

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2008

Volume I

*Summary records
of the meetings
of the sixtieth session
5 May–6 June and
7 July–8 August 2008*

UNITED NATIONS



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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 ... 2008*).

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

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

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

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

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

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This volume contains the summary records of the meetings of the sixtieth session of the Commission (A/CN.4/SR.2956–A/CN.4/SR.2997), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2008

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Chairperson of the Drafting Committee: Mr. Pedro COMISSÁRIO AFONSO

Rapporteur: Ms. Paula ESCARAMEIA

Mr. Nicolas Michel, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General.

* On 8 August 2008, the Commission elected Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland) to fill the unexpected vacancy created by the resignation of Mr. Ian Brownlie (see the 2997th meeting below, para. 2).

AGENDA

The Commission adopted the following agenda at its 2956th meeting, held on 5 May 2008:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Responsibility of international organizations.
4. Shared natural resources.
5. Effects of armed conflicts on treaties.
6. Expulsion of aliens.
7. The obligation to extradite or prosecute (*aut dedere aut judicare*).
8. Protection of persons in the event of disasters.
9. Immunity of State officials from foreign criminal jurisdiction.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-first session.
12. Cooperation with other bodies.
13. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community
CIDIP	Inter-American Specialized Conference on Private International Law
CODEXTER	(Council of Europe) Committee of Experts on Terrorism
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFRC	International Federation of Red Cross and Red Crescent Societies
ITLOS	International Tribunal for the Law of the Sea
MERCOSUR	Southern Common Market
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
OSCE	Organization for Security and Co-operation in Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children’s Fund
UNIFEM	United Nations Development Fund for Women
WHO	World Health Organization
WTO	World Trade Organization

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<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.)
ILR	<i>International Law Reports</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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In the present volume, “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; and “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

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

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

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The Internet address of the International Law Commission is www.un.org/law/ilc.

CASES CITED IN THE PRESENT VOLUME

Case	Nature and source of the decision
<i>Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities</i>	Case T-306/01, Judgement of 21 September 2005, European Court Reports 2005, p. II-3533.
<i>Aerial Herbicide Spraying</i>	(<i>Ecuador v. Colombia</i>), Order of 30 May 2008, <i>I.C.J. Reports 2008</i> , p. 174.
<i>Al-Adsani v. The United Kingdom</i>	Judgement of 21 November 2001, Application no. 35763/97, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2001-I.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	(<i>Bosnia and Herzegovina v. Serbia and Montenegro</i>), Judgment, <i>I.C.J. Reports 2007</i> , p. 43.
<i>Armed Activities on the Territory of the Congo</i>	(<i>Croatia v. Serbia</i>), Preliminary Objections, Judgment, <i>I.C.J. Reports 2008</i> , p. 412. (<i>New Application: 2002</i>) (<i>Democratic Republic of the Congo v. Rwanda</i>), Jurisdiction and Admissibility, Judgment, <i>I.C.J. Reports 2006</i> , p. 6. (<i>Democratic Republic of the Congo v. Uganda</i>), Judgment, <i>I.C.J. Reports 2005</i> , p. 168.
<i>Arrest Warrant</i>	<i>Arrest Warrant of 11 April 2000</i> (<i>Democratic Republic of the Congo v. Belgium</i>), Judgment, <i>I.C.J. Reports 2002</i> , p. 3.
<i>Avena and Other Mexican Nationals</i>	(<i>Mexico v. United States of America</i>), Judgment, <i>I.C.J. Reports 2004</i> , p. 12.
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited</i> , Second Phase, Judgment, <i>I.C.J. Reports 1970</i> , p. 3.
<i>Beagle Channel</i>	Case concerning a dispute between Argentina and Chile concerning the Beagle Channel, Decision of 18 February 1977, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53.
<i>Bo Xilai</i>	<i>Li Weixum, et al. v. Bo Xilai</i> , United States District Court for the District of Columbia, Civil Action No. 04-0649(RJL), 568 F. Supp. 2d 35 (D.D.C. 2008).
“Camouco”	(<i>Panama v. France</i>), Prompt Release, Judgment, <i>ITLOS Reports 2000</i> , p. 10.
<i>Case concerning the Arbitral Award made by the King of Spain on 23 December 1906</i>	Judgment of 18 November 1960, <i>ICJ Reports 1960</i> , p. 192.
<i>Case concerning the location of boundary markers in Taba between Egypt and Israel</i>	Decision of 29 September 1988, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 1.
<i>Certain Phosphate Lands in Nauru</i>	(<i>Nauru v. Australia</i>), Preliminary Objections, Judgment, <i>I.C.J. Reports 1992</i> , p. 240.
<i>Certain Questions of Mutual Assistance in Criminal Matters</i>	(<i>Djibouti v. France</i>), Judgment, <i>I.C.J. Reports 2008</i> , p. 177.
<i>Charles Taylor</i>	<i>Prosecutor v. Charles Ghankay Taylor</i> , Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction of 31 May 2004, Appeals Chamber of the Special Court for Sierra Leone (www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx).
<i>Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium</i>	Judgement of the Court of 13 November 1964, joined cases 90/63 and 91/93, <i>European Court Reports 1964</i> , p. 626.
<i>Conservation and Sustainable Exploitation of Swordfish Stocks</i>	(<i>Chile/European Community</i>), Order of 20 December 2000, <i>ITLOS Reports 2000</i> , p. 148. <i>Chile—Measures affecting the Transit and Importing of Swordfish</i> , WTO (WT/DS 193).
<i>Continental Shelf</i>	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i> , Judgment, <i>I.C.J. Reports 1985</i> , p. 13.
<i>Corfu Channel</i>	Merits, Judgment, <i>I.C.J. Reports 1949</i> , p. 4.
<i>Decision regarding delimitation of the border between Eritrea and Ethiopia</i>	Eritrea–Ethiopia Boundary Commission, Decision of 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 83.
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CHECKLIST OF DOCUMENTS OF THE SIXTIETH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/587	Provisional agenda for the sixtieth session	Mimeographed. The definitive agenda is reproduced on p. vii above.
A/CN.4/588	Topical summary of the discussion held in the Sixth Committee of the General Assembly, during its sixty-second session, prepared by the Secretariat	Mimeographed.
A/CN.4/589 [and Corr.1]	Fourth report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur	Reproduced in <i>Yearbook ... 2008</i> , vol. II (Part One).
A/CN.4/590 and Add.1–3	Protection of persons in the event of disasters: Memorandum by the Secretariat	Mimeographed.
A/CN.4/591	Fifth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur	Reproduced in <i>Yearbook ... 2008</i> , vol. II (Part One).
A/CN.4/592 and Add.1	Effects of armed conflicts on treaties. Comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/593 and Add.1	Responsibility of international organizations: comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/594	Fourth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/595 and Add.1	Shared natural resources: comments and observations by Governments on the draft articles on the law of transboundary aquifers	<i>Idem.</i>
A/CN.4/596 and Corr.1	Immunity of State officials from foreign criminal jurisdiction: Memorandum by the Secretariat	Mimeographed.
A/CN.4/597	Sixth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	Reproduced in <i>Yearbook ... 2008</i> , vol. II (Part One).
A/CN.4/598	Preliminary report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/599	The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>): Comments and observations received from Governments	<i>Idem.</i>
A/CN.4/600	Thirteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/601	Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Kolodkin, Special Rapporteur	<i>Idem.</i>
A/CN.4/602 and Add.1	Filling of casual vacancies in the Commission: Note by the Secretariat	A/CN.4/602 reproduced in <i>Yearbook ... 2008</i> , vol. II (Part One). A/CN.4/602/Add.1 mimeographed.
A/CN.4/603	Third report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	Reproduced in <i>Yearbook ... 2008</i> , vol. II (Part One).
A/CN.4/L.721	Effects of armed conflicts on treaties. Note by the Chairperson of the Working Group on effects of armed conflicts on treaties: Draft article 8	<i>Idem.</i>
A/CN.4/L.722	Shared natural resources: Note on a preamble by the Special Rapporteur	Mimeographed.
A/CN.4/L.723 [and Corr.1]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee on 7, 9, 13, 14, 16 and 28 May 2008	<i>Idem.</i> See also the 2970th meeting, paras. 1 <i>et seq.</i> below.
A/CN.4/L.724	Shared natural resources. The law of transboundary aquifers: Title and texts of the preamble and draft articles 1 to 19 on the law of transboundary aquifers, adopted, on second reading, by the Drafting Committee	Mimeographed. See also the 2970th meeting, paras. 98 <i>et seq.</i> and the 2971st session below.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.725 and Add.1	Responsibility of international organizations. Titles and texts of articles 46, 47, 48, 49 [48], 50 [49], 51 [50], 52 [51] and 53, provisionally adopted by the Drafting Committee on 21, 22, 28, 29 and 30 May 2008	<i>Idem.</i>
A/CN.4/L.726	Effects of armed conflicts on treaties: report of the Working Group	<i>Idem.</i>
A/CN.4/L.727/Rev.1 and Add.1	Effects of armed conflicts on treaties. Texts of draft articles 1, 2, 3, 4, 5, 6 [5 <i>bis</i>], 7 [5], 8, 9 [8 <i>bis</i>], 10 [8 <i>ter</i>], 11 [8 <i>quater</i>], 12 [9], 13 [10], 14 [11], 15, 16 [12], 17 [13], 18 [14] provisionally adopted on first reading by the Drafting Committee on 4 June 2008, and texts of draft articles 5 and 13 and annex provisionally adopted on first reading by the Drafting Committee on 9 and 10 July 2008	<i>Idem.</i>
A/CN.4/L.728	Draft report of the International Law Commission on the work of its sixtieth session: chapter I (Organization of the session)	<i>Idem.</i> For the adopted text, see <i>Official Records of the General Assembly, Sixty-third Session, Supplement No. 10</i> (A/63/10). The final text appears in <i>Yearbook ... 2008</i> , vol. II (Part Two).
A/CN.4/L.729	<i>Idem</i> : chapter II (Summary of the work of the Commission at its sixtieth session)	<i>Idem.</i>
A/CN.4/L.730	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.731 and Add.1–2	<i>Idem</i> : chapter IV (Shared natural resources)	<i>Idem.</i>
A/CN.4/L.732 and Add.1–2 and Add.2/Corr.1	<i>Idem</i> : chapter V (Effects of armed conflicts on treaties)	<i>Idem.</i>
A/CN.4/L.733 [and Corr.1] and Add.1–5	<i>Idem</i> : chapter VI (Reservations to treaties)	<i>Idem.</i>
A/CN.4/L.734/Rev.1 and L.734/Add.1–2 and Add.2/Corr.1	<i>Idem</i> : chapter VII (Responsibility of international organizations)	<i>Idem.</i>
A/CN.4/L.735 and Add.1	<i>Idem</i> : chapter VIII (Expulsion of aliens)	<i>Idem.</i>
A/CN.4/L.736	<i>Idem</i> : chapter IX (Protection of persons in the event of disasters)	<i>Idem.</i>
A/CN.4/L.737 and Add.1	<i>Idem</i> : chapter X (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem.</i>
A/CN.4/L.738 and Add.1	<i>Idem</i> : chapter XI (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem.</i>
A/CN.4/L.739 [and Corr.1]	Reservations to treaties. Text of draft guidelines 2.6.5, 2.6.11, 2.6.12 and 2.8 provisionally adopted by the Drafting Committee on 5 June 2008	Mimeographed. See also the 2974th meeting below, para. 2.
A/CN.4/L.740	<i>Idem</i> . Text of draft guidelines 2.8.1, 2.8.2, 2.8.3, 2.8.4, 2.8.5, 2.8.6, 2.8.7, 2.8.8, 2.8.9, 2.8.10, 2.8.11 and 2.8.12 provisionally adopted by the Drafting Committee on 7, 8, 9, 10, 16 and 22 July 2008	Mimeographed. See also the 2988th meeting below, para. 45.
A/CN.4/L.741	Draft report of the International Law Commission on the work of its sixtieth session: chapter XII (Other decisions and conclusions of the Commission)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixty-third Session, Supplement No. 10</i> (A/63/10). The final text appears in <i>Yearbook ... 2008</i> , vol. II (Part Two).
A/CN.4/L.742	Report of the Planning Group	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixty-third Session, Supplement No. 10</i> (A/63/10). The final text appears in <i>Yearbook ... 2008</i> , vol. II (Part Two), paras. 333–371.
A/CN.4/SR.2956–A/CN.4/SR.2997	Provisional summary records of 2956th to 2997th meetings	<i>Idem.</i> The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTIETH SESSION

Held at Geneva from 5 May to 6 June 2008

2956th MEETING

Monday, 5 May 2008, at 3.05 p.m.

Outgoing Chairperson: Mr. Ian BROWNLIE

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixtieth session of the International Law Commission and extended a warm welcome to members.

2. The Commission's report on the work of its fifty-ninth session¹ had been considered by the Sixth Committee of the General Assembly at its 18th to 26th and 28th meetings, between 29 October and 19 November 2007. A topical summary of the discussion, prepared by the Secretariat, was contained in document A/CN.4/588. Member States had expressed keen interest in the topics considered by the Commission. Following the formal debates in the Sixth Committee, he himself, together with a number of members of the Commission and Special Rapporteurs, had engaged in an interactive dialogue with members of the Sixth Committee, and subsequently with legal advisers of Member States.

Election of officers

Mr. Vargas Carreño was elected Chairperson by acclamation.

Mr. Vargas Carreño took the Chair.

¹ *Yearbook ... 2007*, vol. II (Part Two), document A/62/10.

3. The CHAIRPERSON thanked members for the honour they had conferred upon him in electing him to chair the Commission's sixtieth session. He would strive to carry out his responsibilities efficiently and thoroughly, living up to the legacy of the distinguished jurists who had chaired the Commission in the past.

4. The Commission had a number of interesting new items on its agenda, including protection of persons in the event of disasters and immunity of State officials from foreign criminal jurisdiction, topics on which it could make a great contribution by filling the gaps in international law. The topic of shared natural resources was to be given priority at the current session. It had been decided at the fifty-ninth session to hold a special celebration of the Commission's sixtieth anniversary, and a committee headed by Mr. Pellet had been working on the preparations for that event.

Mr. Kolodkin was elected first Vice-Chairperson by acclamation.

Mr. Hmoud was elected second Vice-Chairperson by acclamation.

Mr. Comissário Afonso was elected Chairperson of the Drafting Committee by acclamation.

Ms. Escameia was elected Rapporteur of the Commission by acclamation.

Adoption of the agenda (A/CN.4/587)

5. The CHAIRPERSON invited the Commission to adopt the provisional agenda.

The agenda was adopted.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON suggested that the meeting should be suspended to enable the Enlarged Bureau to hold consultations on the programme of work of the session.

The meeting was suspended at 3.30 p.m. and resumed at 4 p.m.

7. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the session, which had been drawn up during the consultations. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

8. The CHAIRPERSON invited members interested in participating in the Drafting Committee on the topic "Reservations to treaties" to contact the Chairperson of the Drafting Committee.

Shared natural resources² (A/CN.4/588, sect. B,³ A/CN.4/591,⁴ A/CN.4/595 and Add.1,⁵ A/CN.4/L.722,⁶ A/CN.4/L.724⁷)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

9. Mr. YAMADA (Special Rapporteur), introducing his fifth report on shared natural resources: transboundary aquifers (A/CN.4/591), recalled that at its fifty-eighth session, in 2006, the Commission had adopted on first reading 19 draft articles on the law of transboundary aquifers and commentaries thereto and had decided to transmit them to Governments for comments and observations, to be submitted to the Secretary-General by 1 January 2008. At its fifty-ninth session, in 2007, the Commission had addressed the question of the relationship between the work on transboundary aquifers and that on oil and natural gas⁸ and had indicated its preference to proceed with and complete the second reading of the law of transboundary aquifers independently from its possible future work on oil and natural gas. It had also solicited the views of Governments on the final form of the draft articles. During the debates on the report of the Commission in the Sixth Committee in 2006 and 2007, 45 Governments had offered oral comments and observations, which were summarized in the topical summaries prepared by the Secretariat in documents A/CN.4/577 and Add.1–2⁹ and A/CN.4/588. The relevant summary records of the Sixth Committee were also available. In addition, eight Governments had submitted written comments and observations as he was drafting the fifth report. Subsequently, an additional 11 Governments had submitted written comments. Those 19 written comments were reproduced in summary form in document A/CN.4/595 and Add.1. At the fifty-ninth

session of the Commission, the newly elected members had commented on the draft articles adopted on first reading. Their comments were reflected in the Commission's report on the work of its fifty-ninth session¹⁰ and in the relevant summary records.¹¹

10. The comments and observations made by Governments and members of the Commission on the draft articles adopted on first reading and the commentaries thereto were generally favourable and supportive; a number of useful suggestions for improvements had been made; and the Commission had been encouraged to proceed to the second reading on the basis of the text of the draft articles adopted on first reading. On the question of the relationship between the work on transboundary aquifers and that on oil and natural gas, an overwhelming majority of Governments supported the Commission's suggestion that the law on transboundary aquifers be treated independently of any future work on the issues related to oil and natural gas. On the question of the final form of the draft articles, the views of Governments diverged. Some favoured a legally binding instrument, while others preferred a non-legally binding text.

11. In view of the comments received from Governments, he believed that the Commission should proceed expeditiously with the second reading of the draft articles. The question of any possible future work on oil and natural gas should be addressed only after the second reading of the draft articles on the law of transboundary aquifers had been completed.

12. He wished, however, to raise the question of the final form of the draft articles at the outset, as it would also affect their substance. As previously noted, some Governments thought that a framework convention would be of greater value than a non-binding document, although some of them had also stressed that such an instrument should not supersede existing bilateral or multilateral agreements. Others, however, favoured a non-binding declaration of the General Assembly that would guide States in framing regional agreements. In the absence of a consensus among Governments, the Commission should avoid committing itself either way. If it were to recommend a legally binding document, the text would most likely be shelved indefinitely by the General Assembly, thereby defeating the whole purpose of the exercise. If, on the other hand, the Commission were to recommend a non-binding document, it would be likely to meet with resistance from some Governments and in the Sixth Committee.

13. The problem of water was a matter of global urgency, and the most desirable outcome would be for the principles which the Commission was formulating on transboundary aquifers to be implemented as expeditiously as possible by Governments in their management of specific transboundary aquifers. Such implementation should not be delayed by procedural wrangling over the final form. Accordingly, he recommended the adoption of a two-step approach, following the precedent of the 2001 draft articles on responsibility of States for internationally

² For the text of the 19 draft articles on the law of transboundary aquifers and the commentaries thereto adopted on first reading by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76.

³ Mimeographed; available on the Commission's website.

⁴ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁵ *Idem.*

⁶ Mimeographed; available on the Commission's website.

⁷ *Idem.*

⁸ See *Yearbook ... 2007*, vol. II (Part Two), p. 58, paras. 168–173.

⁹ Mimeographed; available on the Commission's website, documents of the fifty-ninth session.

¹⁰ *Yearbook ... 2007*, vol. II (Part Two), pp. 58–59, paras. 174–176.

¹¹ *Ibid.*, vol. I, 2930th and 2931st meetings.

wrongful acts,¹² whereby the Commission would recommend that the General Assembly should first take note of the draft articles and annex them to the resolution, and should then consider at a later stage the possibility of convening a negotiating conference with a view to concluding a convention. He hoped that this approach would be acceptable to all Governments. Paragraph 9 of the fifth report contained proposed language for the Commission's recommendation to the General Assembly, which he commended to members' attention.

