guideline that encourages States to do so.

(27) The Commission should also point out that it is aware that the word “made”, in the proposed definition in draft guideline 2.6.1 (“a unilateral statement ... *made*\* by a State or an international organization”) is open to discussion: taken literally, it might be understood as

<sup>309</sup> See draft guideline 1.6 (Scope of definitions) above: “The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.”

<sup>310</sup> Liesbeth Lijnzaad (*Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht, Martinus Nijhoff, 1995), p. 45) cites in this respect Rolf Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen* (Berlin, Springer-Verlag, 1986), p. 183) and Renata Szafarz, *loc. cit.* (footnote 270 above), p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, *inter alia*, Horn, *op. cit.* (footnote 291 above), p. 131 at pp. 209–219.

<sup>311</sup> See in this respect the arbitral award of 30 June 1977 in the *English Channel* case (footnote 244 above): “Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance” (p. 32, para. 39). Imbert even thinks that an expressly authorized reservation can be objected to (*Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 151–152).

<sup>312</sup> Among the many examples, see the statement by Australia concerning the reservation of Mexico to the Convention on the High Seas (*Multilateral Treaties ...*, vol. II (footnote 286 above, p. 274) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, vol. I (footnote 284 above), pp. 144–149).

<sup>313</sup> For an example, see the objection by Finland to the reservation of Malaysia to the Convention on the Rights of the Child (footnote 289 above).

meaning that the objection produces effects *per se* without any other condition having to be met; yet objections, like reservations, must be permissible. The word “made” was chosen for reasons of symmetry, because it appears in the definition of reservations. On the other hand, it seemed preferable to the Commission to indicate that the objection was made “in response to a reservation to a treaty formulated by another State or international organization”, as a reservation only produces effects if it is “established with regard to another party in accordance with articles 19, 20 and 23”.<sup>314</sup>

## 2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation

**“Objection” may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.**

### Commentary

(1) Under draft guidelines 2.3.1–2.3.3, the Contracting Parties may also “object” not only to the reservation itself but also to the late formulation of a reservation.

(2) In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word “objects” to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content, some members “wondered whether it was appropriate to use the word ‘objects’ in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable”.<sup>315</sup>

(3) However, while it is true that there appears to be no precedent in which a State or an international organization, without objecting to the late formulation of a reservation, nevertheless objected to it, this hypothesis cannot be excluded. Guideline 2.6.2 draws attention to this distinction.

(4) The members of the Commission who had expressed their opposition to the inclusion of the practice of the late formulation of reservations in the Guide to Practice<sup>316</sup> reiterated their opposition to its inclusion.

<sup>314</sup> Art. 21, para. 1, of the 1969 and 1986 Vienna Conventions.

<sup>315</sup> *Yearbook ... 2001*, vol II (Part Two) and corrigendum, p. 189 (para. (23) of the commentary to draft guideline 2.3.1).

<sup>316</sup> *Ibid.*, p. 185, (para. (2) of the commentary to draft guideline 2.3.1).

## Chapter XI

### FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

#### A. Introduction

439. Following its consideration of a feasibility study<sup>317</sup> that had been undertaken at its fifty-second session (2000) on the topic “Risks ensuing from fragmentation of international law”, the Commission decided to include the subject in its long-term programme of work.<sup>318</sup> At its fifty-fourth session (2002), the Commission included the topic in its programme of work and established a Study Group. It also decided to change the title to “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”.<sup>319</sup> In addition, the Commission agreed on a number of recommendations, including on a series of studies to be undertaken, commencing with a study by the Chairperson of the Study Group entitled “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

440. At its fifty-fifth session (2003), the Commission appointed Mr. Martti Koskenniemi as Chairperson of the Study Group. The Study Group set a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003–2006), distributed among members of the Study Group work on the other studies agreed upon in 2002,<sup>320</sup> and decided upon the methodology to be adopted for that work. The Study Group also held a preliminary discussion of an outline produced by the Chairperson of the Study Group on the subject “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

441. At its fifty-sixth session (2004), the Commission reconstituted the Study Group. It held discussions on the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”, as well as discussions on the outlines prepared in respect of the other remaining studies.<sup>321</sup>

#### B. Consideration of the topic at the present session

442. At the current session, the Study Group was reconstituted and held 8 meetings on 12, 17 and 23 May, 2 June, 12, 18 and 27 July and 3 August 2005. It had before it the following: (a) a memorandum on regionalism in the context of the study on “The function and scope of the *lex specialis* rule and the question of self-contained regimes”; (b) a study on the interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c) of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community; (c) a study on the application of successive treaties relating to the same subject matter (art. 30 of the Convention); (d) a study on the modification of multilateral treaties between certain of the parties only (art. 41 of the Convention); and (e) a study on hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules. The Study Group also had before it an informal paper on the “Disconnection clause”.<sup>322</sup>

443. At its 2859th, 2860th and 2864th meetings, on 28–29 July and on 3 August 2005, the Commission held an exchange of views on the topic on the basis of a briefing by the Chairperson of the Study Group on the status of work of the Study Group.

444. At its 2865th meeting, on 4 August 2005, the Commission took note of the report of the Study Group (A/CN.4/L.676 and Corr.1), reproduced in section C below.

#### C. Report of the Study Group

##### 1. GENERAL COMMENTS AND THE PROJECTED OUTCOME OF THE WORK OF THE STUDY GROUP

445. Following the pattern of the previous year, the Study Group commenced its discussions with a general review of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session (A/CN.4/549, sect. E).

446. The Study Group took note of the broad endorsement of its work thus far in the deliberations of the Sixth Committee. The Group confirmed its wish to complete its task on the basis of the schedule, programme of work and

<sup>317</sup> G. Hafner, “Risks ensuing from fragmentation of international law”, *Yearbook ... 2000*, vol. II (Part Two), annex, p. 143.

<sup>318</sup> *Ibid.*, p. 131, para. 729.

<sup>319</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 97, paras. 492–494.

<sup>320</sup> See *Yearbook ... 2003*, vol. II (Part Two), p. 98, para. 427.

<sup>321</sup> (a) The interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community; (b) the application of successive treaties relating to the same subject matter (art. 30 of the Convention); (c) the modification of multilateral treaties between certain of the parties only (art. 41 of the Convention); and (d) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules (*ibid.*).

<sup>322</sup> The documents are available from the Codification Division of the Office of Legal Affairs.



methodology agreed upon during the 2003 session of the Commission.<sup>323</sup>

447. The Study Group reaffirmed its intention to focus on the substantive aspects of fragmentation in the light of the 1969 Vienna Convention, while leaving aside institutional considerations pertaining to fragmentation. Taking note of the deliberations in the Sixth Committee, it reiterated its intention to attain an outcome which would be concrete and of practical value, especially for legal experts in foreign offices and international organizations. Its work should thus contain critical analyses of the experience of fragmentation in various international organs and institutions and it should yield an outcome that would be helpful in providing resources for judges and administrators coping with questions such as conflicting or overlapping obligations emerging from different legal sources. This would require a description of the actual problems in their social context.

448. The Study Group reaffirmed its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One part would be a relatively large analytical study on the question of fragmentation, composed on the basis of the individual outlines and studies submitted by individual members of the Study Group during 2003–2005 and discussed in the Group. This would consist of a description and analysis of the topic from the point of view of, in particular, the 1969 Vienna Convention. The other part would consist of a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group. This would be a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help in thinking about and dealing with the issue of fragmentation in legal practice. In 2006 a draft of both documents would be submitted by the Study Group for adoption by the Commission.

## 2. DISCUSSION OF A MEMORANDUM ON "REGIONALISM" IN THE CONTEXT OF THE STUDY ON "THE FUNCTION AND SCOPE OF THE *LEX SPECIALIS* RULE AND THE QUESTION OF 'SELF-CONTAINED REGIMES'"

449. The Study Group continued its substantive discussion on the study of the function and scope of the *lex specialis* rule and the question of "self-contained regimes" with a review of a memorandum on regionalism by its Chairperson.

450. It was noted in the memorandum that the expression "regionalism" did not figure predominantly in treatises of international law and in the cases where it was featured it rarely took the shape of a "rule" or a "principle". It was often raised in discussions concerning the universality of international law, in the context of its historical development and the influences behind its substantive parts. It arose only in rare cases in a normative sense as a claim about regional *lex specialis*.

451. There were at least three distinct ways in which "regionalism" was usually understood, namely: (a) as a set of distinct approaches and methods for examining international law, (b) as a technique for international law making, and (c) as the pursuit of geographical exceptions to universal rules of international law.

452. The first—regionalism as a set of approaches and methods for examining international law—was the most general and broadest sense. It was used to denote particular orientations of legal thought or historical and cultural traditions. Such is the case with the "Anglo-American" tradition or the "continental" tradition of international law,<sup>324</sup> or "Soviet" doctrines<sup>325</sup> or "Third World approaches"<sup>326</sup> to international law.

453. Although it is possible to trace the sociological, cultural and political influence that particular regions have had on international law, such influences do not really address aspects of fragmentation such as come under the mandate of the Study Group. These remain historical or cultural sources or more or less continuing political influences behind international law. There is a very strong presumption among international lawyers that, notwithstanding such influences, the law itself should be read in a universal fashion.<sup>327</sup> There is no serious claim that some rules should be read or used in a special way because they emerged as a result of a "regional" inspiration.

454. Very often regional particularity translates itself or becomes apparent as a functional one: a regional environmental or a human rights regime, for example, may be more important because of its environmental or human rights focus than as a regional regime. This type of differentiation does not need further separate treatment since it already forms the gist of the study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" that was exhaustively debated in the Study Group last year.<sup>328</sup>

455. The second type of regionalism—a regional approach to international law-making—conceives

<sup>324</sup> See generally H. Lauterpacht, "The so-called Anglo-American and Continental schools of thought in international law", *British Year Book of International Law*, 1931, vol. 12, pp. 31–62. See also, for example, E. D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains", *Collected Courses of The Hague Academy of International Law*, 1932 (The Hague, Martinus Nijhoff), vol. 40, pp. 305–395.

<sup>325</sup> See K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* (Leiden, Sijthoff, 1970); and T. Långström, *Transformation in Russia and International Law* (Leiden, Martinus Nijhoff, 2003).

<sup>326</sup> See A. Anghie and B. S. Chimni, "Third world approaches to international law and individual responsibility in international conflict", in S. R. Ratner and A.-M. Slaughter, eds., *The Methods of International Law* (Washington, D.C., American Society of International Law, 2004), pp. 185–210.

<sup>327</sup> See generally R. Y. Jennings, "Universal international law in a multicultural world", in M. Bos and I. Brownlie, eds., *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (Oxford, Clarendon Press, 1987), pp. 39–51.

<sup>328</sup> For distinctions of special regimes, in particular those based on functional specialization, see the preliminary report by Mr. M. Koskeniemi, Chairperson of the Study Group, on the study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

<sup>323</sup> *Yearbook ... 2003*, vol. II (Part Two), p. 98, paras. 424–428.



regions as privileged forums for international law-making because of the relative homogeneity of the interests and actors concerned. It is sometimes suggested, for example, that international law should be developed in a regional context, since its implementation would thus be more efficient and equitable and the relevant rules would be understood and applied in a coherent manner. Regionalism in this sense is often propounded by sociological approaches to international law.<sup>329</sup> No doubt it is sometimes advisable to limit the application of novel rules to a particular region. Much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region. However, this sociological or historical perspective, too, falls largely outside the focus of the Study Group. Moreover, the legislative concern in such cases is also often more significant by virtue of the nature of the rules being propounded (that is to say, as rules about “trade” or “environment”) than owing to whatever regional linkage is being proposed.

456. The third situation—regionalism as the pursuit of geographical exceptions to universal rules of international law—seems more relevant in this context. It could be analysed: (a) in a positive sense, as a rule or a principle with a regional sphere of validity in relation to a universal rule or principle, or (b) in a negative sense, as a rule or a principle that imposes a limitation on the validity of a universal rule or principle. In the former case, the rule in question would be binding only on the States of the particular region, while in the latter sense, States concerned would be exempted from the application of an otherwise universal rule or principle. As far as this second (“negative”) sense is concerned, it does not seem to have any independence from the more general question, debated by the Study Group last year, of the possibility and consequences of (a regional) *lex specialis*: the conditions under which a regional rule may derogate from a universal one seem analogous with or identical to the problems dealt with last year.<sup>330</sup>

457. Doubtless, States in a region may, by treaty or otherwise, establish a special law applicable in their mutual relations. In this regard, the “positive sense” merely describes a truism. However, there is a stronger claim to the effect that there may also come into existence types of regional law which are binding on all the States of the region, or other States in their relations with the States of the region, independently of the consent of the latter.

458. Such a claim was dealt with, albeit inconclusively, by ICJ in the *Asylum*<sup>331</sup> case, as well as in the *Haya de la Torre* case,<sup>332</sup> where Colombia contended *inter alia* that a “regional law” had emerged on diplomatic protection,<sup>333</sup>

with the purpose of deviating from the general law. Such law was applicable, in the view of Colombia, even to States of the region that did not accept it.<sup>334</sup> In his dissenting opinion in the *Asylum* case, Judge Alvarez asserted that such rule was not only “binding upon all the States of the New World”, although it “need not be accepted by all [of them]”, but also on all other States “in matters affecting America”.<sup>335</sup> However, ICJ did not pronounce on the theoretical possibility of the existence of rules binding automatically on States of a region and binding other States in their relationship with those States. It treated the claim by Colombia as a claim about customary law and dismissed it on account of Colombia’s having failed to produce evidence of its existence. However, it is very difficult to accept—and there are no uncontested cases on this—that a regional rule might be binding on States of a region, or on other States, without the consent of the latter. Apart from other considerations, there are no unequivocal ways of determining whether or not particular States belong to particular geographical regions.