14. Having carefully examined the various comments and observations from Governments with the valuable assistance of experts from UNESCO, he had formulated the revised texts of draft articles for second reading. The basic structure and conception of the draft articles adopted by the Commission on first reading were essentially maintained. Explanations of all the articles were provided in paragraphs 11 to 41 of the fifth report. For the sake of convenience, the revised texts were formulated in the form of legally binding articles, as had been the case with the draft articles adopted on first reading, but it should be clearly understood that this approach was without prejudice to their final form.

15. In his introduction, he would limit himself to a few basic points, in order to clarify the conception underlying his undertaking, and to dispel the considerable confusion and a number of misunderstandings revealed in the comments from Governments.

16. On the scope of the draft articles, two basic points needed to be made. First, the topic dealt exclusively with transboundary aquifers—those located under the territories of two or more States. Aquifers located outside the territory of any State but across the continental shelves of more than one State were excluded for the reason given in paragraph 16 of the fifth report. Aquifers located within the territory of one State—domestic aquifers—were also excluded, regardless of their links to international surface waters. Secondly, concerns had been expressed about the inclusion in the scope of the draft articles of activities other than utilization of aquifers that would have a direct impact upon aquifers. Assessment of such activities was indispensable for the proper management of aquifers; that did not necessarily mean, however, that the activities in question should be prohibited. In the final analysis, the benefits derived from such activities must be carefully weighed against those deriving from the utilization of aquifers.

17. There were various ways of defining the term “aquifer” scientifically. In the context of the topic, the definition must of course be scientifically correct, but it must also be legally viable for purposes of aquifer management. He believed that the current definition met those requirements. In a sense, an aquifer was a container which held water. The container's outer limit must be clearly delimited. Such a geological formation constituted a single deposit of water for the proper management of which the Commission was seeking to formulate rules. Recharge

and discharge zones and any other areas which might be hydraulically linked to the aquifer itself were outside the aquifer. A hydraulically linked area could theoretically be deemed to extend not only to rivers and lakes but also to rainfall and oceans, or indeed to the whole globe and its atmosphere. The Commission should not concern itself with the global commons.

18. With respect to equitable and reasonable utilization, many Governments had called for a reference to sustainability. It should be borne in mind, however, that the Commission was essentially considering non-renewable resources. Aquifers in arid areas did not receive any recharge and, as with such non-renewable resources as oil, natural gas and mineral resources, sustainability did not play a role. Even in the case of recharging aquifers, recharge represented only a fraction of the total amount of water accumulated over thousands of millions of years. During the first reading, the Commission had avoided referring to sustainability with regard to recharging aquifers in draft article 4 (*d*) and had even included a specific clarification in the commentary to the effect that it was not necessary to limit the level of utilization of a recharging aquifer to the level of recharge. Of course, there were some fully recharging aquifers, such as the Franco-Swiss Genevese Aquifer System, but they were exceptions.

19. With regard to the obligation not to cause harm to other aquifer States, it should be clearly understood that such harm was limited to the harm caused by aquifer States and also to the aquifer concerned. The current exercise was not meant to ensure general protection of the environment. The main players were aquifer States, and, while third States were also called upon to cooperate for specific purposes, they played a subsidiary role.

20. An additional draft article 20 was proposed, on the relationship between the draft articles and other conventions and international agreements. Such a provision would not be necessary as long as the draft articles remained a non-binding instrument. The draft article was proposed mainly to allay the concerns of Governments.

21. Many policy and technical aspects of the topic remained to be addressed. Before doing so, he wished first to listen to the statements of members. He hoped that, with their assistance and cooperation, it would be possible to complete the second reading during the current session of the Commission. The UNESCO expert, due to arrive in Geneva the following day, would be available to assist the Commission in dealing with technical details.

22. Before concluding, he informed the Commission that a document containing the comments and observations of a study group of the International Law Association on the Commission's draft articles had been transmitted to him by Professor Joseph Dellapenna of the Villanova University School of Law in Pennsylvania, United States of America, who had also requested a meeting with himself and the Commission. A copy of the paper had been distributed for information, in English only, as an informal document. Several years earlier, the Commission had held an informal meeting with members of the Water Resources Committee of the International Law Association, a meeting in which Professor Dellapenna had participated in his

¹² See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76. See also General Assembly resolutions 56/83 of 12 December 2001, 59/35 of 2 December 2004 and 62/61 of 6 December 2007.

capacity as Rapporteur of that Committee. He had been instrumental in drafting the Association's Berlin Rules on Equitable Use and Sustainable Development of Waters of 2004,¹³ and had also chaired the Study Group convened to review the draft articles. While the paper, which drew heavily on the Berlin Rules, was extremely interesting and thought-provoking, it was based on a philosophy quite different from that of the Commission. With one exception, no Government had referred to the Berlin Rules in its comments. The one Government that had done so had invoked article 56 (5) of the Berlin Rules, which was not a crucial article, in relation to exceptions to the obligation to exchange information under the Commission's draft article 18, and had proposed to include, not only national defence, but also intellectual property rights, the right to privacy and important cultural or natural treasures, all of which, in the view of that Government, could be endangered by a requirement to share information. He personally did not think it proper for the Commission to engage in the negotiation of draft articles with the non-governmental International Law Association team. Accordingly, he had expressed his gratitude to Professor Dellapenna for the paper and had informed him that, as a subsidiary organ of the United Nations General Assembly, the Commission was required to give priority to the views of Governments in its consideration of the draft articles.

The meeting rose at 4.30 p.m.

2957th MEETING

Tuesday, 6 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. McRAE supported the Special Rapporteur's approach of dealing thoroughly with the second reading and putting aside the question as to whether the Commission should take up the issue of transboundary oil and gas deposits at a later date. Similarly, presenting the rules

in the form of draft articles with the possibility of subsequently elaborating a convention kept all the options open, enabling States to decide later whether they wanted to draft a convention, or to leave them as principles applicable in the framework of customary international law or for regional or bilateral adoption. With regard to draft article 1 (Scope), the Special Rapporteur had introduced two important clarifications in his fifth report. First, he had indicated in paragraph 14 that the draft applied both to fresh water and to salt water (or brine) aquifers, as the latter were in some cases desalinated and used for irrigation. He had also proposed, in paragraph 17, a definition of the utilization of transboundary aquifers and aquifer systems that would include storage and disposal, as aquifers were increasingly used for carbon sequestration in the treatment of wastes. Those clarifications were very useful because they ensured that the draft articles covered all types of aquifer and all the uses made of them. They were also linked, because there was evidence of growing interest and developing practice in the use of saltwater aquifers for carbon storage. However, broadening the scope of the draft articles to include storage and disposal might necessitate reconsideration of other parts of the text. For example, it might be necessary to modify the concept of "equitable and reasonable utilization" in draft article 4, and to clarify the words "benefits derived from the use of water" in subparagraph (b) so as to indicate that "use of water" could include storage and disposal in water. Similarly, in subparagraph (c), overall utilization plans would have to cover not just alternative water sources, but also alternative disposal and storage sites. Moreover, there might be implications for draft article 11 (Prevention, reduction and control of pollution) and draft article 14 (Planned activities).

2. Extension of the concept of utilization to cover storage and disposal had a further implication. If storage of carbon waste in saline aquifers increased, it would not be long before carbon was injected into transboundary aquifers under the continental shelf. Yet such aquifers were excluded from the scope of the draft articles, as had been pointed out by the Netherlands. In paragraph 16 of his report, the Special Rapporteur had defended the exclusion of such aquifers on the ground that few existed, and that they were usually saltwater aquifers associated with rock reservoirs holding oil and natural gas, so that if the Commission were to extend the scope of the draft articles to include the continental shelf, it would be linking the work on transboundary aquifers with that on oil and gas, something it had decided not to do. The Special Rapporteur should therefore rethink his position on that question, for the inclusion of saline aquifers under land made the exclusion of saline aquifers under the continental shelf less justifiable. Further, those aquifers were not necessarily associated with oil and gas reservoirs. The likelihood or otherwise of an oil and gas reservoir being associated with an aquifer was the same, whether the reservoir was located under land or under the continental shelf. Petroleum reservoirs frequently contained a water zone as well as oil and gas. Given that this had not proved to be an impediment to the drafting of articles on aquifers under land, it should not be a barrier to applying the draft articles to transboundary aquifers under the continental shelf. If those aquifers were excluded from the scope of application

¹³ International Law Association, *Report of the Seventy-first Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 335–412.

of the draft articles, they would not be regulated, even though they were becoming increasingly attractive for carbon storage. Moreover, it seemed illogical to exclude them, as the Commission had not yet decided whether it would take up the question of transboundary gas and oil deposits. If it decided not to take up that issue, aquifers located under the continental shelf would either be left out altogether or else would have to be dealt with as a separate topic. In addition, if it decided to take up the issue of gas and oil and to deal with transboundary continental shelf aquifers at the same time, it would indeed be mixing together the two subjects—precisely what it had decided not to do.

3. The Commission was therefore in danger of leaving a gap in its work. In recognizing that the draft articles covered saltwater aquifers, storage and disposal, the Special Rapporteur had acknowledged that carbon storage in saline aquifers was likely to be an increasingly frequent practice in the future. He should therefore take the next logical step of applying the draft articles to transboundary aquifers under the continental shelf, an area that would become increasingly attractive for carbon storage.

4. It had sometimes been asked whether further obligations should be placed on non-aquifer States. The draft articles already placed some obligations on them, particularly in draft article 10 (Recharge and discharge zones), under which non-aquifer States in whose territory there was a recharge zone were obliged to cooperate with the aquifer States. The question was whether that obligation to cooperate went far enough. Should non-aquifer States also have an obligation under draft article 11 (Prevention, reduction and control of pollution) to prevent pollution of the recharge zone that would cause significant harm to an aquifer State? While some reservations had been expressed in that regard, the specific duty of preventing pollution that would cause significant harm was a logical consequence of the obligation to cooperate provided for in draft article 10.

5. A further aspect of the relationship of the draft articles to non-aquifer States called for comment. In paragraph 21 of his fifth report, the Special Rapporteur had noted a suggestion made to add a new subparagraph (*e*) which would read “no State may assign, lease or sell, in whole or in part, to any other State, whether an aquifer State or a non-aquifer State, its right to utilize aquifers”, and had indicated that, in his view, the matter must be left to States to decide. If that were so, no limitation would be imposed on the State that wished to assign its right to utilize an aquifer to a non-aquifer State, perhaps under some regional arrangement, and the other aquifer State would have no say in the matter. Yet an aquifer State was surely entitled to expect that, if its neighbour that shared a transboundary aquifer decided to assign its right to utilize the aquifer to another State, this would be done on terms that ensured that the assignee assumed the same obligations towards its neighbour as the assignor had. In short, assignment of the right to utilize the aquifer should not leave a neighbouring aquifer State worse off than it had been before the assignment. It would therefore be appropriate, without going so far as to prohibit assignment of that right, to include a provision protecting the interests of an aquifer State in the event of an assignment.

6. In paragraph 21, the Special Rapporteur also stated that it was not appropriate to apply the concept of sustainability to aquifers, because the waters in non-recharging aquifers were not renewable resources and even recharging aquifers were only partially recharged. For all that, the concept of sustainability as an objective—rather than an obligation—could find a place in the draft articles and inform the rights of equitable and reasonable utilization and the obligation not to pollute or cause significant harm. True “sustainable development” was mentioned in draft article 7, paragraph 1, but that might not be enough to provide an overall objective or direction. That was no doubt why the International Law Association had advocated a stronger commitment to the concept of sustainability in the draft articles, and had proposed linking utilization to the recharge rate in the case of recharging aquifers. The draft articles would benefit from being more explicit about a commitment to sustainability, rather than simply leaving the issue implicit in draft article 4 (*b*). If the draft were to become a convention, that concept could be clearly set forth in a preamble, but as its future was uncertain, some other way should be found of incorporating it in the main body of the text, something that could perhaps be dealt with in the Drafting Committee.

7. In conclusion, while he was in favour of referring the draft articles to the Drafting Committee, he hoped that the changes he had suggested would first be debated in plenary session.

8. Ms. ESCARAMEIA said she would have preferred a set of draft articles more focused on the protection of transboundary aquifers and less on the rights and duties of aquifer States, thus including all the States that could affect aquifers and be affected by them. She would also have preferred certain fundamental principles—the precautionary principle, the principle of sustainable utilization and the principle of compensation for harm caused—to be clearly enunciated, but she was aware that that approach was opposed by some members of the Commission. Finally, she would have liked the draft articles to follow less closely the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter “1997 Watercourses Convention”), as the topic under consideration differed from it in many respects, and also because that Convention had not been a success, few States having ratified it.

9. On the final form, she understood the Special Rapporteur’s concerns and agreed that the adoption by the General Assembly of a resolution, to which the draft articles would be annexed and that would recommend States to adopt bilateral and regional agreements following the principles set forth therein, would be a good solution. However, she had some concerns about the Special Rapporteur’s proposal that the General Assembly should consider the possibility of convening a negotiating conference. It would be better for the General Assembly to state in its resolution that it would set up a working group in the Sixth Committee with a view to the convening of a conference—in other words, it should adopt some stronger wording, because the matter was urgent and called for the setting up of a procedural mechanism likely to lead to more compelling conclusions.

10. On draft article 1 (Scope), Mexico's proposal to refer to the activities of non-aquifer States that might have an impact on aquifers was a good idea. Perhaps the Special Rapporteur could explain why he had stated in paragraph 13 of his report that the authors of the activities should be clearly specified in the subsequent draft articles. In the informal document of the International Law Association circulated at the previous meeting, it was stated that the draft articles should also cover aquifers that were located in the territory of a single State but were hydraulically connected to international watercourses, or whose discharge and recharge zones were situated in other States. Although such aquifers were not transboundary aquifers, given that they were located in a single State, they could perhaps be regarded as such from the physical standpoint, in view of their particular characteristics. Perhaps reference could be made to that special case, at least in the commentaries, and it would also be interesting to hear the comments of the UNESCO expert on that matter.

11. On draft article 2 (Use of terms), she did not understand why the Special Rapporteur wished to delete the word "underground", which was a useful qualifier, even though any geological formation was, by its very nature, at least partially underground. Some technical advice on that matter from the Special Rapporteur or the expert would be welcome. The current wording of subparagraph (d) was simultaneously too specific and not specific enough: on the one hand, it excluded the continental shelf, and, on the other, it did not cover the case of States administering a territory other than their own. In paragraph 16 of his report, the Special Rapporteur had stated that aquifers were mostly located under land territories of States and therefore had no connection with continental shelf transboundary aquifers. One wondered, however, whether exceptions to that general rule were not covered. That situation should at least be mentioned in the commentaries, and there, too, technical advice would be welcome.

12. With regard to draft article 3 (Sovereignty of aquifer States), several Governments had noted that the expression "in accordance with international law", which was used in a good many legal instruments, should be added to the current wording; she could not see why there should be any objection to its inclusion. On draft article 4 (Equitable and reasonable utilization), she would prefer, like several States, to replace the term "reasonable" with "sustainable". The concept of sustainability was not necessarily confined to the utilization of renewable resources, but referred more to the possibility for future generations to utilize a resource, or a substitute for that resource. It would therefore be regrettable not to use the term "sustainable", which was a term of art used by most legal institutions, added to which, as the majority of aquifers were renewable, it would be strange for the Commission to base itself on confined aquifers, which were the exception. Nevertheless, it might be possible, as Mr. McRae had proposed, to indicate that sustainability did not necessarily mean maintenance at a level identical to that which had been obtained before the utilization of the resource.

13. On draft article 6 (Obligation not to cause significant harm to other aquifer States), she had been pleased

to note that several States had called for the deletion of the term "significant", a qualifier to which she had always been opposed. Greece, for example, had pointed out that by qualifying harm, one accepted that a certain degree of harm could be caused without entailing any consequence. The word "harm" was already sufficiently flexible, and there was no need to create a threshold above which it would be taken into consideration. Bearing in mind the particular vulnerability of aquifers to pollution, the time it took for the effects of that pollution to be noted and felt and, very often, the irreversible nature of the harm, it was essential to establish a standard stricter than that provided for in the 1997 Watercourses Convention, particularly as scientists did not yet fully understand the workings of all those mechanisms. She also endorsed the comments by a number of States that felt that a paragraph concerning compensation for harm should be included.

14. On draft article 9 (Protection and preservation of ecosystems), she supported the proposal by the Netherlands to extend its scope of application to all States, rather than simply to aquifer States, as all States whose activities could have an effect on an aquifer should be obliged to protect and preserve ecosystems. On draft article 11 (Prevention, reduction and control of pollution), she felt that the threshold of "significant harm" was too high, as the Nordic countries had pointed out; that the scope should be extended to cover all States; and that the expression "precautionary approach" should be replaced by "precautionary principle", as requested by the Netherlands. In paragraph 31 of his report, the Special Rapporteur had noted that the utilization of aquifers was not hazardous *per se* and should not necessarily entail resort to a precautionary approach, and that he intended to cite instances in legal instruments to justify his choice of that term in preference to "precautionary principle". However, in her view, the precautionary principle applied to uses that might possibly have harmful consequences—in other words, it applied to the effects and not to the utilization itself. Given that it was very difficult, in the case of aquifers, to detect the effects of a given utilization before they caused harm, the precautionary principle should be applied in full. She would therefore welcome further clarification of that matter, as the drafting change proposed by the Special Rapporteur was not entirely satisfactory. Nevertheless, she was broadly in agreement with the draft articles and considered that they could be referred to the Drafting Committee. She hoped that her suggestions would be taken into consideration, and was greatly looking forward to the debate to be held with the UNESCO experts, and possibly with members of the International Law Association.

15. Mr. GAJA welcomed the fifth report on shared natural resources, which would enable the Commission to draw closer to the final stage of its work, namely the adoption of the draft articles on second reading. Most of the suggestions made since the first reading concerned matters of detail or of wording which could be resolved in the Drafting Committee.

16. On the final form of the draft articles, the Special Rapporteur favoured proposing a set of general principles, with the option of later considering the possibility of adopting a convention. Since a number of States were

opposed to a convention, it would seem appropriate to recommend at the present stage only the adoption of a non-binding text, without ruling out possible moves towards a convention. Furthermore, a widespread view—as in the case of the topic of watercourses—was that issues concerning an aquifer should be dealt with by agreements between the States that shared sovereignty over that aquifer. The model of a framework convention supplemented by protocols had yielded appreciable results in other fields relating to global protection of the environment, for example the ozone layer, but neither the gradual introduction of standards nor a monitoring mechanism seemed appropriate in the case of aquifers.

17. With regard to draft article 19 (Bilateral and regional agreements and arrangements), it would be unrealistic to suggest that the general principles enunciated by the Commission should supersede existing agreements concluded between aquifer States. Draft article 19 could be modified so as to encourage States to reconsider and supplement existing agreements in the light of those principles, or to conclude such agreements where none existed. For that purpose, it did not really matter whether the set of principles was binding or non-binding. The main thing was for States to become aware of the importance of aquifers, and it was more likely that this end would be achieved through that approach than by negotiating a convention that would perhaps never enter into force.

18. Consideration of the question of the relationship between the draft articles and existing or future treaties on the same subject had been postponed pending a decision on the final form of the draft. If the Commission intended to propose the adoption of a convention, that question would clearly have to be addressed, not only with regard to the mutually compatible provisions, as draft article 20 (Relation to other conventions and international arrangements) already did, but especially with regard to conflicting provisions. If it intended to adopt a non-binding set of general principles, that was less important, but it would nevertheless be useful to clarify the relationship between these principles and the 1997 Watercourses Convention, *inter alia* to provide an answer to the possibly misplaced concerns expressed by the International Law Association study group, which claimed that any solution other than a protocol to that Convention would be inappropriate, given that some aspects of the Convention were not covered by the draft articles. Without seeking to interpret the 1997 Watercourses Convention, something which it had no remit to do, the Commission could make it clear that aquifers were not part of a “system of surface waters and groundwaters” to which the Convention referred; that instrument regulated only waters starting from the discharge zone of an aquifer, whereas the present draft articles dealt with the waters that flowed into that zone.