459. Attention was also drawn to two specific issues in the context of regionalism as the pursuit of geographical exceptions to universal rules, which may still require separate treatment, namely: (a) the question of universalism and regionalism in the context of human rights law, and (b) the relationship between universalism and regionalism in the context of the collective security system under the Charter of the United Nations. The former—universalism and regionalism in human rights—raised philosophical questions of cultural relativism which fall outside the scope of the Study. In any case, regional human rights regimes may also be seen as the varying, context-sensitive implementation and application of shared standards, and not as exceptions to general norms. This would imply that such matters would fall under the more general question of the relationship between the general and the special law in the study on the function and scope of the *lex specialis*.

460. The latter—collective security under Chapter VIII of the Charter of the United Nations—raised the question of the priority of competence between regional agencies and arrangements and the Security Council in taking enforcement action. In view of Article 52, paragraph 2, of the Charter, any action by such agencies or arrangements may not be considered an “exception” to the competence of the Security Council. Chapter VIII of the Charter should therefore be seen as a set of functional provisions that seek to deal at the most appropriate level with particular issues relevant to notions of “subsidiarity”.

461. The Study Group expressed support for the general orientation of the memorandum. While members noted that “regionalism” generally fell under the problem of *lex specialis*, some still felt that this was not all that could be said about it. In some fields such as trade, for example, regionalism was influencing the general law in such great measure that it needed special highlighting.

<sup>329</sup> See M. G. Scelle, *Cours de droit international public* (Paris, Domat-Montchrestien, 1948), p. 253. See also H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 1st ed. (London, Macmillan, 1977), at pp. 305–306.

<sup>330</sup> See the preliminary report by Mr. M. Koskenniemi, Chairperson of the Study Group, on the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

<sup>331</sup> *Asylum, Judgment, I.C.J. Reports 1950*, p. 266.

<sup>332</sup> *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71.

<sup>333</sup> See the comments of the Government of Colombia on the existence of American international law, Judgments of 20 and 27

November 1950, *I.C.J. Pleadings, Asylum*, Vol. I, p. 316, at pp. 330–334.

<sup>334</sup> See the allegations of the Government of Colombia in Judgment of 13 June 1951, *I.C.J. Pleadings, Haya de la Torre*, p. 17, at pp. 25–27.

<sup>335</sup> *Asylum* (see footnote 331 above), p. 294.

Practices by the European Union as well as States of the Latin American region were especially emphasized. Although the opinion was expressed that a study on the role and nature of European law would be worthwhile, most members felt that this could not be accomplished in the time available.

462. It was pointed out that human rights law, for example, had always been fragmented into different compartments: political rights, economic rights, rights of the third generation, and so on. It was agreed, however, that the Study Group should not embark upon a discussion of problems of cultural relativism in human rights. In regard to security issues, the opinion was expressed that although the principle of non-intervention was more entrenched in the Western hemisphere than elsewhere, there might be a need to mention recent activities of regional organizations such as the African Union in peacekeeping and peace enforcement. However, others expressed the view that the regional approaches under Chapter VIII of the Charter of the United Nations did not emerge as “fragmentation” but concerned the application of specific Charter provisions.

463. The Study Group held a separate discussion, on the basis of a paper by one of its members, Mr. Economides, of the so-called “disconnection clause” that had been inserted in many multilateral conventions, according to which in their relations *inter se* certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves. This clause had often been inserted at the request of the members of the European Union. In particular, three types of such clauses had typically been created. As a general rule, the exclusion of the provisions of the relevant treaty was complete;<sup>336</sup> in exceptional cases, it was partial,<sup>337</sup> or optional.<sup>338</sup> The objective of such clauses was to ensure that European law takes precedence over the provisions of the multilateral convention in the relations among States members of the Community and between those States and the Community itself. The clause had no effect on the rights and obligations of States not members of the Community, nor on those of States members of the Community towards those States, nor on the rights and obligations of the Community itself.

<sup>336</sup> For example, article 27, paragraph 1, of the European Convention on transfrontier television provides:

“In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.”

See also article 25, paragraph 2, of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

<sup>337</sup> Article 20, paragraph 2, of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters provides:

“In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18.”

<sup>338</sup> Article 13, paragraph 3, of the UNIDROIT Convention on stolen or illegally exported cultural objects provides:

“In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.”

464. Some members felt that the proliferation of such clauses was a significant negative phenomenon. The opinion was even expressed that such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, such clauses were still duly inserted into the relevant conventions and their validity thus followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group agreed, however, that such clauses might sometimes erode the coherence of a treaty. It was important to ensure that they would not be used to defeat the object and purpose of the treaty. Nonetheless, it was felt impossible to determine their effect *in abstracto*.

465. It was also pointed out that in some situations the result may not be as problematic, particularly if the obligations assumed by the parties under the disconnection clause were intended to deal with the technical implementation of the provisions of the multilateral convention or are more favourable than those of the regime from which the disconnection clause departs.

466. On the basis of the discussion, the Study Group agreed that “regionalism” should not have a separate entry in the final substantive report. Rather, various aspects of the memorandum and the debate would be used as examples in the overall schema of the topic, especially in connection with the *lex specialis* rule. Mention of regionalism as a factor contributing to fragmentation should also be included in the introduction to the final report. It should be borne in mind, however, that its role was not only negative. It was often useful as a form of implementing general law (as in the United Nations Convention on the Law of the Sea, for instance). The question of the disconnection clause as a special treaty technique used by the European Union would be dealt with in the context of the analyses of understanding various relationships between the general law and the special law in the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

### 3. DISCUSSION ON THE STUDY ON THE INTERPRETATION OF TREATIES IN THE LIGHT OF “ANY RELEVANT RULES OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES” (ART. 31, PARA. 3 (C), OF THE 1969 VIENNA CONVENTION), IN THE CONTEXT OF GENERAL DEVELOPMENTS IN INTERNATIONAL LAW AND CONCERNS OF THE INTERNATIONAL COMMUNITY

467. The Study Group also discussed a revised paper by Mr. Mansfield on “The interpretation of treaties in the light of ‘any relevant rules of international law applicable in the relations between the parties’ (art. 31, para. 3 (c), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community.”<sup>339</sup> It was recalled that according to article 31, paragraph 3 (c), of the Convention, treaties were to be interpreted within the context of “any

<sup>339</sup> See also C. McLachlan, “The principle of systemic integration and article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54, part 2 (April 2005), pp. 279–319.

relevant rules of international law applicable in the relations between the parties". The provision thus helped to place the problem of treaty relations in the context of treaty interpretation. It expressed what could be called a principle of "systemic integration", that is to say, a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law—in other words, international law understood as a system. The negotiation of individual treaties usually took place as separate diplomatic and practical exercises, conducted by experts in the particular field of regulatory substance covered by the treaty. It was the objective of article 31, paragraph 3 (c), to connect the separate treaty provisions that followed from such exercises to each other as aspects of an overall aggregate of the rights and obligations of States. As an interpretative tool, the principle expresses the nature of a treaty as an agreement "governed by international law".<sup>340</sup>

468. The provision was not a panacea in reducing fragmentation, however. Indeed, article 31, paragraph 3 (c), of the 1969 Vienna Convention was not equipped as a technique to resolve conflicts or overlaps between rules of international law—it merely called upon lawyers to interpret treaties so as to ensure consistency with their normative environment. As such, the provision takes its place alongside a wide set of provisions in the Convention and pragmatic techniques of conflict resolution.<sup>341</sup>