19. Lastly, it would also be useful to specify that the release of water into a discharge zone was a form of utilization—albeit involuntary—of the aquifer, the implications of which should be considered.

20. Ms. XUE said that the Special Rapporteur had given due consideration to the comments by Governments and had incorporated them in the revised draft

articles. The abundance of those comments was encouraging evidence of the importance attached by States to the Commission’s work on the topic. She supported the decision to concentrate first on the work on aquifers, before turning to other shared resources. While it was now clear that this was the prevailing view, she was appreciative of the fact that, regardless of his own opinion, the Special Rapporteur had also taken full account of the concerns of those who wished also to deal with natural gas and oil. Similarly, with regard to the final form of the draft articles, the Commission should adopt a two-step approach, as it had done with the articles on responsibility of States. With regard to article 20, as the draft essentially consisted of guidance for States rather than a binding text, it did not seem necessary to refer to its relationship with other international instruments. State practice would constitute an empirical basis for deciding at a later stage whether a clause such as the one envisaged in draft article 20 was desirable. For the moment, the Commission should ascertain whether, in practice, the principles set forth fulfilled the object and purpose of the draft articles. In so doing, it did not intend to—and must not—restrict the right of States to conclude any arrangements or agreements they deemed appropriate having regard to the specific characteristics of the aquifer concerned. Furthermore, the relationship with the 1997 Watercourses Convention did not pose a problem, as that Convention had not yet entered into force and the matter could be dealt with later when it was necessary.

21. By and large, the revised draft articles reflected the practice of States, and also a long-term vision of sustainable utilization of shared water resources. With regard to Ms. Escarameia’s comments on the criterion “significant” to qualify “harm”, it was interesting to note that the modifier was generally used to qualify the notions of harm and adverse effects in international environmental treaties. Human activities tended to create effects on the natural environment. The Commission was not seeking to prohibit the utilization of aquifers, but to preserve a reasonable balance between, on the one hand, their utilization for purposes of social and economic development and, on the other, the protection of the environment. The term “significant” expressed that balance. Similarly, in European practice, the “precautionary principle” was often defined to weigh the risk against scientific certainty when it came to utilizing a given resource. There again, a balance had to be maintained. The Special Rapporteur was right to prefer the expression “precautionary approach” when utilization alone was at issue. The message was that scientific knowledge must always be taken into consideration when utilizing a resource, but that in the event of uncertainty, a precautionary approach must nevertheless be adopted.

22. Lastly, some of the provisions adopted on first reading could be interpreted as having a very broad scope of application, particularly those concerning management and planned activities. States should be given enough leeway to adopt such cooperation mechanisms as they saw fit in order to utilize and conserve water resources on a sustainable basis. That matter should be further elaborated in the commentaries.

Organization of the work of the session (continued)

[Agenda item 1]

23. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties would be composed of 13 members: Mr. Candioti, Ms. Escameia (Rapporteur), Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Pellet (Special Rapporteur), Mr. Perera, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Ms. Xue. The Drafting Committee on the topic of shared natural resources would comprise 12 members: Mr. Candioti, Ms. Escameia (Rapporteur), Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. McRae, Mr. Ojo, Mr. Saboia, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Ms. Xue.

*The meeting rose at 11.15 a.m.***2958th MEETING***Wednesday, 7 May 2008, at 10 a.m.**Chairperson:* Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (continued) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SABOIA said that, although the abundant oral and written comments received from Governments on the draft articles on the law of transboundary aquifers adopted by the Commission on first reading in 2006 were generally supportive of the approach taken by the Special Rapporteur and the Commission, the number and scope of those comments, which covered both legal and technical aspects of the topic, posed a challenge to the Commission as it commenced its second reading of the draft articles.

2. As to the final form of the Commission's work on the topic, he continued to prefer a non-binding set of guidelines which might serve as a basis for drawing up bilateral or regional agreements and possibly lead to the adoption of more effective norms, or even binding legal instruments, that took account of the specific characteristics

of the aquifers to which they related. He agreed with the Special Rapporteur that if the Commission were to present the General Assembly with a draft convention, there was a danger that its work might be shelved for a number of years. The question raised by Ms. Xue at the 2957th meeting, as to whether there was any need at the current stage for an additional article referring to the relationship between the draft articles and other international legal instruments, was also pertinent.

3. The solution suggested by the Special Rapporteur in paragraph 9 of his fifth report had the advantage of not prejudging the issue of the final form and of leaving it to the General Assembly to decide whether the final product was to be binding or non-binding. He noted that the decision to use mandatory language in the draft articles was without prejudice to the final form of the Commission's work on the topic.

4. He concurred with the Special Rapporteur's views on the informal document submitted by the International Law Association, which took a rather different approach to the subject from that which had guided the Commission for a number of years. It would be detrimental to the whole process to reopen so many issues on second reading without a compelling reason. In any case, the Commission, as a subsidiary organ of the General Assembly, had to give priority to the comments presented by States. He would be reluctant to engage in drafting exercises involving the experts of other organizations unless such was the Commission's established practice.

5. Turning to the wording of the draft articles, he said that in draft article 1 (Scope), the unduly broad reference to "other activities" in subparagraph (b) could hamper legitimate activities, particularly in agriculture and related sectors, in aquifer States. Although in paragraph 13 of his report the Special Rapporteur had expressed his willingness to identify the relevant activities in detail in the commentaries, he personally thought that the subparagraph could be deleted, or at least qualified by the insertion of a reference to "significant harm", in order to establish an appropriate threshold for the possible harmful effects that a specific activity might have on an aquifer. Like Ms. Xue, he considered it important to maintain an approach that did not unduly restrict the legitimate use of aquifers for social and economic development.

6. With regard to draft article 2 (Use of terms), it would be interesting to have clarification of some of the technical matters touched upon in some Governments' comments, such as whether it was correct or necessary to refer to an underlying less permeable layer; whether aquifers whose waters could not be extracted should be included in the definition; and whether the definition of recharge and discharge zones was accurate.

7. While he endorsed Mr. McRae's comments on the importance of including subparagraph (d bis) in the draft articles, even though the concepts of the withdrawal of water and heat needed elucidation, he was somewhat concerned about Mr. McRae's proposal, supported by Ms. Escameia, to extend the scope to include aquifers in areas under the continental shelf. He supported the Special Rapporteur's position on that question.

8. Ms. Escameia's question regarding the responsibility of a State administering another State's territory was worthy of reflection. He understood her remark to refer mainly to the situation of a State that was acting as an occupying Power; in such cases, the rules of international humanitarian law governing the duties of occupying States might address that concern. However, there might be other instances, such as that of a territory administered by the United Nations pursuant to Chapter VII of the Charter of the United Nations, which would merit further discussion and clarification in the commentaries.

9. Draft article 3 (Sovereignty of aquifer States) was crucial to the balance that the Special Rapporteur and the Commission were seeking to strike between, on the one hand, the legitimate sovereign rights of States to use their natural resources, including underground waters, and, on the other, their responsibility regarding the equitable and reasonable use of resources, including transboundary aquifers, and also their duty not to cause significant harm to another aquifer State through that use. It seemed problematic to require a State to exercise its sovereign rights over its portion of the aquifer solely in accordance with the draft articles, the binding or non-binding nature of which had yet to be decided. Other norms of international law were no doubt relevant to the regulation of transboundary aquifers. The inclusion of a reference to international law in general would therefore improve the draft article, as would an express reference to General Assembly resolution 1803 (XVII) of 14 December 1962, which constituted a significant source of law concerning States' permanent sovereignty over their natural resources.

10. With regard to draft article 4 (Equitable and reasonable utilization), he was in favour of maintaining the current approach. It was necessary to take into account the essentially non-renewable nature of aquifers and the fact that although the waters contained in them should be carefully preserved and used with caution, that should not prevent them from serving socially and economically legitimate purposes in the aquifer State where they were located.

11. While he agreed with the Special Rapporteur's rejection, in paragraph 21 of his report, of the proposal that an aquifer State should be prohibited from assigning, leasing or selling its right to utilize an aquifer to another State, he saw merit in Mr. McRae's remark to the effect that rather than establishing a prohibition, some obligations should probably be placed on a State which acquired the right to use an aquifer. The possibility of one aquifer State selling or leasing its portion of the aquifer to another State might indeed be a cause for concern, given that aquifers might be used to dispose of carbon or other materials. That was a particularly disturbing prospect, in the case of developing or vulnerable States that might be prevailed upon by economic circumstances to allow other States to use their aquifer, with possibly detrimental consequences. While those matters might be covered by international instruments regarding the disposal of hazardous and other materials, some reference to that eventuality could perhaps be included in the commentaries.

12. Article 5 (Factors relevant to equitable and reasonable utilization) adequately established the relevant

factors and the current wording should therefore be retained. He had been surprised to read one Government's criticism of groundwater-based agriculture conducted in arid or semi-arid countries "under the pretext of food security" and by its apparent proposal to limit the use of groundwater to supplying the bare essentials for survival. He wondered what that same Government would have to say about the extensive use of subsidized agriculture and its distorting effects on food production, trade and the use of water.

13. He supported the retention of the threshold of "significant harm" in draft article 6 (Obligation not to cause significant harm to other aquifer States). Ms. Xue's helpful statement at the previous meeting had shown how widespread was the use of that qualifier in legal instruments covering similar situations. As he had indicated in his statement to the Working Group on shared natural resources at the previous session, the obligation of aquifer States to take appropriate measures to avoid significant harm should be regarded as an obligation of conduct, rather than as one of result.

14. Draft article 7 (General obligation to cooperate) should be maintained as it stood. In paragraph (2) it would be advisable to retain the word "should", as it would scarcely be possible to make the establishment of a joint committee mandatory in the absence of consent by the interested parties to do so.

15. On draft article 8 (Regular exchange of data and information), he drew attention to Brazil's view that it would be useful to add a specific reference to the importance of a "collective effort to integrate and make compatible, whenever possible, the existing databases, taking into consideration regional contexts and experiences". While that effort might be covered by paragraph 4 as currently worded, the Special Rapporteur should consider including a reference in the commentaries to the need for such an effort, and also to the desirability of establishing aquifer inventories, as suggested by Switzerland.

16. Generally speaking, he supported the drafting of Part III; however, in draft article 10 (Recharge and discharge zones) the reference to recharge and discharge zones should be qualified by an expression such as "most significant", in order to avoid imposing an obligation which might be difficult to apply in practice. He also endorsed the current wording of draft article 11 (Prevention, reduction and control of pollution) and believed that it was necessary to retain the expression "precautionary approach", in the light of the explanations given by the Special Rapporteur in previous reports¹⁴ and in paragraph 31 of his fifth report.

17. With regard to draft article 13 (Management), given that the draft articles were to be seen as a set of guidelines to serve as a basis for bilateral and regional cooperation and instruments, it would be awkward to stipulate that States must establish and implement plans for the management of aquifers in accordance only with the provisions of the

¹⁴ See, in particular, the third report of the Special Rapporteur in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1, para. 33.

draft articles. An additional reference should be made to bilateral or regional instruments or arrangements, which might lay down rules for management more in keeping with the characteristics of the aquifers concerned. He took it that the “joint management mechanism” mentioned in the last sentence of the draft article was meant to refer to the transboundary aspects of managing an aquifer, but was without prejudice to the rights of a State concerning the management of its own segment of the aquifer. It was of course desirable to seek to ensure that transboundary aquifers were operated and managed in a complementary and cooperative manner. That goal should be sought by complementing the current draft articles with bilateral or regional arrangements.

18. Mr. OJO commended the seminal work done by the Special Rapporteur on the topic of shared natural resources and his wise recommendation that the Commission should first complete its work on the law of transboundary aquifers, even though other kinds of shared natural resources, namely oil and gas, might be governed by similar rules and principles under international law. He commended the technical expertise evident in the draft articles adopted on first reading: recourse to experts had made it possible to clarify technical concepts and had shown the importance of interaction between law, science and policy in the progressive development of international law. He likewise commended the Special Rapporteur and UNESCO on the regional seminars held to familiarize Governments with the draft articles, a step which would undoubtedly increase the likelihood of their ultimate adoption.

19. Draft article 1 should leave States in no doubt as to the scope of application. Yet the words “other activities” left room for uncertainty. Accordingly, the examples of such activities listed in paragraph (6) of the commentary to the draft article adopted on first reading, namely farming, the utilization of chemical fertilizers and pesticides and the construction of subways,¹⁵ should be incorporated in the text of subparagraph (b).

20. The intention to regulate the utilization, protection, preservation and management of freshwater resources that were vital for human life, made the draft articles extraordinarily important. Accordingly, there was a need for a clear statement that the draft articles applied to freshwater resources—all the more so because the definitions of “aquifer” and “aquifer system” did not make that plain.

21. It was clear that the draft articles drew heavily on the 1997 Watercourses Convention. As both the draft articles and the Convention applied to transboundary aquifers that were hydraulically connected to international watercourses, there was a potential for conflicts of application. Some statement on the relationship between the two instruments, especially in the event of any conflict between them, was therefore desirable.

22. Paragraph (4) of the commentary to draft article 2 explained that the quantity of waters transmitted between aquifers was important in deciding whether they constituted an aquifer system, since an insignificant or *de minimis* quantity of water might not translate to a true

hydraulic connection. It was important that an idea of the quantity of transmissible water necessary for the constitution of an aquifer system should be indicated, by adding the word “significant” to draft article 2 (b), which could be rephrased to read “‘aquifer system’ means a series of two or more aquifers that have significant hydraulic connection”.

23. Draft article 3 simply restated a basic principle of international law and, as such, it was welcome. He did not, however, subscribe to the suggestion that a specific reference to the application of the principle of sovereignty should be included in the draft article. It was a generally accepted principle of international law that the exercise of sovereignty entailed not only rights but also responsibilities. For that reason, he suggested that the draft article should be left unchanged.

24. In draft article 5, the term “natural characteristics” had a technical meaning which needed to be defined clearly. The commentary to that draft article helpfully explained that the expression referred to the physical characteristics which defined and distinguished a particular aquifer, and set out the three categories of natural characteristics. Similarly the expression “related ecosystem”, used in paragraph 1 (i), required definition in order to guide the interpretation of the draft article. Paragraph 2 should be divided into subparagraphs in order to highlight the importance of each of its components, especially that relating to vital human needs.

25. Since paragraph (5) of the commentary to draft article 6 made it clear that it was “intended to cover activities undertaken in a State’s own territory”, the obligation referred to in the draft article was primarily on the individual State, although a collective obligation on other transboundary States was not excluded. As drafted, however, the article appeared to emphasize that States generally were the primary obligor. Accordingly, paragraphs 1 and 2 should begin with the words “An aquifer State” and the consequential grammatical adjustments should be made.

26. The need for cooperation among aquifer States was central to any meaningful implementation of the proposed draft articles. The principle of cooperation was inherent in draft articles 8 to 16. There was therefore a need for a provision upholding the principles of sovereign equality and territorial integrity, in the interests of weaker States, and reminding stronger States of their traditional obligations under international law. Such a provision should be independent of draft article 7 and might be inserted early in the text, before the current draft article 2. The reference to sovereign equality and territorial integrity could then be deleted from draft article 7.

27. Paragraph (2) of the commentary to draft article 8 stated that the rules set forth therein were residual and applied in the absence of specially agreed regulation of the subject. In fact, however, States should be encouraged to make arrangements for the regular exchange of data and information independently of the provisions of the draft article. He therefore proposed that paragraph 1 should begin with the formulation: “Without prejudice to any other regulation or arrangement which aquifer States

¹⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 95–96.

may make and pursuant to draft article 7 ...". A provision of that nature would serve to remind aquifer States of the need to act on their own initiative in that regard.

28. Draft article 10 was the only one which imposed obligations on non-aquifer States. The obligation to co-operate with aquifer States might involve the exchange of data and information. He therefore suggested that all non-aquifer States in whose territory a recharge or discharge zone was located should be bound by the obligation established in draft article 8. That result could be achieved by inserting at the end of paragraph 2 the words "and for the purposes of this article, such States shall be deemed to be aquifer States pursuant to articles 7 and 8 and shall be bound thereby".

29. Draft article 11 was intended to ensure that States' efforts to prevent, reduce and control pollution of a trans-boundary aquifer or aquifer system also extended to the recharge process. Where the recharge process took place in non-aquifer States, those States should also be covered by that obligation. He endorsed the point made by Ms. Escameia in that regard. He therefore proposed that a second paragraph should be added to draft article 11, to read: "The obligation in this article shall apply *mutatis mutandis* to non-aquifer States where any recharge zone is located within such States."

30. As for draft article 13, the obligation to enter into consultations concerning the management of a trans-boundary aquifer or aquifer system should attach to aquifer States generally. Accordingly, the words "at the request of any of them" should be deleted from the second sentence of the draft article.

31. Mr. PELLET, referring to the procedure for election of officers, said that the rigid application of the principle of geographical distribution governing the appointment of officers of the Commission was not necessarily always a good thing, although he hastened to add that the comment was not directed against any of his colleagues who had been elected at the start of the current session. He would raise the matter again at the celebrations to mark the Commission's sixtieth anniversary.

32. The topic of shared natural resources was of great practical importance, which was why he had strongly supported its inclusion on the Commission's agenda. Nevertheless, if he took the floor in the present debate, it was more as a mark of his esteem for the Special Rapporteur than out of any conviction that he had an interesting contribution to make.

33. He hoped that the Special Rapporteur would forgive him for voicing one small criticism of the presentation of the fifth report. It was irritating that the revised draft articles had been relegated to an annex, so that the reader had constantly to leaf back and forth through the report in order to relate the Special Rapporteur's comments on the revised texts to the provisions to which they referred. It would have been better simply to juxtapose the revised provisions and the comments. It was also regrettable that the Special Rapporteur had not employed some typographical device to highlight the few changes made to the draft articles since the first reading.

34. As to the final form of the texts, he was *prima facie* in agreement with the proposal in paragraph 9 of the report, although he was sceptical about the wisdom of suggesting the convening of a diplomatic conference, even in the medium or long term, given that views on the topic were strongly coloured by the special features and circumstances of each aquifer. Subparagraph (b) of the recommendation in paragraph 9 seemed to set forth the most desirable outcome, although its wording was somewhat strange. It was recommended that States—presumably aquifer States—should make appropriate arrangements bilaterally or regionally with the States concerned. But which were the States concerned? He supposed that the wording referred to the aquifer States, but it could refer to others. If it referred only to aquifer States, the subparagraph should be reworded to read "recommend that aquifer States make appropriate arrangements ...", in which case no mention need be made of the States concerned. If the latter might include third States, the phrase should read "Invite the aquifer States and the other States concerned to make appropriate arrangements ...". He had drawn particular attention to the wording of subparagraph (b), because it referred to what should constitute the Commission's most important objective when presenting its recommendations to the General Assembly.

35. On draft article 1, he said that, by making it clear that the draft articles applied not only to the utilization of aquifers but also to other activities which had or were likely to have an impact upon aquifers, subparagraph (b) not only obviated the need for a new subparagraph (d), as proposed by Saudi Arabia in paragraph 71 of document A/CN.4/595 and Add.1, but also made subparagraph (c) redundant, since the latter merely listed some of those other activities.

36. He agreed with Mr. Ojo that in draft article 2 (b), it would be advisable for the purposes of the draft articles to limit the definition of an aquifer system to systems with a significant hydraulic connection. The precise wording would need to be determined in due course. The same applied to the definition of the aquifer itself in draft article 2 (a). The current definition was too abstract for the purposes of a draft that was concerned only with aquifers of some considerable size.

37. He was somewhat troubled by the definition proposed for the concept of utilization in the new draft article 2 (d bis). The Special Rapporteur indicated in paragraph 17 of his report that it was not exhaustive. To make that clear, the words "*inter alia*" could perhaps be included in the text itself, which gave examples only of the most common types of utilization of transboundary aquifers or aquifer systems. Where codification and progressive development were involved, he was opposed in principle to the inclusion of examples in the text itself: examples should be relegated to the commentaries, and it would in any case be preferable to draft an all-encompassing formulation that obviated the need for examples.

38. On draft articles 4 and 5, which were crucial to the overall balance of the draft, he regretted the fact that the Special Rapporteur had not taken up Cuba's proposal to replace the expression "present and future needs" by

“the needs of present and future generations”. The use of subterranean aquifers, which were almost exclusively non-recharging, was the perfect example of a situation calling for what might be termed “intergenerational prudence”. Even in the case of a non-renewable resource, he did not see why concerns about sustainability should not be addressed in the draft. They were addressed, and rightly so, in draft article 7, paragraph 1, but that concept should permeate the entire draft and be reflected specifically in draft articles 4 and 5.

39. In his comments on draft articles 9 and 11, the Special Rapporteur seemed averse to the notion that States other than aquifer States might have a role to play in the protection and preservation of ecosystems and the prevention, reduction and control of pollution. That came as a surprise to him, perhaps owing to his limited knowledge of aquifers. However, either non-aquifer States as defined in draft article 2 (*d*) could play no real role in such endeavours, in which case he agreed with the Special Rapporteur, or else they could, in which case he failed to comprehend the Special Rapporteur’s reticence. If there were any specific situations in which States other than aquifer States could play an important role in the preservation of aquifers, they were not described in the report.

40. Even though the Special Rapporteur had asked members to confine their comments to draft articles 1 to 13, he had so little to say on the remaining draft articles that it made good sense to address the entire text in a single intervention. The minor change to the wording of draft article 15 had no effect on the French and, he presumed, on other language versions. Referring to the proposed new draft article 20, paragraph 1, he questioned the advisability of basing it on article 311, paragraph 2, of the United Nations Convention on the Law of the Sea, a provision which he had always found frankly baffling. He could not see the point of saying that a convention did not alter the rights and obligations arising from other agreements with which it was compatible. What mattered was not what happened when texts were compatible, but what happened when they were incompatible. It would be better to say nothing and let the principles of *lex specialis* and *lex posterior priori derogat* come into play. Moreover, the Commission usually left the drafting of final clauses to the diplomatic conferences at which instruments were adopted, and the Special Rapporteur’s proposal appeared to prejudge the decision to be adopted by the General Assembly on the final form of the draft.

41. However, his opposition to the new draft article had an even more pragmatic basis: at some point in the more or less remote future, the draft might well become a convention, but that was not what the Commission would be recommending to the General Assembly if, as he hoped, it adopted the course of action outlined in paragraph 9 of the report. If that was to happen, then throughout the interim period, draft article 20 would at best be devoid of purpose and, more likely, would create needless complications and raise questions concerning the interrelation between soft and hard law. It would be for a diplomatic conference to decide whether the future instrument should include such provisions in its final clauses.

42. Accordingly, he favoured referring to the Drafting Committee draft articles 1 to 13, and also draft articles 14 to 19, but not draft article 20.

43. Mr. FOMBA congratulated the Special Rapporteur on the excellent quality of his report and endorsed his view that the partial similarities between non-recharging aquifers and natural deposits of oil and gas did not mean that the applicable rules were entirely identical or automatically applicable to both categories of natural resources. He likewise agreed that a decision on whether to undertake work on oil and natural gas should be postponed until the work on transboundary aquifers had been completed.

44. A wide divergence of views and a number of options existed with regard to the final form of the draft articles, all of which must be given due consideration so as to evaluate their respective advantages and disadvantages. A case-by-case approach should prevail, and the Commission’s work should be guided by considerations of practical utility. Nevertheless, in view of the topic’s importance to humankind and of the fact that it followed on from the 1997 Watercourses Convention, a legally binding convention should be the ultimate goal.

45. Accordingly, he endorsed the comments in paragraphs 8 and 9 of the report concerning the need for a flexible and graduated approach, the length of time required for codification and the importance of urgent action in the face of the global water crisis. The Special Rapporteur rightly suggested that one way of coping with that situation was for States to enter into bilateral or regional arrangements on the basis of the principles stipulated in the draft articles. However, the question then arose as to what would be the fate of arrangements that predated the principles, in the event that the two sets of arrangements were totally or partially incompatible. Perhaps, as suggested by Mr. Pellet, the *lex specialis* rule would automatically apply. Despite some of the comments made at the previous meeting, he fully endorsed the Special Rapporteur’s suggestion that a two-step approach should be followed, starting with a draft recommendation to the General Assembly. He also agreed with the Special Rapporteur’s view that, since the draft recommendation to the General Assembly foresaw the possibility of a convention, the revised texts needed to be in that form.

46. Retaining the existing title was acceptable, even though the meaning of the term “transboundary” seemed to cause some problems. When draft articles 1 and 2 were read together, it was clear that the draft applied to all aquifers and aquifer systems, regardless of whether they were linked to surface waters. Nevertheless, it would be useful to provide some examples in the commentaries. With regard to subparagraph (*b*) of draft article 1, he commended the Special Rapporteur’s intention to identify the relevant activities in the commentaries. On the question whether to mention the activities of non-aquifer States that could have an impact on aquifers, the Special Rapporteur took the view that the matter could be dealt with in the draft articles dealing with the obligations of States. However, draft articles 6 and 7 did not expressly address that subject. Did the Special Rapporteur plan to propose new provisions for that purpose? Such provisions could perhaps be located in Part IV, concerning activities

affecting other States, and could be entitled “Activities of States other than aquifer States”.

47. The proposal to add a new subparagraph (*d*) to draft article 1 was not appropriate, for the reasons given by the Special Rapporteur. As for the question whether saltwater resources should be excluded, he had expressed a similar concern at the previous session and was glad to see that the Special Rapporteur had admitted that there were some very limited instances of the use of brine aquifers for irrigation, as would be explained in the commentary.

48. In connection with draft article 2, on the use of terms, the Special Rapporteur was to be commended for his efforts to draw on the best technical advice available. As to whether the scope of the draft articles should be extended to continental shelves, he found the Special Rapporteur’s response on the whole convincing. He also agreed with Mr. Pellet’s proposal to modify the definition of “utilization” so as to emphasize that it was not exhaustive; alternatively, the commentary could address the problem. The commentaries could also address other technical issues, as suggested in paragraphs 18 and 19 of the report.

49. He could generally go along with the Special Rapporteur’s reasoning in paragraph 21 of his report with regard to the concept of sustainability, but would like to see further efforts made to define the relationship between the terms “reasonable” and “sustainable”. Consideration should also be given to the question whether a distinction should be made between the cases of non-recharging and recharging aquifers. While he had initially endorsed the use of the phrase “present and future needs”, he now thought that the idea of the needs of future generations should be spelled out. As to whether a State could assign, lease or sell, in whole or in part, its right to utilize aquifers, while agreeing with the Special Rapporteur that the matter must be left to States to decide, he noted that nothing was said in the report about the position of international law on that subject.

50. He endorsed the views, expressed in paragraphs 23 and 25, that the scope of the obligation under draft article 6 not to cause significant harm to other aquifer States and the legal framework relating to compensation should be clarified in the commentaries. As for the suggestion that the scope of draft article 9, concerning protection and preservation of ecosystems, might be broadened to include, not just aquifer States, but all States, it would be helpful if the Special Rapporteur were to submit clarifications making it possible to decide whether non-aquifer States should be required to protect ecosystems located outside aquifers.

51. He agreed that procedural measures pursuant to draft article 11 on prevention, reduction and control of pollution would best be explained in the commentaries. While he lacked the technical expertise to respond to the question whether non-aquifer States in whose territory there was neither a recharge nor a discharge zone of a transboundary aquifer of other States had any role to play in preventing, reducing or controlling pollution of that aquifer, he felt that the question certainly deserved further consideration.

52. It was certainly open to debate whether the phrase “precautionary approach” was to be preferred to “precautionary principle” in draft article 11, and the Special Rapporteur’s intention to cite conventions in which those expressions occurred was therefore welcome. However, the Special Rapporteur should be aware that he himself sometimes used the two phrases interchangeably. Lastly, the proposal to alter the word order of the second sentence of that draft article seemed acceptable.

53. Mr. BROWNLIE said that the fifth report contained many sensible and helpful observations on a difficult subject, rightly taking the view that it was not practical to have the topic encompass the qualitatively different subject of oil and natural gas. On the final form of the draft articles, he had initially been attracted by the flexible compromise solution suggested in paragraph 9 of the report, but after hearing Mr. Pellet’s remarks, he had reverted to the idea of preparing a draft convention. While the topic might not necessarily be particularly suited to a positive law approach, drafting in the form of a convention would nevertheless help the Commission to retain control of the subject matter.

54. He did not agree with the Special Rapporteur’s reasoning about sustainability: while fashionable, such environmental law concepts were not yet very well formed. He would be strongly in favour of including sustainability, as long as the notion was properly explained and given precise content. In the context of aquifers, a reference to intergenerational values would be useful and sensible.

55. The legal status of aquifers was surprisingly complex. Draft article 3 spoke of the sovereignty of aquifer States; General Assembly resolution 1803 (XVII) of 14 December 1962 referred to the inherent sovereignty of the aquifer State; and draft article 4 covered the right of equitable and reasonable utilization which seemed indistinctly to recognize some legal interest apart from sovereignty as such. Draft article 6 spoke of the obligation not to cause “significant” harm. In the work on international liability in case of loss from transboundary harm arising out of hazardous activities, “significant” was not the strongest qualifier used, and was construed as meaning “subject to proof in quantitative terms”. In the context of transboundary harm, there was indeed a problem with proving damage, a problem that flowed partly from the unfortunate yet longstanding division in the Commission’s work between international liability and State responsibility. Draft article 11 placed on aquifer States a duty of prevention and control. There was a lacuna, however, in respect of the role of principles of general international law in relation to State responsibility, which could not be set aside. There was also a need for a paragraph on compensation.

56. Against that background, some inferences could be drawn. First, there was no shared or proprietary legal interest between aquifer States. Secondly, sovereignty and control connoted a duty to prevent harm to the other aquifer State or States. Thirdly, that necessarily involved a straightforward application of the classical principles of State responsibility, as sovereignty implied a duty to control and therefore a duty not to permit a territory under control to become a source of harm to neighbouring

States. That principle was reflected in the arbitral award in the *Trail Smelter* case, the *Corfu Channel* case and the recent case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In his view, an aquifer was clearly a domain under the sovereignty and control of an aquifer State.

57. His conclusion was that there was an awkwardness in the draft articles in relation to State responsibility. Draft article 6 made no reference to State responsibility but created an obligation not to cause significant harm, and draft article 11 posited a duty of prevention and control of pollution. However, there was no reference to the principles of State responsibility under general international law. The key question, then, was whether those provisions inferentially indicated the absence of State responsibility under general international law. It was strange to see references in draft article 11 to the precautionary principle, in the absence of any reference to the principles of State responsibility. The numerous principles of customary or general international law already in existence should be recognized as applying to sovereignty and to the duty to control pollution or other damage to other aquifer States that derived from sovereignty over part of an aquifer.

58. Mr. CANDIOTI, referring to the final point made by Mr. Brownlie, said that the intention of the Working Group and of the Special Rapporteur had never been to exclude responsibility for transboundary harm in relation to aquifers. A reference to responsibility under general international law was included in the commentaries produced by the Special Rapporteur. In addition, there was a general reference to responsibility for transboundary harm in the Commission's earlier work on responsibility of States for internationally wrongful acts¹⁶ and for activities not prohibited by international law.¹⁷

59. Mr. VASCIANNIE congratulated the Special Rapporteur on an excellent fifth report. On the question of the final form of the draft articles, there seemed little point in producing a framework convention, as many members of the Sixth Committee might be disinclined at the current time to proceed to a binding multilateral treaty. That circumstance, together with the fact that some "specially affected" States already had bilateral or regional obligations concerning transboundary aquifers, counselled against the framework convention approach. On the other hand, for the Commission merely to provide a report seemed to be an unduly modest way of going about the codification and/or progressive development of what was acknowledged to be a topic of some urgency in international law.

60. Partly by elimination of the alternatives, he supported the Special Rapporteur's recommendation in paragraph 9 of the report. It would probably be unnecessary to suggest the establishment of a working group of States; States themselves could determine the pace at which to move the matter forward.

61. He endorsed the Special Rapporteur's suggestion that consideration of oil and natural gas should be deferred until the work on aquifers had been completed. Even although some of the arguments put forward by States for keeping the issues separate, as summarized in paragraph 5 of the report, were not entirely convincing, nevertheless, if there was significant State resistance and a rational basis for treating oil and natural gas differently from water, it might be prudent to maintain the distinction in the Commission's work. The justification for making the distinction appeared to be simply that the commercial treatment of the one resource had traditionally differed from that of the other two.

62. With regard to draft article 1 (Scope), the Special Rapporteur maintained that the intention to apply the adjective "transboundary" to both aquifer and aquifer system was clear; he personally agreed with that assessment. However, in the context of litigation, one could press the point, particularly if an ambiguity arose in translation. Perhaps draft article 2, on use of terms, could spell out that intention in order to eliminate any doubt.

63. A substantive matter arose in connection with the words "other activities" in draft article 1 (b). Someone reading the draft articles in years to come might legitimately ask which other activities were contemplated within the scope of the document and might not necessarily be helped by the qualifier that the activity had or was likely to have "an impact", given the subjective nature of the word. Nor was it sufficient to say that the other activities would be identified in the commentary, because if the instrument eventually became a framework convention, States would want to know, from the text, precisely what activities were contemplated. He suggested the insertion of a brief list of the activities contemplated in draft article 1 (b).

64. Turning to the use of terms, he said that Ms. Escarameia's reminder that the word "territory", as used in the definition of "aquifer State" in draft article 2 (d), would not include the continental shelf was of course correct; it was also consistent with the Special Rapporteur's view that the continental shelf should not be included in the topic unless the transboundary aquifer between two States extended to the continental shelf, because it was rare for aquifers to extend to the shelf and because rock reservoirs usually held oil and natural gas, and sometimes brine. As had been argued by Mr. McRae and Ms. Escarameia, however, those arguments were not conclusive, not least because the Special Rapporteur was now of the opinion that the utilization of brine fell within the scope of the topic in respect of land territory. Nonetheless, he personally was inclined to support the Special Rapporteur's approach, because he agreed that oil and natural gas should not be addressed in the draft articles, and also because the law pertaining to the continental shelf had developed, in some senses, in a manner independent of the law on resources in land territory. It was not clear to him why those two regimes—land and shelf—should be conflated for the purposes of transboundary aquifers. The fact that the Special Rapporteur had made provision for brine under land territory did not necessarily mean that the same should be done for brine within the seabed and subsoil of the continental shelf, which was an area of sovereign rights, not of sovereignty.

¹⁶ See footnote 12 above.

¹⁷ Draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98, and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67.

65. He supported Ms. Escarameia's view that sovereignty in draft article 3 could be said to be exercised "in accordance with the principles of international law". However, he saw no need to qualify the word "sovereignty" in the draft article with the adjective "inherent", as had been suggested by one Government.

66. The concept of "equitable and reasonable utilization" was carefully elaborated upon in draft articles 4 and 5. The advantage to be gained by changing the phrase to read "equitable and sustainable utilization" was yet to be fully demonstrated, given the need to strike a balance among various social, economic and other factors, a need pointed out by Ms. Xue at the previous meeting. Reasonable use incorporated considerations of sustainability.

67. He assumed that the list of considerations in draft article 4 was meant to be exhaustive, but that the list of factors in draft article 5 was not; that the sovereignty of an aquifer State encompassed its power to assign to third States its rights to utilize its aquifer; and that the aquifer State could assign no greater rights than it had. That was consistent with the approach to permanent sovereignty over natural resources taken by the General Assembly.

68. With regard to draft article 7, paragraph 2, on the general obligation to cooperate, it would be helpful to indicate some of the specific purposes for which States should establish joint mechanisms of cooperation.

69. He noted that draft article 8, on regular exchange of data and information, included a "best efforts" provision in paragraph 3. That might be as far as one could go at the current time, but he wondered whether the economic challenges facing a country, or the terms of its national law on proprietary information, might perhaps serve to bar the provision of information under that clause.

70. Mr. WISNUMURTI expressed his gratitude to the Special Rapporteur for his fifth report, which set out the views of Governments in a balanced manner. The Special Rapporteur had rightly concluded that an overwhelming majority of Governments and members of the Commission supported his suggestion that the law on transboundary aquifers should be treated independently of any future work on the issues related to oil and gas. That conclusion gave clear direction to the work of the Commission.

71. Regarding the final form of the draft articles, he shared the Special Rapporteur's view that the ultimate goal should be their adoption as a legally binding convention. That might, however, be a lengthy process, involving difficult negotiations in a diplomatic conference whose protracted nature would undermine the effectiveness of efforts to take urgent measures to deal with the global water crisis. He therefore believed that the two-step approach suggested by the Special Rapporteur in paragraph 9 of his fifth report was realistic and reasonable, and welcomed the decision to draft the revised texts in the form of a convention.

72. However, if the General Assembly agreed to the two-step approach suggested, there should be few illusions as to the likelihood of Governments demonstrating sufficient interest and political will to examine the

draft articles with a view to concluding a convention, as suggested in subparagraph (c) of the draft recommendations contained in paragraph 9 of the report. That said, if Governments were really to put into practice the recommendation formulated in subparagraph (b) of the draft recommendations, by making appropriate bilateral or regional arrangements on the basis of the principles enunciated in the draft articles, and if they saw the usefulness of such arrangements, that might in turn create the conditions necessary for the convening of a diplomatic conference.

73. On draft article 1, he had taken note of the Special Rapporteur's clarification regarding an observation by one Government, referred to in paragraph 14 of the report, to the effect that the draft article did not exclude cases of utilization of brine (saltwater) aquifers where salt water was extracted and the desalinated water used for irrigation. It might be sufficient to make that clarification in the commentary, rather than in the draft article itself.

74. On the use of terms (draft article 2), the Special Rapporteur indicated in paragraph 16 of the report that he was opposed to the suggestion that the definition of "aquifer State" should be extended to cover shared natural resources found under the continental shelves of States. He sympathized with the Special Rapporteur's concern that such an extension of the definition would cause complications and would be contrary to the accepted approach that the drafting of articles on transboundary aquifers should be pursued independently of any future work of the Commission on issues related to oil and natural gas. However, while it was true, as noted by the Special Rapporteur, that extension of such aquifers beyond territorial seas was possible but rather rare, the Commission should not *a priori* exclude the need for a definition which covered cases in which the transboundary aquifers extended to the continental shelves of States. Continental shelves were considered to be the extension of the land mass of the States concerned, which had sovereign rights over the natural resources contained therein. For those reasons, and as there was the possibility, as indicated by the Special Rapporteur in paragraph 16 of the report, that transboundary aquifers might be found beneath the continental shelves under the jurisdiction of the States concerned, there was no reason to exclude transboundary aquifers that extended to the continental shelves from the definition in draft article 2 (d).

75. He had no serious difficulty with the new draft article 2 (*d bis*) proposed by the Special Rapporteur, which made it clear that the notion of utilization of transboundary aquifers and aquifers systems included withdrawal of water, heat, storage and disposal. He took the point made that the provision should be understood as being applicable to other relevant draft articles, including draft articles 4 and 5.