469. In the past, article 31, paragraph 3 (c), of the 1969 Vienna Convention has not often been resorted to. Indeed, the article has been sometimes criticized for providing little guidance as to when and how it is to be used, what to do about overlapping treaty obligations, whether it also took account of customary rules and whether the "relevant rules of international law applicable in the relations between the parties" referred to the law in force at the conclusion of the treaty or otherwise.<sup>342</sup> However, recent practice has showed a considerably increased recourse to the provision. It has been resorted to, for example, by the Iran-United States Claims Tribunal,<sup>343</sup> ECHR,<sup>344</sup> arbitral tribunals established pursuant to

multilateral agreements,<sup>345</sup> and the Appellate Body within the WTO Dispute Settlement Understanding,<sup>346</sup> as well as ICJ.<sup>347</sup> Suggestions aiming to "operationalize" article 31, paragraph 3 (c), have been: (a) to reinstate the central role of general international law in treaty interpretation, (b) to locate the relevance of other conventional international law in this process, and (c) to shed light on the position of treaties in the progressive development of international law over time ("inter-temporality"). In this connection, the revised report by Mr. Mansfield offered a series of propositions for consideration.

470. First, according to the principle of "systemic integration", attention should, in the interpretation of a treaty, also be given to the rules of customary international law and general principles of law that are applicable in the relations between the parties to a treaty. This principle could be articulated as a negative as well as a positive presumption:

(a) *Negative*, in that entering into treaty obligations, the parties would be assumed not to have intended to act inconsistently with customary rules or with general principles of law; and

(b) *Positive*, in that parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way".<sup>348</sup>

471. The importance of custom and general principles is highlighted whenever a treaty provision is unclear or open-textured or when the terms used in the treaty have a recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer.<sup>349</sup> The process may on occasion involve extensive investigation of sources outside the treaty in order to determine the content of the applicable rule of custom or

<sup>340</sup> 1969 Vienna Convention, art. 2, para. 1 (a).

<sup>341</sup> These include the other techniques being discussed by the Study Group.

<sup>342</sup> See the separate opinion of Judge Weeramantry in the case concerning the *Gabčíkovo-Nagymaros Project* (footnote 175 above), p. 114. See also H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Three)", *British Year Book of International Law*, 1991, vol. 62, p. 58.

<sup>343</sup> See *Esfahanian v. Bank Tejarat* (1983) IUSCTR (Cambridge, Grotius, 1984), vol. 2, p. 157. See also Case No. A/18 (1984), *ibid.*, vol. 5, p. 251, at p. 260. The provision was also relied upon in a dissent in *Grimm v. Iran* (1983), *ibid.*, vol. 2, p. 78, at p. 82, on the question of whether a failure by Iran to protect an individual could constitute a measure affecting "property rights" of his wife. See also *Amoco International Finance Corporation v. Iran* (1987), *ibid.*, 1988, vol. 15, p. 189, at p. 222.

<sup>344</sup> *Golder v. United Kingdom*, Judgment of 21 February 1975, ECHR, Series A: Judgments and Decisions, vol. 18, and *Loizidou v. Turkey* (see footnote 250 above). See also *Fogarty v. United Kingdom*, ECHR, application No. 37112/97, Grand Chamber, Judgment of 21 November 2001, *Reports of Judgments and Decisions*, 2001–XI, p. 157; *McElhinney v. Ireland*, ECHR, application No. 31253/96, *ibid.*, p. 37; *Al-Adsani v. United Kingdom*, ECHR, application No. 35763/97, *ibid.*, p. 74; *Banković and Others v. Belgium and Others*, ECHR, application No. 52207/99, Judgment of 12 December 2001, 2001–XII, p. 333.

<sup>345</sup> Permanent Court of Arbitration: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, decision of 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 59. See also ILM, vol. 42 (2003), p. 1118. See further the International Tribunal for the Law of the Sea, *Mox Plant case* (Ireland v. United Kingdom), Request for Provisional Measures Order, 3 December 2001, *ITLOS Reports 2001*, p. 95; and Order No. 3 (24 June 2003), ILM (see above), p. 1187. See also *Pope and Talbot Inc v. Government of Canada* before the North American Free Trade Agreement Tribunal, Award on the merits (10 April 2001), *ICSID Reports*, vol. 7 (2005), p. 102; and award in respect of damages (31 May 2002), *ibid.*, p. 148. See also ILM, vol. 41 (2002), p. 1347.

<sup>346</sup> WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (WT/DS58/AB/R), of 12 October 1998; and *European Communities: Measures Concerning Meat and Meat Products (Hormones)*, (WT/DS26/AB/R, WT/DS48/AB/R), of 16 January 1998.

<sup>347</sup> *Oil Platforms* (see footnote 175 above). See also the separate opinion of Judge Weeramantry in the *Gabčíkovo-Nagymaros Project* case (see footnote 175 above), p. 88, at p. 114.

<sup>348</sup> *Pinson* case, Franco-Mexican Commission (Verzija President), in A. D. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases 1927–1928* (London, Longman, 1931): "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way." See also UNRIAA, vol. V (Sales No. 52.V.3), p. 422.

<sup>349</sup> For example, as in the construction of the terms "fair and equitable treatment" and "full protection and security" in *Pope and Talbot Inc. v. Government of Canada* (see footnote 345 above).



general principle (as in *Al-Adsani*<sup>350</sup> and *Oil Platforms*<sup>351</sup>). The significance of rules of customary international law and general principles of law in this process is in the fact that they perform a systemic or constitutional function in describing the operation of the international legal order.<sup>352</sup>

472. Secondly, where another treaty is applicable in the relations between the parties, this raises the question as to whether it is necessary that all the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes. Four answers to this question may be considered:

(a) That all parties to the treaty under interpretation should also be parties to any treaty relied upon for its interpretation.<sup>353</sup> This is a clear but very narrow standard. The resulting problems might be alleviated by making a distinction between using the other treaty for the purposes of *interpretation* or *application*. In any case, such other treaty may always be used as evidence of a common understanding between the parties;

(b) That the parties in the *dispute* are also parties to the other treaty. This approach would broaden the range of treaties potentially applicable for interpretation purposes. However, it would run the risk of inconsistent interpretations depending on the circumstances of the particular treaty partners in dispute;

(c) That the rule contained in a particular treaty be required to possess the status of customary international law.<sup>354</sup> This approach has the merit of rigour, but it might be inappropriately restrictive with regard to treaties which have wide acceptance in the international community (including by the disputing States) but are not in all respects stating customary international law (such as the United Nations Convention on the Law of the Sea);

(d) That although the complete identity of treaty parties would not be required, the other rule relied upon could be said to have been implicitly accepted or tolerated by all parties to the treaty under interpretation.<sup>355</sup>

<sup>350</sup> See footnote 344 above

<sup>351</sup> See footnote 175 above.