76. With regard to the provisions on equitable and reasonable utilization (draft article 4), he supported the proposal by some Governments, referred to in paragraph 21 of the fifth report, to include the concept of sustainability in the text of draft article 4 by substituting "equitable and sustainable utilization" for "equitable and reasonable utilization". The concept of sustainability was a broad

one, covering not only renewable, but also non-renewable resources, including the waters in non-recharging aquifers. The proposal for a new subparagraph (*e*) that would read “no State may assign, lease or sell, in whole or in part, to any other State, whether an aquifer State or a non-aquifer State, its right to utilize aquifers”, deserved further study, and the Commission should take a clear position in that regard. Leaving the question to States to decide might be a convenient way to address the matter, but it would be at the expense of legal certainty.

77. On the issue of protection and preservation of ecosystems (draft article 9), he welcomed the Special Rapporteur’s intention, as stated in paragraph 28, to submit the clarification on the scope of ecosystems located outside aquifers so that the decision could be made whether non-aquifer States should be required to protect such ecosystems.

78. Mr. NOLTE, commending the Special Rapporteur’s exemplary work, said that the draft articles set out in the fifth report left little room for criticism, carefully balancing the values and interests at stake. He supported the Special Rapporteur’s strategy of separating the work on transboundary aquifers from the issues of oil and natural gas and endorsed his careful approach with regard to the final form of the draft articles, for the reasons set out in the report. He also agreed on the need to limit their scope so as to avoid possible complications and overlap. He endorsed the reference in draft article 1 (*b*) to “other activities”, a reference that had been criticized by a number of members. He understood that formulation to have the function of a catch-all clause; it would be asking too much to enumerate all possible activities which might affect aquifers, in particular in view of the difficulty of predicting future developments.

79. The balance that must be struck between the interests of aquifer States and the need for the conservation of aquifers had been well formulated in draft article 3. The use of the word “sovereignty” was legitimate in the context. He wondered, however, whether the exercise of sovereignty should be described as having only to be “in accordance with the present draft articles”, as draft article 3 provided. He rather thought, like Ms. Escameia and Mr. Brownlie, that there should also be a reference to general international law. As far as he could see, the draft articles did not expressly refer to general international law or customary international law. It should be specified that the draft articles were without prejudice to such rules of customary international law as might provide greater protection to transboundary aquifers or aquifer systems. It could be argued that in certain areas, general principles of customary international environmental law provided more protection to transboundary aquifers or aquifer systems than did the draft articles. It should be made clear that the purpose of the draft articles was not to reduce the existing protection of aquifers under general or customary law or to freeze the development of those rules of law; indeed, in a time of fragmentation of international law, there should be an explicit reference to them.

80. He agreed with the Special Rapporteur that there was no need for an additional subparagraph in draft article 4 prohibiting the assignation, lease or sale of an aquifer

to another State. Either the draft articles would become a non-binding declaration, in which case they were equally applicable to all States regardless of any assignation, or they would become a binding treaty, in which case a treaty State would not be able to shed its obligations by transferring parts of its rights over the aquifer to another State or entity.

81. He agreed with the obligation formulated in draft article 6 not to cause significant harm. Like Ms. Escameia and Mr. Pellet, he was not fully persuaded that the obligation should be limited to aquifer States. It was true that draft article 10 covered non-aquifer States, but only those in whose territory a recharge or discharge zone was located. Like Mr. Pellet, he wondered whether it was not conceivable, for example, that pollution emitted by a third State might affect a recharge or discharge zone or whether, in the present period of climate change and technological development, it would not become possible for some States that were neither aquifer States nor non-aquifer States in which a recharge or discharge zone was found to use climate-modification techniques that might affect aquifers. In his view, the draft articles should cover such eventualities.

82. With regard to draft article 20, on the relation to other conventions and international agreements, he agreed with its basic idea, assuming that the draft articles were to become a convention, although like Mr. Pellet, he was not certain that article 311 of the United Nations Convention on the Law of the Sea was the right model. The instruments on biological and cultural diversity could serve as more recent and convincing models. He did not understand, however, whether the Special Rapporteur intended to include draft article 20 in the event that the draft articles remained a non-binding document or one reflecting customary international law. He endorsed Ms. Xue’s point that it should be made clear in the draft articles themselves that draft article 20 applied only if the draft articles took the form of a convention. In either case, they should contain a clause specifying that they left customary law unaffected to the extent that it afforded greater protection to aquifers or aquifer systems.

83. He agreed with previous speakers who recommended that the draft articles should be referred to the Drafting Committee.

84. Mr. CAFLISCH said that while he had no objection to referring draft articles 1 to 13 to the Drafting Committee as they stood, he would also like to comment on them briefly.

85. In view of the warm welcome given to the draft articles adopted on first reading, every effort should be made not to make too many changes to them. The detailed commentary of the International Law Association, regardless of its merits, came rather late in the day.

86. As rightly noted by Mr. McRae, aquifers were not watercourses, and thus the Commission should not follow too closely the 1997 Watercourses Convention. Another reason for not doing so was the relative lack of success of that instrument: after 11 years of virtual existence, only 15 ratifications had been received out

of the 35 needed—not exactly an impressive result. That should probably be borne in mind when deciding what form the draft articles would take. On the other hand, it must be acknowledged that there were many similarities with the law of international watercourses, which explained the presence of a number of provisions that were modeled, at least in part, on those of the 1997 instrument.

87. The two-step approach proposed in paragraph 9 seemed appropriate, especially having regard to the difficulties to which the negotiations on the 1997 Watercourses Convention had given rise. However, if that approach were adopted, it would be necessary, as rightly pointed out by Ms. Xue, to leave out draft article 20 for the time being. That would not be a serious matter, because there seemed to be general agreement that the draft articles could become be a soft law instrument.

88. He also wished to raise a number of more specific points. Apparently there were underground watercourses in some seabeds that were not part of what was commonly known as the “territory of the State”, an expression which might, at most, cover the territorial and archipelago seabed, but not the continental shelf. Consequently, if the Commission decided that the draft articles would not cover the aquifers of the continental shelf, the text should be left as it stood; if it decided they would indeed cover the continental shelf, the relevant provisions would have to be recast. In the latter case, the Commission would have, in draft article 2, to define the word “territory” as including the maritime areas over which the State exercised sovereign rights. On no account could the problem be dealt with in the commentary to draft articles 2, 3 and 6.

89. With regard to draft article 3, he supported Mr. Nolte’s proposal to include a reference to general international law, particularly where international law offered greater protection than did the draft articles. On draft articles 4 and 5, he said that the words “equitable and reasonable” in draft article 4 were a standard formulation. The word “equitable” basically referred to the factors enumerated in draft article 5. The word “reasonable” meant “in a rational manner”, “in an optimal manner” or “in the best way possible”; it denoted a non-wasteful utilization of the resource—in other words, its sustainable utilization. The idea of “sustainability” was thus clearly included in the draft article. That had been the intention in article 5 of the 1997 Watercourses Convention, and that was what should be made clear in the present case. It would be very strange to juxtapose the terms “equitable” and “sustainable”. Furthermore, inserting the word “sustainable” would not add anything to the text. On the contrary: if the phrase “equitable and sustainable” was employed, it might suggest that the Commission interpreted the standard formulation in a manner that differed from its common interpretation. Accordingly, he was against any change.

90. The same problem that had arisen in connection with the relationship between articles 5, 6 and 7 of the 1997 Watercourses Convention resurfaced in revised draft article 6, namely, the problem of the relationship between new uses of resources—the “planned activities” covered by draft article 14—and existing uses. New uses often encroached upon existing ones, thereby causing

significant “harm” to initial users. That meant that, in cases in which a particular resource was nearly exhausted, if the “no harm” rule was enforced strictly, there would simply be no room for the activities of new watercourse States. The drafters of the 1997 Watercourses Convention had ultimately resolved the problem by providing—rather nebulously, it might be added—that the existence of significant harm was to be evaluated on the basis of and subject to the rule of equitable and reasonable utilization set forth in article 5 and the criteria specified in article 6 of the Convention. That was not his own interpretation but reflected that of the ICJ in the case concerning the *Gabčíkovo–Nagymaros Project*. The Special Rapporteur had opted for exactly the same solution in revised draft article 6, paragraph 3, a solution that he found acceptable, not because it echoed the wording used in the 1997 Watercourses Convention, but because it was based on the interpretation of articles 5 and 6 of that Convention by the ICJ.

91. As for the term “significant harm”, used in draft article 6, that wording had less to do with the extent of the harm than with its susceptibility to proof, as had been pointed out by Mr. Brownlie. Put differently, it implied a level of harm not so insignificant as to be impossible to establish. The adjective “significant” should therefore be retained.

92. Lastly, with regard to draft article 11, he would prefer to retain the expression “precautionary approach” since it had the advantage of leaving open the controversial question of whether a duty of precaution existed in general international law. The term “approach” did not favour either solution, instead leaving the question open.

93. Ms. JACOBSSON offered congratulations to the newly elected members of the Bureau, and in particular to Mr. Vargas Carreño, who would no doubt serve ably as Chairperson during the Commission’s commemorative session. She thanked the Secretariat for facilitating preparations for the current session by making the topical summary of the discussion held in the Sixth Committee (A/CN.4/588) available at an early stage, by circulating two reports informally, and, especially by producing and distributing a CD-ROM containing statements made during the Sixth Committee’s debate at its sixty-second session (2007). That initiative would help to ensure that even members of the Commission who had not been able to attend the debate were duly informed of the proceedings.

94. She endorsed the views expressed by other members regarding the importance of separating the Commission’s work on issues relating to oil and natural gas from its work on those relating to water and transboundary aquifers. While the question of the final form of the draft articles should remain open for debate, she believed that, ideally, in view of the importance of aquifers to humankind, the final result should be a legally binding convention. In the absence of global regulations, she would welcome bilateral and regional arrangements, but only to the extent that they were based on the norms and principles laid down in international law in general and the draft articles in particular, for an issue that was of global concern must be regulated in a wider global context. It was against that background that she was prepared to discuss how best to develop the Special Rapporteur’s proposal for a two-step approach, should the

Commission decide to take that course. On the other hand, the Special Rapporteur's proposal for a draft recommendation in paragraph 9 of his report needed further discussion, since it suggested that not even the Commission was entirely convinced of the importance of its work, and also risked engendering a passive rather than an active approach on the part of the General Assembly.

95. She wished to comment on the use of terms in the draft articles from the perspective of someone who had not participated in the initial work on the topic. Endorsing the view of the Special Rapporteur, in paragraph 6 of his third report, that "[t]he term 'impact' used in subparagraph (b) should be construed as a wider concept than 'harm'",¹⁸ she was somewhat concerned that the Commission might have lost sight of that basic assumption. Although the term "impact" might sometimes be used to refer to adverse or negative effects, more often, as in the 1991 Protocol on Environmental Protection to the Antarctic Treaty, it had a more neutral connotation, describing effects that might be minor or transitory, and hence negligible, in nature. Yet paragraph (7) of the commentary to article 1 of the draft articles adopted on first reading stated that "in the context of subparagraph (b), 'impact' relates to a forceful, strong or otherwise substantial adverse effect, while the threshold of such effect is not defined here".¹⁹ The explanation given in the commentary, that the term "impact" was used in a sense different from its ordinary meaning, might lead to confusion, since even the scope of the draft articles pursuant to draft article 1 (b) remained unclear in the absence of a definition of "impact" in the text itself. Similarly, in draft article 6, it was unclear how the term "impact" differed from "significant harm". The same problem arose in draft article 10 in connection with the use of the expression "detrimental impacts". She therefore welcomed the Special Rapporteur's intention to return to the subject in the commentaries, particularly as the word "impact" occurred in so many of the draft articles.

96. Still on draft article 2 (Use of terms), she welcomed the fuller explanation of the definition of the term "aquifer" and sought clarification, as to whether the term encompassed subglacial and other confined groundwaters.

97. Regarding draft article 3, on the sovereignty of aquifer States, although she had no problem with the general legal principle whereby States exercised sovereignty over their natural resources, she favoured the inclusion in that draft article of a reference to the other rules and principles of international law, as suggested by some members and by Governments in the Sixth Committee.

98. Turning to draft article 6, she agreed with those who considered the threshold of "significant harm" to be too high. If in its earlier work the Commission had indeed construed the term "significant harm" to refer to a degree of harm that could be proved, as had been suggested by Mr. Brownlie and Mr. Caflisch, that should be made explicit. Furthermore, the draft articles did not deal at all with the matter of compensation. The connection between "significant harm" and compensation appeared to have been lost sight of.

99. Another important lacuna was the absence from both draft article 6 and draft article 11 of a general obligation on aquifer States to restore the environment, namely the aquifer or aquifer system to which they had caused significant harm, given that those who were dependent on the aquifer or aquifer system would derive greater benefit from a restored environment than from the award of financial compensation to the injured aquifer State. Furthermore, the draft articles should clearly establish an obligation of aquifer States to adopt immediate response measures to prevent a situation from worsening. The advisability of such an obligation was increasingly being recognized, as evidenced by the Commission's draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,²⁰ and by Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, on liability arising from environmental emergencies.

100. Draft article 11 was one of the most important of the draft articles since it was aimed at giving aquifer States a tool to prevent, reduce and control pollution of their transboundary aquifers and obliged them to take a precautionary approach. Draft article 11 had been criticized in the Sixth Committee and in the Commission on the grounds that the threshold of "significant harm" was too high, and that the obligation for an aquifer State to take a "precautionary approach" was too vague, so that the term "precautionary principle" should be used instead. She shared those concerns. Lastly, she was of the view that further consideration should be given to Mr. Ojo's suggestion to add a paragraph to draft article 11 that would confer on all States in whose territory recharge and discharge processes took place the obligation to take measures to prevent, reduce and control pollution.

101. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for having facilitated the work of the Commission with regard to its consideration of the revised draft articles for second reading. The cooperation organized by the Special Rapporteur between the Commission and agencies and bodies of the United Nations system and other institutions had been of inestimable value in increasing the Commission's scientific and technical understanding of the subject of transboundary aquifers. Particularly praiseworthy was the contribution made by UNESCO through its International Hydrological Programme.

102. With regard to the final form of the draft articles, the ultimate goal of the Commission should be a framework convention, which, provided that it was sufficiently flexible, could be used to guide the conclusion of regional and bilateral agreements and to encourage the accession to such a convention of States that already possessed a bilateral or regional legal framework. However, given that there was no uniformity in the views expressed by States in that regard, he supported the Special Rapporteur's view that it would be unrealistic to expect that a convention could be produced in a reasonably short period of time and that the Commission should therefore follow the two-step approach that it had adopted in 2001 for the draft articles on responsibility of States for internationally wrongful acts. Accordingly, he supported the proposal to

¹⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1, p. 66.

¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 96.

²⁰ *Ibid.*, pp. 58 *et seq.*, para. 66.

recommend to the General Assembly that it should take note of the draft articles on the law of transboundary aquifers in a resolution, annexing the draft articles to the resolution in order to give them the necessary exposure to the international community; recommend that States should establish bilateral or regional arrangements on the basis of the draft articles; and consider, at a later stage, the possibility of concluding a convention.

103. Consequently, the draft articles should be presented in the form of a convention, as envisaged by the Special Rapporteur, but with the addition of a preamble setting out general considerations such as the desirability of achieving sustainable aquifer utilization, with a view to avoiding, *inter alia*, unduly restrictive interpretations of the “present and future needs” referred to in draft article 4 (c). Draft article 7 already contained an explicit reference to “sustainable development”. However, reference to the sustainable use of transboundary aquifers should also be made in the text of the draft articles themselves since, as Mr. Pellet had pointed out, an even more important aspect of the topic was the issue of intergenerational solidarity. A precedent for the inclusion of a preamble was to be found in the draft articles on prevention of transboundary harm from hazardous activities adopted in 2001. A two-stage approach had also been adopted by the General Assembly for the topic “Nationality of natural persons in relation to the succession of States”.²¹

104. Having presided over the Sixth Committee when it had negotiated resolutions on the topics of “Nationality of natural persons in relation to the succession of States” and “Responsibility of States for internationally wrongful acts”, he could vouch for the fact that a consensus text had been achieved in both cases following arduous negotiations. Given that in the case of the draft articles on the law of transboundary aquifers there were no substantive objections from States—only proposals for improving or strengthening their content, most of which could be included in the commentaries—he tended to think that a draft resolution submitted by the Special Rapporteur stood a good chance of being received favourably by the Sixth Committee.

105. Generally speaking, he could support the revised text of the draft articles. However, he concurred with Mr. Vasciannie on the desirability of including in draft article 1 (b) a brief list of the “other activities that have or are likely to have an impact upon those aquifers and aquifer systems”. However, the Special Rapporteur had already indicated his intention to provide a detailed description of those activities in the commentary.

106. On draft article 2, he agreed with the Special Rapporteur that the definition of the term “aquifer” was scientifically and technically correct and also legally precise. For the purposes of greater clarity, the term “underground” in draft article 2 (a), should be retained before the phrase “geological formation” since he was not certain

that all geological formations were necessarily entirely underground. He agreed with the observation made by Ms. Escameia in that regard.

107. On the Special Rapporteur’s proposal to include in draft article 2 a definition of the phrase “utilization of transboundary aquifers or aquifer systems”, he would appreciate clarification of the terms “storage” and “disposal”, which would need to be explained in the commentary. He was concerned by the reference made to “acceptable ‘storage’ and ‘disposal’”, particularly in the light of the statement that “[i]t is understood that regulations are in force in many States prohibiting the injection of toxic, radioactive or other hazardous wastes”. For those and other reasons, the draft articles should refer to a “precautionary principle” rather than to a “precautionary approach”.

108. He endorsed the views expressed by one State and by Mr. McRae with regard to extending the scope of application of the draft articles to include transboundary aquifers located, in whole or in part, under the continental shelf.

109. He also endorsed the views of various members, including Mr. Caffisch, Ms. Jacobsson and Mr. Nolte, concerning the need to include in the draft articles a reference to the rules and principles of international law, including international liability and environmental protection. Such a reference should also appear in a draft preamble and in the commentary.

110. Mr. HMOUD reiterated his support for the approach of separating the work on aquifers from that on oil and natural gas, for the reasons set forth in the Special Rapporteur’s previous reports, including the nature, utilization and economic dimensions of the two types of resources. In preparing the revised draft articles for second reading, the Special Rapporteur had succeeded in striking a balance between the views transmitted by States, the views of members, and the practical and legal considerations peculiar to transboundary aquifers.

111. Although the 1997 Watercourses Convention had not, to date, attained the necessary recognition, there was no alternative to taking its principles as a starting point in preparing the draft articles on transboundary aquifers, given that such principles as the duty to cooperate, equitable utilization and the prevention of harm were cornerstones that applied *mutatis mutandis* to both legal regimes.

112. As to the final form of the draft articles, he supported the two-step approach whereby the draft articles would be annexed to a General Assembly resolution and, after allowing States time for reflection, negotiations would be entered into with a view to concluding a convention. That was the most practical way of attracting a higher level of acceptance of the draft articles by States confronted with a new body of law.

113. With regard to draft article 1, he supported the view that the chief aim of the draft was to address States’ utilization of transboundary aquifers. Since the draft articles also dealt with the protection, preservation and management of aquifers, he looked forward to the inclusion in the

²¹ *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 54/112 of 9 December 1999, resolution 55/153 of 12 December 2000, in which the draft articles adopted by the Commission are reproduced in annex, and resolution 59/34 of 2 December 2004, in which the General Assembly decided to include the topic in the agenda of its sixty-third session (2008).

commentary of a list of examples of other activities that had or were likely to have an impact on those aquifers. He wondered whether the Special Rapporteur should consider harmonizing the terminology of draft article 1 (*b*) (“likely to have an impact”) with the expressions “significant harm” and “significant adverse effect” used in draft article 6, paragraph 2, and draft article 14 respectively, both of which referred to activities other than transboundary aquifer utilization. States would be better able to regulate their activities if they could evaluate them on the basis of a single standard.

114. Draft article 3 was an important clarification of the principle that each aquifer State exercised sovereignty over the portion of the transboundary aquifer located within its territory. The exercise of sovereignty by aquifer States entailed not only rights but also obligations under international law, including those stemming from the wrongful use of the aquifer. In his view, there was no need to include principles of State responsibility in the draft articles.

115. On draft article 4, he endorsed the application of the standard of “equitable and reasonable” utilization rather than of “equitable and sustainable” utilization, as application of the latter could give rise to injustice in the case of non-recharging aquifers. The criterion of reasonability was an objective test and easier to measure than that of sustainability in taking into account the relevant factors enumerated in draft article 5.

116. With regard to draft article 5, the indicative factors included were generally acceptable and allowed for flexibility. He asked whether it might be possible to draw a distinction between factors relating to equitable utilization and those relating to reasonable utilization. That might be important, not only from the standpoint of legal clarity—since reasonability and equitability were not interchangeable—but also when it came to establishing the relative weight of each factor. He was not convinced that subparagraph (*i*) actually related to equitable and reasonable utilization; it seemed to have more to do with protecting the related ecosystem.

117. With regard to draft article 6, the obligation to take all appropriate measures to prevent the causing of significant harm was pitched at a suitable level to balance the policy considerations of the various States. Raising or lowering the threshold might cause opposition to the principle and reduce the likelihood of its being recognized by States. Once again, he did not see a need to insert a paragraph on liability or responsibility of the State and its consequences. The general principles of law governed the acts of States and the legal effects of such acts *vis-à-vis* the aquifer and other aquifer States.

118. Turning briefly to Part III of the report, he said he was of the view that, although the protection and preservation of the ecosystem were important goals in international relations, the draft articles should be concerned with regulating or assisting aquifer States in regulating their utilization of transboundary aquifers. He was not sure that the environmental dimension was pertinent unless harm had been caused to other States as a result of the State’s activity in relation to the aquifer. That being said,

if the Commission wished to proceed in that direction, he would have no objection. Lastly, he was in favour of referring draft articles 1 to 13 to the Drafting Committee.

119. The CHAIRPERSON said he took it that the Commission wished to refer revised draft articles 1 to 13 to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2959th MEETING

Thursday, 8 May 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its debate on the fifth report of the Special Rapporteur.

2. Ms. ESCARAMEIA recalled that, in the Special Rapporteur’s view, the procedures under draft article 14 (Planned activities) should be comparatively simple. However, given that several States, and also some members of the Commission, wished to see a more detailed formulation, it might be desirable to revisit at least some of the procedural requirements provided for in the 1997 Watercourses Convention, such as consultations and negotiations. It would also be desirable to specify in the commentary what was meant by the expression “significant adverse effect”, and perhaps also to replace the expression “as far as practicable” with “as far as possible”, the meaning of which was more restrictive.

3. With regard to draft article 18, it was not clear why the Commission should not follow the standard set in the 1997 Watercourses Convention, which dispensed States from the obligation to provide information “vital” to their national defence or security. By referring instead to “information the confidentiality of which is essential to its national defence or security”, the Commission would

be lowering the threshold. She could see no reason why information that was “essential” rather than “vital” to national defence or security should be better protected where aquifers were concerned.

4. Even though the final form of the text had yet to be decided, it could safely be said that the text to be submitted to the Sixth Committee would have the basic format of a convention, as it consisted of draft articles rather than principles. Against that background, draft article 20 was crucial, but would need to be made more specific, for in its current form it said very little. Reference should be made to the relationship of the draft articles with future and previous treaties, recommending that the former must be in conformity with the draft articles and the latter harmonized with them.

5. Lastly, still with a view to formulating a framework convention, a draft article 21 concerning a dispute settlement mechanism would also be useful, particularly as such a mechanism could serve as a model for future bilateral and regional agreements. With those provisos, she was in favour of referring all the draft articles to the Drafting Committee.

6. Mr. FOMBA, referring to the proposal to replace the words “shall include” with “could include”, in draft article 15, said that the provision was not intended to impose a strict obligation on the developed countries, and that co-operation in that area could proceed only on the basis of respect for sovereignty and the will to achieve consensus.

7. Draft article 20 was justified within the formal context of a convention, in order to avoid conflicts with other texts by defining the legal relationship between them. However, it was not clear what would happen in the event of incompatibility between the provisions of the draft articles and those of other treaties. The Special Rapporteur rightly considered that there could be no general rule establishing priority of one text over another, and that a decision on such priority would be possible only after the contents of the relevant provisions had been fully examined. However, he went on to propose that the draft articles should prevail over the 1997 Watercourses Convention; while that seemed appropriate, one might wonder whether that primacy should be relative or absolute. All in all, the wording of draft article 20 should be reviewed in the light of the various comments made, particularly by Ms. Escameia. With that proviso, the draft articles could be referred to the Drafting Committee.

8. Mr. CAFLISCH said he was unsure why draft article 14 referred only to disagreements “on the possible effect of the planned activities”. He would prefer a reference to disagreements “on the planned activities and their effect”. Furthermore, in paragraph 3, the list of procedures for peaceful settlement of the dispute (consultations, negotiations and a fact-finding body) should be expanded, or at least not limited. The Special Rapporteur was right to wish to simplify the complicated provisions of the 1997 Watercourses Convention in that draft article, the wording of which could, however, be improved.

9. Draft article 19 was also in need of some reformulation. It would be better not to deny States the option of

concluding a plurality of bilateral or regional agreements or arrangements if they so wished, and accordingly to use those expressions in the plural.

10. The inclusion or otherwise of a dispute settlement mechanism raised a question of principle, namely whether the Commission wished to embellish the draft articles with such a mechanism, or whether it preferred to leave the matter to a still hypothetical conference on the codification or progressive development of the law of nations.

11. Mr. PELLET said that a broader question of principle arose, namely whether the text proposed was a set of draft articles or a draft convention. The former usually contained no final clauses, and that was why he personally was not in favour of referring draft article 20 to the Drafting Committee. There was no call to change the usual practice of the Commission, which was to deal with the codification of problems of substance, leaving it to the General Assembly to decide what form it wished to give to the product of the Commission’s work. To do so would be all the more regrettable because the proposed final clause had been introduced at the second reading stage, which was tantamount to presenting the General Assembly with a *fait accompli*.

12. Mr. CAFLISCH said he was of the view that clauses concerning peaceful settlement of disputes were not final clauses, but part of the main body of the treaty. He himself was not always in favour of including a dispute settlement mechanism in treaties. Nonetheless, he held to the views he had expressed on the peaceful settlement procedure outlined in draft article 14.

13. Mr. CANDIOTI endorsed Mr. Pellet’s remarks on final clauses. On the other hand, he favoured the suggestion, made by Mr. Vázquez-Bermúdez at the previous meeting, to add a preamble. That would be in conformity with the practice of the Commission, which had already adopted that course of action even in the case of texts that did not take the form of a draft convention. Such a preamble would serve, *inter alia*, to recall the importance of the topic, the object of the draft articles and the precedents in international law on which they were based. Regardless of the final form to be decided on by the General Assembly, a preamble would be useful, and the Drafting Committee could be entrusted with its formulation.

14. Mr. SABOIA said he agreed with the views expressed by Mr. Pellet and Mr. Candiotti with regard to draft article 20. The Commission should not engage in the drafting of such clauses without first having decided on the final form it intended to give to the text. It should therefore continue to prepare draft articles that might later become a convention. Only if the final decision taken were to opt for a convention would it be necessary to draft final clauses or other articles appropriate to an instrument of that type. On the other hand, he was open to the idea of drafting a preamble.

15. Ms. ESCARAMEIA agreed with Mr. Caflisch that a draft article on dispute settlement could not be regarded as a final clause. However, that was not the

question: the question was whether it was simply a procedural matter. In her view, it was not a procedural but a substantive matter. It was essential that the General Assembly should know what the Commission thought about a question as important as that of the relationship between the present draft articles and existing—and perhaps future—bilateral and regional agreements and arrangements. That would not be tantamount to presenting the General Assembly with a *fait accompli*, as it might very well disregard the Commission's opinion, as it had occasionally done in the past.

16. With regard to draft article 20 and a possible draft article 21, she felt that the logic of the text called for the inclusion of draft article 20. That same logic would lead the Commission also to include a draft article 21 on peaceful settlement of disputes, there again to enable the General Assembly to know the Commission's view on that subject.

17. Mr. PELLET said that if the Commission wished to include a preamble in the draft articles, it would not be for the Drafting Committee to formulate it, *pace* Mr. Canioti. That task should be entrusted to a working group.

18. Mr. GAJA said that a decision should be reached on the final form of the draft articles before those questions were considered, and that the Commission should give some guidance to the Drafting Committee. In their current form, the draft articles more closely resembled a set of general principles. If the Commission wished to draft a text that could become a convention, some elements of reciprocity should be taken into account. Otherwise there would be a danger of imposing on aquifer States which were contracting parties certain obligations that other aquifer States would not have. The approach adopted thus far had been to set forth general principles applicable to States, whether or not they had expressed their consent to be bound. On that understanding, the Commission should continue to elaborate a set of draft articles which might be annexed to a resolution. The Commission could also recommend that the General Assembly consider the conclusion of a convention in the future.

19. Mr. McRAE said that a distinction should be drawn between draft article 20 and other so-called "final provisions". As some States had pointed out, if the Commission decided to propose a draft convention, it would be necessary to deal with the relationship between the draft articles and other international conventions and agreements. The present draft article 20 did not serve that purpose, and it would therefore be necessary to revise it.

20. Ms. XUE reiterated her previous position regarding the two-step approach proposed by the Special Rapporteur. If account was to be taken of State practice, it would not be necessary to consider a draft article 20, at least for the moment; that would be necessary only when States were ready to adopt a binding legal instrument.

21. With regard to settlement of disputes, Ms. Escameia had raised a substantive issue. Given that the utilization of aquifers was likely to give rise to disputes between States, a procedure to settle them was needed.

Nevertheless, the Commission had already adopted, *inter alia*, draft article 7, which provided for a general obligation of States to cooperate in good faith when a dispute arose. The Commission must thus ask itself whether some particular aspects of the law of transboundary aquifers called for the adoption of special clauses concerning the settlement of disputes. Furthermore, Article 33 of the Charter of the United Nations, which constituted a general principle of international law on the matter, would in any case apply. Against that background, the current draft articles seemed to her to be perfectly adequate.

22. Mr. SABOIA said he was fairly satisfied with the current drafting of articles 14 to 19. As for draft article 20, he shared the views of members who considered that the clause was not necessary for the moment. He nevertheless wished to reaffirm his view that, as currently drafted, draft article 14 achieved a balance of factors regarding cooperation and communication between aquifer States with regard to planned activities. Any attempt to introduce additional factors risked upsetting that balance, and he would therefore be opposed to it. What was needed in the context of notification was a set of guidelines based on the practice of States that could serve for the elaboration of bilateral or regional arrangements.

23. Mr. YAMADA (Special Rapporteur) said he regretted having misled Mr. McRae through his inadequate description of draft article 1 (*d*) in paragraph 14 of his fifth report. Although most aquifers held fresh water, some of them, particularly in arid regions, contained brackish water that was less saline than seawater and was used, untreated or after treatment, for irrigation. Furthermore, the water contained in the rock reservoirs located under the continental shelf was always brine, and at present there was no foreseeable way in which it could be utilized. For that reason, he had proposed that aquifers located under the continental shelf should be excluded from the scope of the draft articles.

24. With regard to the concept of sustainability, he sometimes felt that the term was used to refer to totally different concepts. Many treaties dealt with the management of renewable natural resources, among them the United Nations Convention on the Law of the Sea, in which the principle was defined as the "maximum sustainable yield". That was a scientific principle for the management of renewable natural resources. Initially, he had thought that this principle could be applied to recharging aquifers. However, having met with strong resistance from Governments and members of the Commission, he had abandoned the term "sustainability", and the current drafting of article 4 (*d*) had been adopted instead.

25. The "intergenerational" principle was referred to in article 2, paragraph 5 (*c*), of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which provided that: "Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs." Furthermore, under the terms of Principle 3 of the Rio Declaration on Environment and Development ("Rio Declaration"), "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present

and future generations”.²² That notion, which was to be found again in article 5, paragraph 1 (b), of the draft articles (“the social, economic and other needs, present and future, of the aquifer States concerned”) was sometimes also referred to as the principle of sustainability. But, in his view, that was more a social than a scientific principle, and thus the two concepts must not be confused.

26. With regard to draft article 20, the lack of any provisions on the relationship between the draft articles and other international conventions and agreements in the text adopted on first reading²³ had been strongly criticized by Governments in the Sixth Committee. Accordingly, he had felt it was his duty to present a draft article on that issue, to enable members of the Commission to debate it.

27. The CHAIRPERSON said he would take it that the Commission wished to refer parts IV and V (articles 14–20) of the draft articles to the Drafting Committee.

It was so decided.

28. Mr. PELLET said that the Drafting Committee could not do as it pleased but must base its work on what had been said in plenary session. Conversely, it was not desirable for the plenary Commission to offload its responsibilities onto the Drafting Committee. It should provide guidance to the latter on matters of principle, in particular concerning the recommendation to be addressed to the General Assembly. The Drafting Committee would have to reformulate draft article 20 in the light of what had been said in plenary session. In order to do that properly, it must know whether the Commission was going to recommend to the General Assembly that the draft articles should be annexed to a resolution, or that they should become a convention, in which case article 20 would have to be drafted differently. He therefore suggested that the Commission should give the Drafting Committee some indication as to the decision it was intending to take with regard to the final form of the draft.

29. Mr. VÁZQUEZ-BERMÚDEZ said that Mr. Pellet’s comments on the Drafting Committee’s mandate were pertinent. He thought he could discern the beginnings of a consensus with regard to the proposal made by the Special Rapporteur in paragraph 9 of his fifth report, that the General Assembly should annex the draft articles to a resolution and consider the possibility of concluding a convention. He also reminded members of his own suggestion to add a draft preamble.

30. Mr. SABOIA said he agreed with Mr. Pellet that the Commission should instruct the Drafting Committee. Paragraph 9 of the report, containing the recommendation of the Special Rapporteur, was quite clear in advocating a two-step approach. Thus, if the Commission approved the content of that paragraph, the Drafting Committee would have to complete the work on the draft articles as

submitted, without prejudicing the outcome by engaging in the preparation of a draft convention.

31. Mr. CANDIOTI said that the Commission should request the Drafting Committee to prepare a text concerning the final form of the draft articles, which could then be considered in plenary. The Drafting Committee could also be entrusted with the task of preparing a draft preamble.

32. Mr. WISNUMURTI thanked Mr. Pellet for raising the problem. Up until the present, the Commission had confined itself to working on the draft articles, without placing emphasis on their final form. He endorsed the content of the recommendation formulated by the Special Rapporteur in paragraph 9 of the report, and suggested that the Commission should indicate, in its own annual report, that it regarded the draft articles as constituting the text of a convention—without prejudice, of course, to the decision to be taken by the General Assembly on that question. He also supported the proposal to prepare a draft preamble, which would enable the Commission to submit a complete text of a convention.

33. Mr. GAJA said that the problem was not so much deciding whether final clauses were needed or draft article 20 should be amended, but rather what final form the draft articles would take, as a convention could not use the same language as would be used to state general principles. In a convention, one could not conceivably impose obligations on aquifer States if other aquifer States were not parties to that convention; if the convention was ever to be ratified, reciprocity must be taken into account. Since the majority of members of the Commission seemed to support the two-step approach proposed by the Special Rapporteur, he suggested following that approach.

34. Mr. GALICKI said that, as a member of the Drafting Committee, he would like the plenary Commission to indicate clearly to that Committee what was expected of it and how much leeway it had. The suggestion to add a clause at the end of the draft articles went beyond the mandate normally conferred on a committee of that type; the same went for the drafting of a preamble, which, furthermore, was likely to cause the Drafting Committee to lose precious time. For all that, the suggestion was nonetheless welcome, and the Chairperson of the Drafting Committee could be asked to designate a few of its members to draft a preamble, so as to avoid monopolizing the Drafting Committee’s time for several days.

35. The CHAIRPERSON, noting that the Commission had been unable to come to a decision, suggested that a working group should be set up, with the task of formulating recommendations with a view to assisting the plenary in taking a decision on the questions still pending.

36. After a discussion in which Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee), Mr. CANDIOTI and Mr. SABOIA participated, concerning the desirability of establishing such a working group, the CHAIRPERSON announced that he would suspend the meeting in order to hold consultations with members.

The meeting was suspended at 11.40 a.m. and resumed at noon.

²² Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, Annex I.

²³ Yearbook ... 2006, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76 (see footnote 2 above).

37. The CHAIRPERSON said that the consultations just held had shown that the differences of opinion among members were greater than he had initially thought. However, all members considered that the proposal to adopt a two-step approach made by the Special Rapporteur in paragraph 9 of his fifth report was acceptable for the moment. With regard to the proposal to draft a preamble, nothing appeared to justify the establishment of a working group for that purpose. If he heard no objection, he would therefore consider that the Commission wished to entrust that task to the Special Rapporteur, who would submit a draft text to the plenary Commission, which would then refer it to the Drafting Committee.

It was so decided.

The meeting rose at 12.05 p.m.

2960th MEETING

Friday, 9 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations²⁴ (A/CN.4/588, sect. E,²⁵ A/CN.4/593 and Add.1,²⁶ A/CN.4/597,²⁷ A/CN.4/L.725 and Add.1²⁸)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GAJA (Special Rapporteur), introducing his sixth report on responsibility of international organizations (A/CN.4/597), said that the report considered issues relating to the implementation of the international responsibility of international organizations. Questions concerning the final clauses and the placement of the chapter on the responsibility of a State in connection with the act of an international organization would be addressed in his seventh report. In the course of the session, a working group

²⁴ For the text of the draft articles with commentaries thereto provisionally adopted by the Commission at its fifty-ninth session, see *Yearbook ... 2007*, vol. II (Part Two), chap. VIII, sect. C, pp. 81 *et seq.*

²⁵ Mimeographed; available on the Commission's website.

²⁶ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²⁷ *Idem.*

²⁸ Mimeographed; available on the Commission's website. For the text of the articles as adopted by the Commission at the present session and the commentaries thereto, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.2.

should be convened for a brief discussion of some of the questions to be addressed in the seventh report. As hitherto it had been the Commission's practice to adopt the draft articles provisionally at the same session at which they had been submitted by the Special Rapporteur, the comments submitted by Governments and international organizations always related to texts already provisionally adopted. Accordingly, his seventh report would provide the occasion for responding to comments made by States and international organizations on the draft articles already adopted, and would also contain proposals to review some of its draft articles.

2. International responsibility of an international organization could exist *vis-à-vis* a State, another international organization or other entities or persons. Yet the draft articles that he now proposed addressed only the invocation of responsibility of an international organization by a State or another international organization. That was consistent with the approach taken in Part Two of the draft articles, article 36 of which stated that this Part covered only obligations owed to one or more organizations, to one or more States, or to the international community as a whole, while the Part was without prejudice to any right, arising from the international responsibility of an international organization, which might accrue directly to a person or entity other than a State or an international organization. Thus, although not expressly stated in a separate provision, the limitation on the scope set forth in Part Two of the draft articles also applied to Part Three, and clearly resulted from draft article 46. The reason for not including a separate provision was to maintain consistency with the approach taken in the draft articles on responsibility of States for internationally wrongful acts,²⁹ in which a similar limitation had been expressed in Part Two with regard to the obligations of the responsible State, and an implied limitation had been reflected in Part Three, with regard to the implementation of the international responsibility of a State. That being said, if members considered it necessary for the sake of clarity to introduce a separate provision, he would have no objection.