<sup>352</sup> Examples of customary rules include: the criteria of statehood (see *Loizidou v. Turkey* (footnotes 250 and 294 above)); the law of State responsibility (which has influenced both the reach of human rights obligations (see *Loizidou v. Turkey* and *Issa and Others v. Turkey*, application No. 31821/96, decision of 16 November 2004). See also the reliance on the public international law rules of jurisdiction in *Banković and Others v. Belgium and Others* (footnote 344 above), at pp. 351–352, paras. 59–60; and the law of economic countermeasures in the WTO Dispute Settlement Understanding; the law of State immunity; the use of force; and the principle of good faith (*United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 346 above)).

<sup>353</sup> This was the approach adopted by the GATT Panel Report, *United States: Restrictions on Imports of Tuna* (DS29/R of 16 June 1994), reproduced in ILM, vol. 33 (1994), p. 839, at p. 892, para. 5.19.

<sup>354</sup> See, for example, the emphasis placed in *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 346 above) on the fact that, although the United States had not ratified United Nations Convention on the Law of the Sea, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law.

<sup>355</sup> Pauwelyn supports this approach in the case of the WTO Covered Agreements. See J. Pauwelyn, *Conflict of Norms in Public International*

473. The third problem left open by the formulation of article 31, paragraph 3 (c), concerned inter-temporality, that is, the question as to whether, with regard to the other rules of international law in the interpretation of a treaty, the interpreter is limited to international law applicable at the time the treaty was adopted, or whether subsequent treaty developments may also be taken into account.<sup>356</sup> Here a distinction might be made between subsequent treaties which may affect the *application* of the treaty to be interpreted (the process of bringing the latter treaty *up to date*)<sup>357</sup> and those that may affect the *interpretation* of the treaty itself, that is to say, cases where the concepts in the treaty are themselves “not static but evolutionary”.<sup>358</sup> Although there was support for the principle of contemporaneity (that is, that only provisions contemporaneous to the treaty under interpretation should be taken into account), it could not be excluded *a priori* that the parties might intend the interpretation and application of a treaty to follow subsequent developments.

474. However, a safe guide to a decision on the matter may not be found in the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties’ intentions in this regard in the material sources referred to in articles 31 and 32 of the 1969 Vienna Convention, namely, in the terms themselves, the context, the object and purpose of the treaty and, where necessary, the *travaux préparatoires*.<sup>359</sup>

475. The Study Group welcomed the revised paper by Mr. Mansfield, in general endorsing in general terms the adoption of an interpretative approach to article 31, paragraph 3 (c) of the 1969 Vienna Convention, which may be of practical use to judges and administrators. The approach taken towards achieving systemic integration was felt to be consistent with the approach taken by the Study Group the previous year in its discussion of the Chairperson’s report on the *lex specialis* and the question of “self-contained regimes”.<sup>360</sup> Some members still felt that there was, perhaps, a need for a grounding of such a principle in the Convention itself. Accordingly, the Study Group preferred to refer, not to the “principle”, but to the “objective” of systemic integration. According

*Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), pp. 257–263.

<sup>356</sup> In the title to Mr. Mansfield’s study, the reference to interpretation “in the context of general developments in international law and concerns of the international community” refers to inter-temporality, a problem which was not expressly resolved by the Commission at the time when it framed the 1969 Vienna Convention.

<sup>357</sup> *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 345 above), p. 91, para. 103; or ILM (*ibid.*), p. 1138, para. 103.

<sup>358</sup> Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim’s International Law*, 9th ed. (Harlow, Longman, 1992), p. 1282.

<sup>359</sup> ICJ has, on several occasions, accepted that this process may be permissible where the parties insert provisions into their treaty which by *their terms or nature* contemplate evolution. This was done most recently in the *Gabčíkovo-Nagymaros Project* case (see footnote 175 above), at pp. 76–80. See also the separate opinion of Judge Weeramantry, *ibid.*, pp. 113–115. See further, for example, the advisory opinion given by ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, at p. 31; and its decision in *Aegean Sea Continental Shelf*, *Judgment*, I.C.J. Reports 1978, p. 3, at p. 32.

<sup>360</sup> *Yearbook ... 2004*, vol. II (Part Two), pp. 112–115, paras. 303–330.



to this objective, whatever their subject matter, treaties are a creation of the international legal system, and their operation is predicated upon that fact.

476. The Study Group accepted that there was a need to put into effect article 31, paragraph 3 (c). However, it was also widely felt that the relationship between subparagraphs (a) and (b) of article 31, paragraph 3 and its subparagraph (c) needed to be clarified. Article 31, paragraph 3 (c), was not to be used outside the general context of article 31. Some doubt was also expressed regarding the possibility of getting very far in determining rules of treaty interpretation. Such interpretation was a rather “artistic” activity that could scarcely be grasped by firm rules or processes.

477. The Study Group highlighted the flexibility built into article 31, paragraph 3 (c). It accepted that the rules referred to in article 31, paragraph 3 (c), included not only other treaty rules but also rules of customary law and general principles of law. Concerning the role of custom and general principles, it was noted that in addition to the situations mentioned in paragraph 471 above, custom and general principles may be equally relevant where the treaty regime collapses. If several rules from different sources (treaty, custom, general principles) might be applicable, the view, also expressed last year, was reiterated that although there was no formal hierarchy between the legal sources, lawyers tended to look first at treaties, then at customary rules and then at general principles in seeking answers to interpretative problems.

478. Regarding other applicable conventional international law, the Study Group felt that it did not need to take a definite position on the four solutions suggested in paragraph 472 above. The task for determination rested upon the judge or the administrator on the basis of the nature of the treaty under interpretation and the concrete facts in each case. It was also suggested that a fifth solution might be considered, namely that all relevant rules of international law applicable in relations between the parties be taken into account and given whatever weight might be appropriate under the circumstances.

479. Regarding inter-temporality, there was support for the principle of contemporaneity as well as the evolutive approach. Again the Study Group felt that it should not make a choice between the various positions. It saw its role as limited to indicating the possible options available to the judge or administrator charged with answering the question as to whether the reference to “other relevant rules” in article 31, paragraph 3 (c), was limited to rules in force when the treaty was adopted or could be extended to cover subsequent treaties also.

#### 4. DISCUSSION OF THE PRELIMINARY REPORT ENTITLED “HIERARCHY IN INTERNATIONAL LAW: *JUS COGENS*, OBLIGATIONS *ERGA OMNES*, ARTICLE 103 OF THE CHARTER OF THE UNITED NATIONS, AS CONFLICT RULES”

480. The Study Group also considered a revised report by Mr. Z. Galicki entitled “Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules”. The report outlined relevant aspects to be considered with

respect to the concept of hierarchy in international law, gave a brief description of *jus cogens*, obligations *erga omnes* and the nature of obligations under Article 103 of the Charter, and practical examples in which some of these categories have been addressed,<sup>361</sup> and also raised issues concerning possible relationships between them. The report also considered the potential impact of the three categories as conflict rules on the process of fragmentation of international law, particularly on other norms of international law, and highlighted the connection between this study and the other studies relating to fragmentation of international law.

481. It was suggested that in the main the concept of hierarchy in international law should be approached and discussed by the Study Group from the point of view of hierarchy of norms and obligations, without *a priori* excluding other possible concepts of hierarchy. It was also pointed out that the concept of hierarchy in international law was especially developed by doctrine.