3. The question of the implementation of the responsibility incurred by a State *vis-à-vis* an international organization clearly related to the responsibility of States and thus lay outside the scope of the present draft articles. The fact that this position had not been covered in the draft articles on responsibility of States did not justify its inclusion in the current draft; one would have to amend several articles on responsibility of States, a course of action which it would probably be unwise to undertake at the present juncture. Obviously, some of the issues to be discussed under the current topic with regard to relations between a responsible international organization and an injured State or international organization might also be relevant where the responsible entity was a State. There was also a more extensive body of practice for cases in which the State rather than the international organization was responsible. Nonetheless, the Commission should resist any temptation to extend the scope of the topic to cover that lacuna.

²⁹ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76 (see footnote 12 above).

4. Since, in most cases, the entities that were injured by a wrongful act of an international organization were States, the definition of an injured State provided in article 42 on responsibility of States should also apply in the context of the current draft. According to that article, there were three cases in which a State might be considered as injured: the case in which the obligation breached was owed to that State individually; the case in which the obligation breached was owed to a group of States, including that State, but the breach specifically affected that State; and the case in which the obligation breached was owed to a group of States, including that State, and the breach was of such a character as to change radically the position of all the other States to which the obligation was owed with respect to the further performance of the obligation. What applied to States would seem also to be applicable by analogy to international organizations. That view was reflected in draft article 46. Thus, for instance, if two international organizations concluded an agreement and one of them subsequently breached an obligation under the agreement, the other organization would be regarded as injured on the ground that the obligation breached was owed to it individually.

5. Articles 43 to 45 on responsibility of States dealt with certain procedural matters. Clearly, provisions on notice of claim and loss of the right to invoke responsibility should apply to injured States irrespective of whether the responsible entity was a State or an international organization. Furthermore, it was hard to see why different rules should apply when the injured entity was not a State but an international organization. Draft articles 47 and 48 therefore replicated the corresponding provisions in the articles on responsibility of States, albeit with some minor adaptations.

6. The main question addressed in his report with regard to procedural rules was whether it was necessary to replicate in the current draft the provisions concerning nationality of claims and the exhaustion of local remedies set forth in article 44 on the responsibility of States. While the draft articles he proposed did not include a provision to that effect, that was not because there might not be cases in which a State could exercise diplomatic protection *vis-à-vis* an international organization. A straightforward example would be that of an international organization that was responsible for administering a territory and that had caused injury to the national of a State, which subsequently exercised diplomatic protection on behalf of its national *vis-à-vis* the international organization. The possibility could also be envisaged of an international organization invoking the responsibility of a second international organization on behalf of one of its agents, for personal injuries suffered by that agent following a breach committed in a territory administered by the latter organization—a situation that closely paralleled the exercise of diplomatic protection. That was a situation envisaged in the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, which afforded not only functional protection in respect of the damage caused to the United Nations, but also reparation due to the victim or to persons entitled through him. The term “diplomatic protection” was not applicable to such situations, however, as it had been defined by the Commission as relating exclusively to action taken by States.

7. With regard to the exhaustion of local remedies, he could not categorically rule out the possibility that effective remedies might exist within certain organizations. Although the question of the applicability of the local remedies rules to international organizations had been the subject of lively debate in the literature, it arose much less frequently in relation to international organizations than in relation to States. His conclusion was that there was no need to address issues of admissibility in the draft articles. That did not imply, however, that nationality of claims and exhaustion of local remedies could never be relevant when a claim was made against an international organization.

8. An additional advantage in not replicating article 44 on responsibility of States in the current draft was that omitting it would help to dispel the impression given by article 48 of the draft articles on responsibility of States, which at first sight appeared to suggest that the nationality of claims requirement applied also to a State invoking responsibility other than as an injured State. Although that interpretation was clearly wrong, the ambiguity would be averted if no provision concerning nationality of claims was included in the draft articles.

9. In the context of the current draft, a plurality of injured entities or a plurality of responsible entities were likely to exist, especially when both an international organization and its members, or some of them, were responsible in relation to the same internationally wrongful act. The corresponding articles on responsibility of States could be used as models, albeit with a certain number of adaptations that were illustrated in the report. The details of those adaptations could be found in draft articles 49 and 50.

10. On the question of the invocation of responsibility by an entity other than an injured State or international organization, in some respects the position of international organizations did not differ from that of States, as set forth in article 48 of the articles on responsibility of States, which considered the case of an obligation owed to a group of States. In the context of the current draft, the appropriate wording could be “group of entities”. If such a group included an international organization, the latter would be entitled to invoke the responsibility of another international organization on the basis of a provision parallel to that of article 48, subject to the proviso that the obligation breached must be one established for the protection of a collective interest of the group.

11. A more difficult question was whether international organizations were in the same position as States when an international organization breached an obligation owed to the international community as a whole. One example would be the case of an international organization that had committed a breach of a human rights obligation stemming from general international law. Who would then be entitled to invoke responsibility? It seemed clear enough that, in such cases, a State was entitled to invoke the responsibility of the international organization just as it could invoke that of another State. What remained open to question, however, was whether an international organization could invoke the responsibility of another international organization when the latter committed a breach of an obligation owed to the international community as a whole.

12. What little information had been provided by international organizations and Governments suggested that practice in respect of that specific provision was non-existent. It was, however, impossible to rule out the eventuality of an international organization committing this type of wrongful act, for instance a breach of an obligation relating to the protection of human rights under general international law. Should such a breach occur, it was unlikely that another organization would invoke responsibility. But could the Commission take the view that it would not be entitled to do so? Some examples existed of an international organization invoking the responsibility of a non-member State held to be in breach of an obligation towards the international community. Insofar as an international organization was deemed to be entitled to invoke the responsibility of a State, it was conceivable that a similar solution could apply to the invocation of the responsibility of an international organization, which was the only question that had to be addressed in the current draft articles.

13. In chapter III of the report on the work of its fifty-ninth session,³⁰ the Commission had invited Governments and international organizations to express their views on that question. The majority of the comments received indicated that the entitlement of an international organization to invoke responsibility for a breach of an obligation owed to the international community was more limited than that of a State. He had surveyed those comments in paragraph 36 of his report. The crucial element was considered to be whether an international organization would have the mandate to protect the general interests underlying the obligation, for only if that condition were met would an international organization be able to react to a breach relating to interests the protection of which fell within its mandate.

14. That view was reflected in draft article 51, paragraph 3, which seemed to be in line with the passage he quoted, in paragraph 37 of his report, from the advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in which the ICJ had found that international organizations “are invested by the States which create them with powers, the limits of which are a function of the common interest whose promotion those States entrust to them” [p. 78, para. 25 of the opinion].

15. Consequently, as the Commission of the European Communities had held at the end of the passage quoted in paragraph 36 of his report, a technical transport organization would not “be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole”. The International Law Commission could accept that approach.

16. States and international organizations which were entitled to invoke responsibility as entities other than an injured State or international organization could not seek reparation on their own behalf. After all, they had not been injured. What they could do, as was indicated in draft article 51, paragraph 4, on the model of article 48 of

the draft articles on responsibility of States, was to request cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and performance of the obligation of reparation in the interest of the injured State or organization, or of the beneficiaries of the obligation breached.

17. Those entitlements to invoke responsibility had been set forth in the draft articles on responsibility of States in order to give meaning to the obligations owed to the international community as a whole, or which were established for the protection of a collective interest of a group. Otherwise, if no State had been injured by the wrongful act, the breach would have no legal consequences because, although there would be an obligation of reparation, no State would be able to request it. That was a concern which had resulted in what paragraph (12) of the commentary to draft article 48 on responsibility of States had termed “a measure of progressive development”.³¹ In his view, the same approach should be taken with regard to a breach committed by an international organization.

18. The final section of the report, dealing with countermeasures that States or international organizations could take against a responsible international organization, provided a few examples from practice relating to countermeasures taken by injured States within the framework of the World Trade Organization (WTO). There would be no reason to consider that injured States, which could under certain conditions take countermeasures against responsible States, could not, under the same conditions, take countermeasures against a responsible international organization. While practice offered some examples of countermeasures taken by international organizations against a responsible State, he had found no examples of countermeasures taken by an injured international organization against a responsible international organization. While such action was possible, it was unlikely to occur very often.

19. Countermeasures by international organizations were a delicate question on which the Commission had requested comments in chapter III of the report on the work of its fifty-ninth session. As paragraph 45 of his sixth report recorded, several States had taken the view that, in principle, an injured international organization could resort to countermeasures under the same conditions as those applicable to States. In view of the replies given and the difficulty of finding policy reasons for a different solution, the proposed draft articles on countermeasures were therefore largely similar to the corresponding articles on responsibility of States.

20. However, special rules were likely to apply to the relations between an international organization and its members, whether the injured party was the member or the international organization. The rules of the organization might restrict the resort to countermeasures in one case or the other, or in both. In his report, he had given some examples of such restrictive conditions. That would reflect the duty of cooperation underlying relations between an organization and its members. Although the rules of the organization might affect the relations

³⁰ *Yearbook ... 2007*, vol. II (Part Two).

³¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 127.

between an international organization and its members in many ways that were relevant to the issues of international responsibility, the reason he had included draft article 52, paragraphs 4 and 5, was that he felt that such an implicit or explicit restriction on countermeasures resulting from the rules of the organization was sufficiently important to deserve a mention.

21. Draft article 57 dealt with two separate questions. The first related to measures taken against a responsible international organization by an entity other than an injured State or international organization. As was well known, article 54 of the draft articles on responsibility of States provided that the chapter on countermeasures did not prejudice the right of any State which was not injured but which was entitled to invoke the responsibility of another State, to take lawful measures against the responsible State.³² “Lawful measures” was a term about which much had already been written; it was not appropriate for the Commission, at the present stage, to clarify the term, which had represented a compromise solution adopted in order to reach consensus on the articles on responsibility of States. Given the history of article 54 of the articles on responsibility of States and the fact that it would be difficult to find reasons to depart from its wording, the same approach should be followed in paragraph 1 of draft article 57 on the responsibility of international organizations. The fact that measures might be taken by another international organization, rather than by a State, did not justify taking a different approach. The question needed to be left open, although there were examples of international organizations which had not been injured by a breach taking lawful measures against a State.

22. In the second paragraph of draft article 57, he had suggested a rule concerning the resort to countermeasures by members of an international organization to which the injured members had transferred exclusive competence over certain matters. In that case, the member State would not be in a position to resort to countermeasures in the areas for which competence had been transferred, because the entitlement to take them in those areas had been transferred along with competence. One example in which such a situation might arise was that of a regional economic integration organization. The Commission could leave the issue unresolved, or cover it by a reference to *lex specialis*. The other possibility would be to allow the organization to take countermeasures at the request of the member and on its behalf, though clearly within the restrictions imposed by the criterion of proportionality, because the organization might have much more effective means at its disposal than did the State.

23. He wished to stress that the rule he was suggesting was unlikely to be welcomed by the international organizations concerned. It was designed to allow injured member States to respond to the injury by taking indirectly the measures that they were precluded from taking because of the transfer of competence. He therefore expected to receive critical comments on that matter from regional economic integration organizations.

24. Once articles on countermeasures had been adopted, it would be possible to fill a lacuna which had been deliberately left in the chapter on circumstances precluding wrongfulness. A footnote to article 19 stated that the text of that article would be drafted at a later stage, when the issues relating to countermeasures by an international organization would be examined in the context of the implementation of the responsibility of an international organization. That drafting work could be done on the basis of the seventh report, which would have to examine the additional question of whether draft article 19 should cover only countermeasures that an injured international organization might take against a responsible international organization, or whether an injured international organization might also take countermeasures against a responsible State, a question that had not been directly addressed in Part Three, since the draft articles were concerned only with the responsibility of international organizations.

The meeting rose at 10.55 a.m.

2961st MEETING

Tuesday, 13 May 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (*continued*) (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its debate on the sixth report of the Special Rapporteur (A/CN.4/597).

2. Ms. ESCARAMEIA noted that draft article 46 (Invocation of responsibility by an injured State or international organization) limited the entities that could invoke the responsibility of international organizations to States and other international organizations. That limitation seemed to stem from the relation between that draft article and draft article 36 (Scope of international obligations set out in this Part), which excluded individuals and other entities from invoking that responsibility. However, that same draft article 36 specified that the obligation breached could also be owed to the international community as a whole, which meant that entities other than States and

³² *Ibid.*, p. 137; see in particular paragraph (7) of the commentary to draft article 54, p. 139.

international organizations (for example the International Committee of the Red Cross (ICRC), which was not an international organization, but which had a role to play in situations involving a breach of international humanitarian law) should be able to invoke that responsibility. She therefore urged the Special Rapporteur to revise draft article 46 so as to include other entities that could invoke the responsibility of international organizations.

3. In her view, a new draft article should be added between draft articles 47 and 48, similar to article 44 of the draft articles on responsibility of States for internationally wrongful acts,³³ concerning admissibility of claims. That article would deal with the requirement for a State to exercise diplomatic protection if one of its nationals was injured. According to the report, that omission was attributable more to the difficulty of accepting the requirement to exhaust local remedies than to any dearth of claims by States against international organizations on account of injury caused to their nationals. However, the requirement to exhaust local remedies did not apply only to diplomatic protection, but to almost all international claims. If nothing was said on that matter, what would be the consequence when a national of a State was injured by an international organization? Since the draft article referred only to States and international organizations, that would mean that only direct injuries were covered, and not those caused to nationals of a State. In short, and taking account also of the provisions of draft article 46, that would effectively mean that injuries caused by international organizations to persons other than States or other international organizations were totally excluded from the scope of the draft articles, which was rather unsatisfactory, indeed artificial, given the real state of affairs.

4. The term “entities”, used in draft articles 49 to 51, appeared to refer exclusively to States and international organizations. That terminology was rather confusing, especially because draft article 36, paragraph 2, on the scope of obligations, used the term “entity” with a different meaning; accordingly, that term should be replaced throughout by the expression “States or international organizations”.

5. With regard to countermeasures (draft articles 52 to 57), the Special Rapporteur seemed to admit as a general principle not only that international organizations could be the target of countermeasures by States and other international organizations (with the caveat that, if they were members of the international organization, such action must not be inconsistent with its internal rules), but also that they could themselves impose countermeasures. In her view, those premises raised some difficulties. They seemed to stem mainly from the practice of the European Union and its relations with the WTO. However, the European Union was a very special type of international organization, whose members did not have the capacity to impose most economic countermeasures, or even to react to countermeasures imposed on them. No general rule could be inferred from such a case. Unlike States, international organizations were legally created entities, which had specific mandates spelled out in their

constituent instruments. It was very questionable whether such powers would include, even implicitly, the power to apply countermeasures, a possibility that was in any case increasingly criticized in respect of States themselves. Furthermore, it could be seen from the judgment of the Court of Justice of the European Communities of 13 November 1964, in *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, cited in paragraph 43 of the report, that resort to countermeasures was possible only when specifically authorized.

6. In paragraph 46 of his report, the Special Rapporteur stated that the rules of the organization determined the nature of the countermeasures that could be taken, and that if they were unlawful, they carried consequences only if they were taken against its members and not against entities other than its members. In her view, if an international organization acted in breach of the mandate conferred upon it, that affected not only its members, but also the international community as a whole, and countermeasures could never be considered lawful in such a case. Draft article 52 should therefore be reformulated; she also proposed replacing, in its paragraphs 4 and 5, the phrase “only if this is not inconsistent with the rules of the ... organization” with “only if this is permitted by the rules of the ... organization”. Furthermore, it would be useful to add a paragraph 1 *bis* providing that the power of an injured international organization to take countermeasures was limited to the express capacity given to it by its rules.

7. With regard to draft article 55 (Conditions relating to resort to countermeasures), she proposed adding, in paragraph 3 (b), after the words “a court or tribunal”, the words “or any other body”. In draft article 57 (Measures taken by an entity other than an injured State or international organization), she suggested adding, at the end of paragraph 2, a phrase along the lines of “only when the international organization’s mandate expressly so permits”. As for the other draft articles, they could be referred to the Drafting Committee.

8. Mr. McRAE said that the Commission’s unwillingness to distinguish between different types of international organization, with which he had already taken issue at the previous session, was the reason why a number of Governments did not approve of its work on responsibility of international organizations. Furthermore, as long as the Commission gave the impression that it was content simply to adjust the present draft articles to the articles on responsibility of States, it would continue to draw criticism.

9. Thus, the analogy between responsibility of States and that of international organizations encountered a difficulty in draft article 46, which provided that “[a] State or an international organization is entitled as an injured party to invoke the responsibility of another international organization ...”. In his view, if States were entitled to invoke responsibility by virtue of the very fact that they were States, the same was not true of international organizations, which could do so only if they were expressly so authorized, or if that power derived from their constituent instruments. Draft article 46 seemed to be saying

³³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, para. 76.

that international organizations had an autonomous right, which would place them on the same footing as States. It should in fact state that only international organizations with the constitutional mandate to do so could invoke the responsibility of another international organization. If that principle was not expressly stated, the Commission would be perceived to be granting to certain international organizations powers that they did not possess.

10. In fact, in draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization), the Special Rapporteur had done what had not been done in draft article 46. Thus, draft article 51, paragraph 3, made the right of an international organization to invoke responsibility, where the obligation breached was due to the international community as a whole, dependent on whether the organization “has been given the function to protect the interest of the international community underlying that obligation”. While he welcomed that qualification, he considered that in all cases the ability of an international organization to invoke responsibility depended on whether that function had been entrusted to it by its member States. That, in his view, was what could be inferred from the quotation from the advisory opinion of the ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* given in paragraph 37 of the report. Consequently, it was the rules of the international organization that determined whether it was entitled to invoke responsibility, and that must be made clear in draft article 46, if the Commission wished to avoid giving the impression that it regarded international organizations as being identical to States.

11. With regard to draft article 50, on plurality of responsible entities, he felt that the Special Rapporteur’s economy of language had perhaps led to some confusion. When the Special Rapporteur spoke of the responsibility of a subsidiary entity, it needed to be made clear that what was at issue was the independent responsibility created in accordance with draft article 29, so as to ensure that no confusion arose between the responsibility of an organization and the potential responsibility of its members.

12. On countermeasures, in paragraph 41 of his report the Special Rapporteur took the view that they were an important aspect of implementation of international responsibility, and that it was hard to find a convincing reason for exempting international organizations from being targeted by such measures. The draft articles went further, however, because they dealt with the right of international organizations to take countermeasures, not simply with the fact that they could be the target of them.

13. *Pace* the Special Rapporteur, one might take the view that countermeasures were the relic of a primitive system based solely on the use of force, and that their expansion through a process of progressive development of international law was to be discouraged rather than promoted.

14. It was a process of progressive development, because there was no existing law on that matter and practice was virtually non-existent. The Special Rapporteur referred to cases involving WTO and the European Communities, but those examples were suspect in two respects.

15. First, although there was much debate on the issue, retaliation under WTO rules was not exactly the same as countermeasures under international law, and had not been designed as a treaty-based form of countermeasure. It had its own unique origins and characteristics. Under the WTO rules, withdrawal of concessions from a party that had failed to fulfil its obligations was essentially a contractual remedy, and not a measure imposed in reprisal for non-compliance with an international obligation. To take WTO practice as illustrative of the operation of countermeasures was to generalize a quite specific regime.

16. Secondly, to consider WTO practice in the context of cases involving the European Communities was even more problematic. In the *Hormones* case, for example, retaliation against the European Communities had been authorized, not because the European Communities was an international organization, but because it was a party to the WTO agreement. Such a case could therefore not tell one anything about the application of countermeasures to an international organization.