482. It was also noted that norms of *jus cogens*, obligations *erga omnes* and obligations under the Charter of the United Nations (Article 103) should be treated as three parallel and separate categories of norms and obligations, taking into account their sources, their substantive content, territorial scope and practical application. All three categories were also characterized by certain weaknesses: (a) norms of *jus cogens* lacked a definitive catalogue and the concept as such was not entirely uncontested, (b) obligations *erga omnes* were often of a very general nature, both in substance and in their application, and they involved “the legal interests of all States”, which may develop over time, and (c) unlike norms of *jus cogens* and obligations *erga omnes*, obligations under Article 103 of the Charter were formally limited to States which are members of the United Nations.

483. Although the three categories raised a wide range of theoretical and practical questions, it was reiterated that the Study Group should examine them only as “conflict rules” in the context of difficulties arising from the diversification and expansion of international law. The objective should be to come up with guidelines of a general character, bearing in mind the difficulty of identifying hierarchical structures between norms.

484. The report further highlighted the close connection between the study on hierarchy in international law and the other four studies. The conclusions by the Study Group on this study would thus depend on the conclusions emerging from the other studies, and the former would in

<sup>361</sup> For example, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32; *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, p. 90, at p. 102; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, I.C.J. Reports 1996, p. 595, at p. 616; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 243 above), at p. 23; and the separate opinion of Judge Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, I.C.J. Reports 1993, p. 325, at p. 440, para. 100. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 175 above).

turn have consequences for the results of the latter. In this connection, it was suggested that conclusions could be further developed around a number of clusters concerning (a) the general concept of hierarchy in international law, (b) the acceptance and rationale of hierarchy in international law, (c) the relationship between the various norms under consideration, and (d) the relationship between hierarchy and fragmentation of international law. As regards the relationship between the various norms under consideration, the paper by Mr. Galicki suggested the necessity of recognizing the principle of harmonization.

485. In the ensuing discussion, it was noted that the current study was the most abstract and academic among the five selected studies. It was therefore necessary to bear in mind the views expressed in the Sixth Committee and to proceed in as concrete a fashion as possible. In this connection, it was stressed that the Study Group should focus on hierarchy and other possible relationships between norms of international law in the context of fragmentation. It should seek to employ the technique, followed in the other studies, of setting the subject of legal reasoning within an international legal system in relation to the three categories, as conflict rules.

486. It was considered essential to study how hierarchy served as a tool to resolve conflicts, the acceptance and rationale of the hierarchy in relation to practical examples concerning the three categories, and the context in which hierarchy operated to set aside an inferior rule and the consequences of such setting aside.

487. While there was no hierarchy as such between sources of international law, general international law recognized that certain norms have a peremptory character. Certain rules were recognized as superior or having a special or privileged status because of their content, effect or scope of application, or on the basis of consent among parties. The rationale of hierarchy in international law found its basis in the principle of the international public order, and its acceptance is reflected in examples of such norms of *jus cogens*, obligations *erga omnes*, as well as treaty-based provisions such as Article 103 of the Charter of the United Nations.<sup>362</sup> The notion of public order is a recognition of the fact that some norms are more important or less important than others. Certain rules exist to satisfy the interests of the international community as a whole. Some members of the Study Group, however, felt that the metaphor of hierarchy in international law was not analytically helpful, and that it needed to be contextualized within specific relationships between norms of international law. It was stressed that hierarchy operated in a relational and contextual manner.

488. It was clearly understood that while norms of *jus cogens* and obligations arising under Article 103 of the Charter of the United Nations addressed aspects of hierarchy, obligations *erga omnes* were more concerned with the area of application of norms, rather than hierarchy. The qualification of norms as *erga omnes* did not

imply any hierarchy. In exploring such relationships, the Study Group could also survey other provisions in multilateral treaty regimes of a hierarchical nature similar to Article 103, as well as take into account the special status of the Charter in general. Inasmuch as obligations *erga omnes* did not implicate normative hierarchy, it was suggested that it would be better to take account of this fact by adopting the title “norms with special status in international law”.

489. The concept of *jus cogens* has been widely accepted by the doctrine and is reflected in the 1969 Vienna Convention.<sup>363</sup> The Commission has previously resisted the effort of compiling a catalogue of norms of *jus cogens*, deciding “to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals”.<sup>364</sup> On this basis, the Study Group agreed that it would not seek to produce a catalogue of norms of *jus cogens*.

490. While hierarchy may solve conflicts of norms, it was acknowledged that conflicts between norms of *jus cogens*, obligations *erga omnes* and obligations under Article 103 of the Charter of the United Nations could also emerge. In regard to the complex relationship between obligations *erga omnes* and norms of *jus cogens*, it was observed that while all *jus cogens* obligations had an *erga omnes* character, the reverse was not necessarily true. This had also been the view of the Commission in its draft articles on responsibility of States for internationally wrongful acts.<sup>365</sup> The Study Group would retain such a position. It was also noted that the recent ICJ advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was pertinent to this relationship.<sup>366</sup>

491. As regards the relationship between norms of *jus cogens* and obligations under Article 103 of the Charter of the United Nations, some members highlighted its complex nature, while others stressed the absolute priority of the former over the latter.

492. The Study Group identified the need to address the effects of the operation of norms of *jus cogens*,

<sup>363</sup> According to article 53 of the 1969 Vienna Convention: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” And according to article 64: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

<sup>364</sup> *Yearbook ... 1966*, vol. II, p. 271, document A/6309/Rev.1, part II (Report of the Commission on the work of its eighteenth meeting, para. (3) of the commentary to article 50 of the draft articles on the law of treaties).

<sup>365</sup> According to article 40, paragraph 1, of the draft articles on State responsibility for internationally wrongful acts: “This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.” (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29). And according to article 48, paragraph 1 (b): “the obligation breached is owed to the international community as a whole” (*ibid.*).

<sup>366</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 175 above).

<sup>362</sup> For example, the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third meeting (see footnote 78 above).

obligations *erga omnes* and obligations under Article 103 of the Charter of the United Nations (or similar treaty provisions). Norms of *jus cogens* were non-derogable and the effect of this operation was to produce the invalidity of the inferior norm. By contrast, obligations *erga omnes* related to the opposability of the obligations to all States, in particular to the right of every State to invoke their violation as a basis for State responsibility. It was also observed that a distinction should be made between the invalidity of the inferior rule that resulted from the presence of *jus cogens* and the inapplicability of the inferior rule resulting from the operation of Article 103.

493. Some members of the Study Group doubted that the principle of harmonization had a particular role to play in the relationship between norms of *jus cogens* and other norms. The Study Group nevertheless recognized that the principle of harmonization should be seen as a cross-cutting interpretive principle, applicable in hierarchical relations also, as far as possible.<sup>367</sup>

---

<sup>367</sup> See the study by the Chairperson on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

## Chapter XII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Programme, procedures and working methods of the Commission, and its documentation

494. At its 2832nd meeting, held on 3 May 2005, the Commission established a Planning Group for the current session.<sup>368</sup>

495. The Planning Group held four meetings. It had before it section H of the topical summary of the discussion held in the Sixth Committee of the General Assembly at its fifty-ninth session, entitled “Other decisions and conclusions of the Commission” (A/CN.4/549 and Add.1, sect. H), and General Assembly resolution 59/41 (paras. 6–8, 13–14 and 17) on the report of the Commission on the work of its fifty-sixth session.

496. At its 2859th meeting on 28 July 2005, the Commission took note of the report of the Planning Group.

##### 1. COST-SAVING MEASURES

497. The Commission, having considered paragraph 8 of General Assembly resolution 59/41, on budgetary constraints and the requirements resulting from unforeseeable circumstances of the programme of work of the Commission for the current session, decided that it should start the second part of the fifty-seventh session on 11 July 2005, thereby reducing the duration of the session by one week.

##### 2. DOCUMENTATION

498. The Commission considered the question of the timely submission of reports by Special Rapporteurs. It recalled that if the dates for the submission of reports as originally indicated by the Special Rapporteurs were not observed, the availability of reports might be jeopardized, which could have far-reaching consequences for the programme of work of the Commission. Bearing in mind the principles governing the submission of documents in the United Nations as well as the heavy workload of the relevant services of the Organization, the Commission wishes to emphasize the importance it attaches to the timely submission of reports by Special Rapporteurs, with a view to their processing and to their distribution sufficiently in advance to allow members to study them.

##### 3. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

499. The Working Group on the long-term programme of work was reconstituted with Mr. Alain Pellet

<sup>368</sup> The composition of the Planning Group appears in paragraph 5 above.

as Chairperson.<sup>369</sup> The Working Group held two meetings and its Chairperson reported orally to the Planning Group on 25 July 2005. The Working Group intends to submit a full report, together with the topics that it proposes for inclusion in the long-term programme of work at the end of the quinquennium.

##### 4. NEW TOPIC FOR INCLUSION IN THE CURRENT PROGRAMME OF WORK OF THE COMMISSION

500. At its 2865th meeting, on 4 August 2005, the Commission decided that the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, which is already included in the Commission’s long-term programme of work, would be included in the programme of work of the Commission, in accordance with the decision taken by the Commission at its fifty-sixth session.<sup>370</sup> At the same meeting, the Commission decided to appoint Mr. Zdzisław Galicki Special Rapporteur for the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.

##### 5. HONORARIUMS

501. The Commission reiterated once more the views it had expressed in paragraphs 525–531 of its report to the General Assembly on the work of its fifty-fourth session,<sup>371</sup> in paragraph 447 of its report on the work of its fifty-fifth session<sup>372</sup> and in paragraph 369 of its report on the work of its fifty-sixth session.<sup>373</sup> The Commission reiterates that General Assembly resolution 56/272 of 27 March 2002 concerning the question of honorariums especially affects Special Rapporteurs, in particular those from developing countries, as it comprises the support for their necessary research work.

#### B. Date and place of the fifty-eighth session of the Commission

502. The Commission decided that the fifty-eighth session of the Commission be held in Geneva from 1 May to 9 June and from 3 July to 11 August 2006.

#### C. Cooperation with other bodies

503. The Inter-American Juridical Committee was represented at the present session of the Commission by Ms. Ana Elizabeth Villalta Vizcarra, member of the

<sup>369</sup> See the composition of the Working Group in paragraph 9 above.

<sup>370</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 363.

<sup>371</sup> *Yearbook ... 2002*, vol. II (Part Two), pp. 102–103.

<sup>372</sup> *Yearbook ... 2003*, vol. II (Part Two), p. 101.

<sup>373</sup> *Yearbook ... 2004*, vol. II (Part Two), pp. 120–121.



Committee, who addressed the Commission at its 2847th meeting on 1 June 2005.<sup>374</sup> An exchange of views followed.

504. At its 2851st meeting on 14 July 2005, Judge Jiuyong Shi, President of ICJ, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it.<sup>375</sup> An exchange of views followed.

505. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Z. Kamil, who addressed the Commission at its 2853rd meeting on 19 July 2005.<sup>376</sup> An exchange of views followed.

506. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe were represented at the present session of the Commission by Mr. Guy de Vel, Director-General for Legal Affairs of the Council of Europe, who addressed the Commission at its 2860th meeting on 29 July 2005.<sup>377</sup> An exchange of views followed.

507. On 27 May 2005, an informal exchange of views was held between members of the Commission and members of the European Society of International Law on the topic of responsibility of international organizations.

508. On 13 July 2005, an informal exchange of views was held between members of the Commission and members of the legal services of ICRC on topics of mutual interest.

509. On 4 August 2005, an informal exchange of views was held between members of the Commission and members of the Sub-Commission on the Promotion and Protection of Human Rights on issues of mutual interest, and in particular on the topic of "Reservations to treaties".

#### **D. Representation at the sixtieth session of the General Assembly**

510. The Commission decided that it should be represented at the sixtieth session of the General Assembly by its Chairperson, Mr. Djamchid Momtaz.

511. Moreover, at its 2865th meeting, on 4 August 2005, the Commission requested Mr. Ian Brownlie, Special Rapporteur on the topic "Effects of armed conflicts on treaties", to attend the sixtieth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.

#### **E. International Law Seminar**

512. Pursuant to General Assembly resolution 59/41, the forty-first session of the International Law Seminar was

held at the Palais des Nations from 11 to 29 July 2005, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

513. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.<sup>378</sup> The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

514. The Seminar was opened by the Chairperson of the Commission, Mr. Djamchid Momtaz. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar.

515. The following lectures were given by members of the Commission: Mr. Victor Rodriguez-Cedeño: "Unilateral acts", in cooperation with Ms. Maria Isabel Torres Cazorla; Mr. John Dugard: "Diplomatic protection"; Mr. Djamchid Momtaz: "Advisory opinion of the International Court of Justice of 9 July 2004"; Mr. Pemmaraju Sreenivasa Rao: "International liability of acts not prohibited by international law"; Mr. Chusei Yamada: "Shared natural resources"; Mr. M. Koskeniemi: "Fragmentation of international Law"; Mr. Giorgio Gaja: "Responsibility of international organizations".

516. Lectures were also given by Mr. Arnold Pronto, United Nations Office of Legal Affairs: "The Work of the International Law Commission"; Mr. Vincent Cochetel, UNHCR: "International refugee law—recent developments"; Mr. Yves Renouf, WTO Legal Adviser: "The WTO dispute settlement system"; Mr. Markus Schmidt, OHCHR: "The work of the Human Rights Committee". Study visits were organized to the European Organization for Nuclear Research and to Palais Wilson.

517. Each Seminar participant was assigned to one of two working groups on "Unilateral acts" and "Diplomatic protection". The special rapporteurs of the Commission for these subjects, Mr. Victor Rodriguez Cedeño and Mr. John Dugard, provided guidance for the working groups. The groups presented their findings to the Seminar. Each participant was also asked to submit a written summary

<sup>374</sup> This statement is recorded in the summary record of that meeting, *Yearbook ... 2005*, vol. I, p. 115 *et seq.*

<sup>375</sup> *Ibid.*, p. 136 *et seq.*

<sup>376</sup> *Ibid.*, p. 156 *et seq.*

<sup>377</sup> *Ibid.*, p. 211 *et seq.*

<sup>378</sup> The following persons participated in the forty-first session of the International Law Seminar: Ms. Paula Cristina Aponte-Urdaneta (Colombia); Ms. Nicola Brown (Jamaica); Mr. Daniel Costa (United States); Mr. Eric De Brabandère (Belgium); Mr. Diallo Madou (Mali); Mr. Ekouevi Eucher Eklu-Koevanu (Togo); Ms. Amelia Emran (Malaysia); Ms. Ginette Goabin Y.A. (Benin); Mr. Øyvind Hernes (Norway); Mr. Kumar Karki Krishna (Nepal); Mr. Lazarus Kpasaba Istifanus (Nigeria); Ms. Magdalena Lickova (Czech Republic); Ms. Norma Irina Mendoza Sandoval (Mexico); Ms. Loretta Mensa-Nyarko (Ghana); Mr. Makenga Mpasi (Congo); Ms. Maryam Norouzi (Iran (Islamic Republic of)); Mr. Eric Rabkin (Canada); Ms. Aušra Raisytė-Daukantiene (Lithuania); Mr. Shikhar Ranjan (India); Ms. Neni Ruhaeni (Indonesia); Mr. Scott Sheeran (New Zealand); Ms. Annika Elisabeth Tahvanainen (Finland); Mr. Knut Traisbach (Germany); Mr. Lijiang Zhu (China). A Selection Committee, under the Chairpersonship of Mr. Jean-Marie Dufour (President of the Geneva International Academic Network), met on 20 April 2005 and selected 24 candidates out of 110 applications for participation in the Seminar.

report on one of the lectures. A collection of the reports was compiled and distributed to all participants.

518. Participants were also given the opportunity to make use of the facilities of the United Nations Library, which extended its opening hours during the event.

519. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms, followed by a reception.

520. Mr. Djamchid Momtaz, Chairperson of the Commission, Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, Mr. Ulrich von Blumenthal, Director of the Seminar, and Mr. Scott Sheeran, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-first session of the Seminar.

521. The Commission noted with particular appreciation that the Governments of the Czech Republic, Finland, Germany, Mexico, New Zealand, Sweden and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed a sufficient number of fellowships to be awarded to deserving candidates from

developing countries to achieve an adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 10 candidates and partial fellowship (subsistence only) to 6 candidates.

522. Of the 927 participants, representing 157 nationalities, who have taken part in the International Law Seminar since 1965, the year of its inception, 557 have received a fellowship.

523. The Commission stresses the importance it attaches to the sessions of the International Law Seminar, which enable young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and with the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2006 with as broad a participation as possible.

524. The Commission noted with satisfaction that in 2005 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at its next session, within existing resources.

## CHECKLIST OF DOCUMENTS OF THE FIFTY-SEVENTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/546	Sixth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur	Reproduced in <i>Yearbook 2005</i> , vol. II (Part One).
A/CN.4/547	Responsibility of international organizations: comments and observations received from Governments	<i>Idem.</i>
A/CN.4/548	Provisional agenda	Mimeographed. For agenda as adopted, see p. 10 above.
A/CN.4/549 and Add.1	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat	Mimeographed.
A/CN.4/550 [and Corr.1–2]	The effect of armed conflict on treaties—an examination of practice and doctrine: a memorandum prepared by the Secretariat	Mimeographed.
A/CN.4/551 and Corr.1 and Add.1	Third report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur	Reproduced in <i>Yearbook 2005</i> , vol. II (Part One).
A/CN.4/552	First report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie, Special Rapporteur	<i>Idem.</i>
A/CN.4/553	Third report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/554	Preliminary report on the expulsion of aliens, by Mr. Maurice Kamto	<i>Idem.</i>
A/CN.4/555 and Add.1	Shared natural resources: comments and observations received from Governments and relevant intergovernmental organizations	<i>Idem.</i>
A/CN.4/556	Responsibility of international organizations: comments and observations received from Governments and international organizations	<i>Idem.</i>
A/CN.4/557	Eighth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/558 [and Corr.1] and Add.1 [and Corr.1]–2	Tenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.665	Reservations to treaties: titles and texts of the draft guidelines adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.666/Rev.1	Responsibility of international organizations: titles and texts of the draft articles adopted by the Drafting Committee	<i>Idem.</i>
A/CN.4/L.667	Draft report of the International Law Commission on the work of its fifty-seventh session: chapter IV (Shared natural resources)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)</i> . For the final text, see p. 15 above.
A/CN.4/L.668	<i>Idem</i> : chapter V (Effects of armed conflicts on treaties)	<i>Idem</i> , p. 27 above.
A/CN.4/L.669 and Add.1	<i>Idem</i> : chapter VI (Responsibility of international organizations)	<i>Idem</i> , p. 38 above.
A/CN.4/L.670	<i>Idem</i> : chapter VII (Diplomatic protection)	<i>Idem</i> , p. 49 above.
A/CN.4/L.671 and Add.1–2 [and Corr.1]	<i>Idem</i> : chapter X (Reservations to treaties)	<i>Idem</i> , p. 63 above.
A/CN.4/L.672 and Add.1–2	<i>Idem</i> : chapter IX (Unilateral acts of States)	<i>Idem</i> , p. 59 above.
A/CN.4/L.673	<i>Idem</i> : chapter I (Organization of the session)	<i>Idem</i> , p. 9 above.
A/CN.4/L.674	<i>Idem</i> : chapter VIII (Expulsion of aliens)	<i>Idem</i> , p. 54 above.
A/CN.4/L.675 [and Corr.1]	Programme, procedures and working methods of the Commission, and its documentation: report of the Planning Group	Mimeographed.
A/CN.4/L.676 [and Corr.1]	Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group	<i>Idem</i> . Reproduced at p. 83 above.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.677	Draft report of the International Law Commission on the work of its fifty-seventh session: chapter XI (Fragmentation of international law: difficulties arising from the diversification and expansion of international law)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixtieth Session, Supplement No. 10</i> (A/60/10). For the final text, see p. 83 above.
A/CN.4/L.678	<i>Idem</i> : chapter XII (Other decisions and conclusions of the Commission)	<i>Idem</i> , p. 92 above.
A/CN.4/L.679	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-seventh session)	<i>Idem</i> , p. 11 above.
A/CN.4/L.680	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem</i> , p. 13 above.
A/CN.4/L.681[and Corr.1]	Report of the Working Group on shared natural resources (groundwaters)	Mimeographed.
A/CN.4/SR.2831–A/CN.4/SR.2866	Provisional summary records of the 2831st to 2866th meetings	<i>Idem</i> . The final text appears in <i>Yearbook ... 2005</i> , vol. I.



---

### كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى: الأمم المتحدة، قسم البيع في نيويورك.

#### 如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约联合国销售组。

#### HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York.

#### COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à: Nations Unies, section des ventes, New York.

#### КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк.

#### CÓMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, sección de Ventas, Nueva York.

---

---

United Nations publication  
Sales No. E.11.V.5 (Part 2)  
ISSN 0082-8289

USD 50  
ISBN 978-92-1-133707-5



9 789211 337075

55000