17. Furthermore, in many cases, and in particular in the context of WTO, the European Communities acted more like a federal State than an international organization. There was really no parallel with international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), or even WTO itself. There again, the approach of considering international organizations as a single phenomenon could lead the Commission into difficulty.

18. In order to examine more fully the way in which the European Communities functioned within WTO, both as an entity invoking the responsibility of other States and as one against which responsibility was invoked, a much more detailed analysis would be required of its relations with its member States in that context. In many cases, the European Communities was defending, not measures it had itself taken as an international organization, but measures taken by its member States.

19. The practice of the European Communities within WTO had led to considerable confusion: WTO members frequently brought complaints both against the European Communities and against a given member State, although the European Communities asserted the right to defend the State concerned in WTO proceedings and had tried to avoid decisions that might seem to impose obligations directly on the member States themselves.

20. The Special Rapporteur had acknowledged that the European Communities practice within WTO was complex when he suggested having a particular rule for regional economic integration organizations in the case of draft article 57, but, in his own view, that too was a question which needed to be considered in greater detail.

21. In view of the absence of relevant practice, he suggested that the Commission should consider what kinds of countermeasures an international organization could take. As the use of force and economic measures were ruled out, for obvious reasons, there remained only the withholding of contractual obligations under some treaty arrangement. That narrower frame of reference should perhaps constitute the starting point for consideration of the question.

22. Mr. GAJA (Special Rapporteur) sought clarification from Mr. McRAE concerning his first argument, namely that one could not consider an international organization as an injured party when there was a breach of an obligation. He wondered whether, for example, in the case of a headquarters agreement between an international organization and a State, the organization would not have the possibility of invoking the responsibility of the host State that had breached that agreement unless its constituent instrument contained a rule authorizing such a claim to be preferred.

23. Mr. McRAE replied that it would in any case be necessary to decide in the light of the particular characteristics of the organization concerned and of its particular rules, rather than starting from the general proposition that all international organizations would have such a possibility, and then applying it to the particular case.

24. Mr. NOLTE said that the warning quoted in the footnote to paragraph 41—namely that the work of the Commission would become “a train wreck” if the provision that it was to elaborate concerning countermeasures directed at an internationally wrongful act of an international organization were to provide new justifications for those who had long been inclined to “sanction” the United Nations—expressed an entirely legitimate concern. For that reason, he disagreed with draft article 52, paragraphs 4 and 5, pursuant to which an injured member of a responsible international organization could, as a general rule, take countermeasures against the organization—countermeasures being excluded “only if this is not inconsistent with the rules of the ... organization”. In his view, that presumption should be reversed.

25. He therefore proposed that draft article 52, paragraph 4, should read: “A member of an international organization which claims that it has suffered an injury for which the organization is responsible may not take countermeasures against the organization except if this is consistent with the character, the law and the rules of that same organization.”

26. International organizations constituted special regimes, specific communities whose members had renounced, usually implicitly, the possibility of taking the law into their own hands, in the conviction that the rules of the organization would enable disputes to be resolved, should they arise. Even if they did not, the existence and operation of international organizations should not be jeopardized by the application of unilateral countermeasures. The Charter of the United Nations, for example, had created a legal framework and procedures that might be fatally undermined if the secondary rules, which made sense in the context of responsibility of States that recognized each other's sovereignty, were transposed into the context of relations between the United Nations and its Member States. It was not a question of ruling out the possibility that the United Nations could act illegally and that Member States could respond to such acts, but of determining whether Member States could react by taking countermeasures.

27. How was it possible to determine whether the law of an organization excluded resort to countermeasures by

its members? The problem was that the constituent treaty of most organizations contained no explicit rules on that issue, and that a presumption in favour of the possibility of members taking countermeasures, as suggested by the Special Rapporteur, thus risked serving as a blanket authorization. However, that would be inappropriate if it was the character of an international organization, or the nature of the community that had created it, that determined whether countermeasures were or were not permissible. In such a case, merely to state that the “rules of the organization” determined the issue was somewhat misleading. It was not any specific rule, nor a group of specific rules, but the rules of the organization as a whole, including their purpose, that constituted the character of the organization and determined whether countermeasures were permissible. It was therefore important that reference should be made not only to the “rules” of the organization, but also, more generally, to the “character” and “law” of the organization.

28. Nor should the question whether the members of an international organization could resort to countermeasures be answered by way of formal analogies. It was a question of interpreting existing practice and identifying the policy choices contained in the constituent treaties of the international organizations. As far as past practice was concerned, the lack of precedents spoke in favour of an *opinio juris* of States that countermeasures, as a general rule, were not permissible. In his opinion, the onus was on the Special Rapporteur to show that there should be a presumption in favour of member States taking countermeasures—a requirement that the report had not met. As for the policy choice expressed in a constituent treaty, the Charter of the United Nations, in particular, was designed as a special regime in which States targeted by binding decisions of the Security Council and recommendations of the General Assembly were not supposed to challenge them other than through recourse to United Nations bodies or by claiming that the decisions in question had been taken *ultra vires*. Admittedly, those possibilities of recourse were perhaps unsatisfactory in certain respects, but that did not justify an invitation by the Commission to targeted States to use the law of responsibility of international organizations to legitimize challenging the outcome of common deliberations by applying unilateral measures.

29. Lastly, he affirmed his conviction that the general approach to the question of countermeasures was extremely important, and supported the suggestion by Ms. Escameia that the issue should be discussed in a working group.

30. Mr. GAJA (Special Rapporteur) said he was surprised to hear that paragraphs 4 and 5 of draft article 52 contained a presumption in favour of a member State of an international organization taking countermeasures against that organization, or vice versa. That had certainly not been his intention. Furthermore, he saw no real difference between draft article 52, paragraph 4, as drafted by himself and the formulation proposed by Mr. Nolte.

31. Mr. NOLTE said that even though it was slight, the presumption existed, insofar as, pursuant to draft article 52, it was only if it had been established that the

rules of the organization prohibited it from so doing that a member State was precluded from taking countermeasures. He would prefer the emphasis to be placed on the opposite presumption, namely that it must first be established that, in a given international organization, the taking of countermeasures by member States was permitted.

32. Mr. GAJA (Special Rapporteur), responding to members who had disputed the relevance of WTO practice to the topic under consideration, said that many examples existed of measures taken by an international organization against a responsible State. He had referred to some of them in paragraph 58 of his sixth report, but he could add other examples. The reason why he referred to them at that point of his report was that the matter at issue was not measures taken by an injured international organization within the meaning of draft article 46, but rather within the meaning of draft article 51. Furthermore, there was no point in going into the details of that practice if there was to be a “without prejudice” clause concerning cases in which the organization had taken measures in reaction to a breach of an obligation owed to the international community as a whole. In any case, whether or not one approved of the existing practice, one could not say that such practice was totally lacking.

33. Lastly, he stressed that none of the States that had formulated comments had expressed the view that an international organization could not take countermeasures.

The meeting rose at 11.10 a.m.

2962nd MEETING

Wednesday, 14 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (*continued*) (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the sixth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/597).

2. Mr. PELLET said he would begin with a number of general comments and then turn to the first part of the report. To begin with, he had a problem with the overall approach to the draft articles, particularly as it affected Part Three. Draft article 1 indicated that the draft articles applied to the international responsibility of an international organization or of a State for the internationally wrongful act of an organization, but the result of that restrictive approach was that nowhere, and, in particular, neither in chapter I nor in chapter II of Part Three, did the Commission deal with the question of the right of an international organization to invoke the responsibility of a State, despite the fact that the problem arose very concretely and relatively often. It had not been taken up in the articles on responsibility of States for internationally wrongful acts of 2001,³⁴ although it had been envisaged that all questions relating to the responsibility of international organizations would be grouped together in the draft articles under consideration. That seemed entirely logical, because there could be no question of the Commission placing on its agenda a new topic on the competence of an international organization to implement the international responsibility of a State. The Commission had the possibility of addressing the issue, as envisaged in the syllabuses on topics recommended for inclusion in the long-term programme of work of the Commission adopted in 2000 (and which he himself had prepared), in which, with regard to the topic of responsibility of international organizations, it had indicated that: “One of the problems of the topic is that the draft on State responsibility is silent on the rights of an international organization injured by an internationally wrongful act of a State. This gap should be filled during the consideration of the responsibility of international organizations. This might be done either in a separate part or, as proposed in this paper, in connection with questions relating to the ‘passive responsibility’ of international organizations. Both of these solutions offer advantages and disadvantages.”³⁵ The same was also true in respect of the protection which an international organization could exercise in the event of injury caused to one of its agents, which was known as functional protection. He noted in passing that functional protection was not the equivalent of diplomatic protection: the injury calling for reparation was suffered by the organization, because it was in the exercise of its mandate that the agent had suffered it.

3. In paragraphs 15 to 20 of the report, the Special Rapporteur considered at length the possibility of transposing article 44 of the draft articles on responsibility of States, before coming to a conclusion with which he personally disagreed and to which he would return later in his statement. What, though, had become of the protection that the organization could exercise on behalf of one of its officials or beneficiaries? The famous functional protection referred to in the 1949 advisory opinion of the ICJ in the *Reparation for Injuries* case, which showed that there was nothing theoretical about it, was mentioned nowhere in the draft articles under consideration, just as it was mentioned nowhere in the 2006 draft articles on diplomatic protection.³⁶

³⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, para. 76.

³⁵ *Yearbook ... 2000*, vol. II (Part Two), pp. 135–150, at p. 136.

³⁶ *Yearbook ... 2006*, vol. II (Part Two), pp. 24–26, paras. 49–50.

4. When he had expressed his concern regarding those questions to the Special Rapporteurs on the topics at the conclusion of the Commission's studies on responsibility of States and on diplomatic protection,³⁷ both Mr. Crawford, for responsibility of States,³⁸ and Mr. Dugard³⁹ had replied that those matters would be addressed during the consideration of the topic of responsibility of international organizations. He was aware that Mr. Gaja was reluctant to take them up, but he did not think that special rapporteurs should be able to "pass the buck" in that way. As he saw it, the draft articles under consideration constituted a last chance to fill those glaring lacunae, even though, intellectually, it was true that the issue was no longer the responsibility of international organizations but rather, once again, the responsibility of States, albeit implemented by international organizations. The link with the subject was sufficient. That was what had been planned at the beginning, when the topic had been proposed. The lacuna was all the more striking in that the question did not concern potential or purely hypothetical problems, unlike many others addressed by the Commission; on the contrary: the problems to which he was referring did indeed arise, and practice in the area was considerable, not only concerning functional protection, but also concerning implementation of the responsibility of the State. To cite just one example among many: international organizations that had suffered injury as a result of Iraq's invasion of Kuwait in 1990 had been able to bring claims before the United Nations Compensation Commission in order to obtain compensation; a number had indeed done so. Thus, the lacuna was a considerable problem, one which was justified only on the most abstract grounds. The reasoning behind the Special Rapporteur's proposals held good, regardless of whether an organization brought a claim against another organization or against a State. Enormous intellectual energy had been expended on the rare case in which an organization might bring a claim against another international organization, whereas nothing was said about the much more interesting and important question of claims which an organization might bring against a State.

5. The Special Rapporteur announced at the beginning of the sixth report what subjects he intended to take up in the seventh. The two questions to which he had just alluded needed to be considered as a matter of priority. On the other hand, he was very sceptical with regard to the Special Rapporteur's plan to review, in the light of comments received from States, the draft articles provisionally adopted, before completing the first reading of the draft (paragraph 3 of the report). He had two serious objections to that approach. First, that would make the Commission the executors of the political will of States (and, furthermore, of their supposed political will, since the Commission did not yet even have at its disposal a complete set of reactions by States to the draft articles as a whole, which by definition remained incomplete). It was not the Commission's task to give form to the will of States. Needless to say, the positions of States—as the Commission's "customers"—had to be taken into account, but what counted

most, on first reading at any rate, was for the Commission to submit to States and the Sixth Committee a complete and coherent draft, one that was far removed from the political considerations by which States might—quite legitimately—be guided.

6. Secondly, if, in response to the reaction of the Sixth Committee, the Commission were to revert to draft articles already adopted, there would be no end to the process, which would also lead to a vicious cycle of unhealthy relations with the Sixth Committee. He did not see why, in such circumstances, there would be any need for a second reading. There was also a danger that the Commission might feel obligated to review the draft articles again and again in further readings to accommodate the comments of States. Instead, it should try to present a coherent first draft, before proceeding to a second reading which took account of the comments of States.

7. Turning to chapter II of the report, on the invocation of responsibility, he noted that it was above all draft article 46, as it related to article 51 of the draft articles on responsibility of States, that had given rise to the greatest number of comments by members. The problems were essentially the same, which made sense, since it was there that the most difficult issues of principle arose. First, there was the problem of the competence (or perhaps, more exactly, of the capacity) of international organizations to invoke international responsibility at the international level, one which arose not only *vis-à-vis* other international organizations, albeit very rarely, but also, and above all, *vis-à-vis* States. Secondly, the question had been asked whether that overall capacity was unlimited, as, in the opinion of the previous speakers, the current wording of draft article 46 would show, or whether it was necessary to introduce the principle of the speciality of the organization in one form or another. At the previous meeting, Mr. Nolte had suggested reversing the presumption of capacity, and Mr. McRae—and also Ms. Escameia if he had understood correctly—had proposed specifying that such capacity was restricted to cases in which the international organization had received a mandate to that effect. Initially, he had thought that those proposals were sound: in one form or another, the principle of speciality was relevant, provided that the concept of the "function of an organization" was not made too rigid and it was accepted that there could be an implicit competence in that area, which in his view was inseparable from the principle of speciality.

8. However, on closer reflection, he had had second thoughts, not because he disagreed with the idea behind his colleagues' proposals, but because it did not seem useful to express the idea of the principle of speciality in draft article 46. It was important to bear in mind the object and purpose of the provision: it presupposed that the international organization concerned was the sole beneficiary of the obligation breached or that it was part of the group of injured entities. If the obligation was legally owed to it in either form, it was because the obligation was part of its functions, and he therefore did not see why that should be spelled out in draft article 46. There was no call to theorize on the question of capacity under international law or obligations in general; all that was required was to ascertain when an international organization could invoke the

³⁷ See *Yearbook ... 2000*, vol. I, 2613th meeting, pp. 10–11, paras. 58–60, and *Yearbook ... 2004*, vol. I, 2791st meeting, p. 3, para. 20.

³⁸ *Yearbook ... 2000*, vol. I, 2616th meeting, p. 28, para. 17.

³⁹ *Yearbook ... 2004*, vol. I, 2792nd meeting, p. 9, para. 34.

responsibility of another international organization or a State. If the obligation that was breached was owed to it, it was linked to its functions, and he did not see why something should be stated which was automatically implicit in the provision. Thus, the point made in paragraph 8 was expressed too elliptically, and should be explained in greater detail in the commentary.

9. Likewise, he disagreed with Ms. Escarameia's proposal to insert in draft article 46 a formulation covering other entities, such as the ICRC—or, for that matter, the International Olympic Committee or other major organizations which had a public service function of sorts. Perhaps such entities had the same kinds of rights and obligations as international organizations, though that was debatable. No doubt they had a certain measure of international legal personality, but if, as he believed, they were not international organizations, then it was neither logical nor timely to try to find a formulation that would include them, though it might be possible to refer to them in the commentary. However, it was not a good idea to introduce them at such a comparatively late stage in the work.

10. On the other hand, he agreed with Ms. Escarameia that the word "entity", the legal meaning of which was very unclear, should be deleted from the draft articles in favour of a systematic reference to States and international organizations. He also agreed with her that, while it might be clumsy, at least it was correct; the experience of the Drafting Committee had shown that it was sometimes possible to come up with more economical formulations than those initially envisaged.

11. He had no quarrel with the content of draft articles 47 and 48, although draft article 47, paragraphs 1 and 2, could probably be merged; that was a question of drafting. However, he took issue with paragraphs 11 to 13 of the report, which explained the reasoning behind draft articles 47 and 48. He shared Mr. McRae's concern that the draft articles and their underlying rationale were modelled too closely on the articles on responsibility of States. He did not think it sufficient to say, as the Special Rapporteur did in paragraph 11, that as "the articles on responsibility of States [did] not address the question of which State organ [was] to be regarded as competent for bringing or withdrawing a claim ... [i]t would be strange for the Commission to address the latter question for the first time in the present context". That did not seem to be correct: whereas a State was sovereign and had full legal capacity to organize itself as it saw fit, that was not the case with an international organization. Not only should it be specified that an international organization must respect its own rules, or at any rate its constituent instrument, but it must also be asked whether the problem arose in the same way, first, for international organizations and States and, secondly, for those that were members and those that were not, because members knew how the international organization functioned and who could do what, whereas non-members were not expected to be aware of such issues.

12. Turning to paragraphs 15 to 20, he said he was not persuaded by the Special Rapporteur's argument against including in the draft articles a provision equivalent to

article 44 of the draft articles on responsibility of States, relating to admissibility of claims. Either, as Ms. Escarameia had asked at the previous meeting, it should be concluded that the "mediate" injury suffered by agents of the organization had been excluded from the draft articles (and he did not see why that should be the case), or else the draft articles should be assumed to include that type of injury. It seemed particularly odd to eliminate that situation, since paragraphs 15 to 20 were the only ones in the report which referred to an abundant practice. Yet, while the practice existed, the Special Rapporteur seemed not to want to address it. He was aware that the practice mainly concerned claims of States against international organizations or of international organizations against States, but, as he had already insisted, those cases should not be simply discarded.

13. In any case, the considerations which the Special Rapporteur set out in paragraph 19 were not very convincing. The Special Rapporteur was right to say that the requirement of nationality clearly did not apply, but the link of function did and basically played the same role as the nationality link in the situation envisaged. At the end of paragraph 19, the Special Rapporteur asserted that "the eventuality of this type of claim being addressed by an international organization against another international organization is clearly remote". That was incorrect, in any case for economic integration organizations, and the probability was certainly no more remote than that of most of the other situations contemplated in the draft articles.

14. Thus, he was very much in favour of the inclusion of a provision corresponding to article 44 of the draft articles of 2001 on responsibility of States, but which, given the very specific nature of the problem for international organizations, should be worded very differently. That would also be an excellent opportunity to show that the Commission was not simply slavishly copying the articles on responsibility of States.

15. The most astonishing aspect of the absence of an article corresponding to article 44 was that the Special Rapporteur, after explaining why he ruled out such a provision, had nevertheless concluded in paragraph 20 that "[t]his would not imply that the requirements of nationality of claims and exhaustion of local remedies are always irrelevant when a claim is addressed against an international organization". If they were not always irrelevant, then why were they not discussed?

16. He had nothing to say about the content of draft article 50, but pointed out that, in paragraph 2 of the French version, the phrase "*dommage qu'il ou elle a subi*" sacrificed too much to political correctness in the guise of grammatical correctness. The Drafting Committee should be asked to make the necessary changes.

17. Draft article 51 posed from another perspective the problems of principle which he had addressed with regard to draft article 46. As a fervent defender of article 48 of the draft articles on responsibility of States, he would approach the question with an open mind. Be that as it might, an international organization was an international organization and a State was a State. However, to cite the advisory opinion of the ICJ in the *Reparation for*

Injuries case, “[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice” [p. 180]. That meant that a State, by virtue of the very fact that it was a part of the international community of sovereign States, could act for the benefit of the international community as a whole, but he agreed with Mr. McRae that it was by no means clear whether the same could be said of an international organization.

18. For the same reasons he had mentioned at the start of his statement, he had no problem with paragraph 1 of article 51, subject to the general provisos that, as Ms. Escameia had suggested, the phrase “group of entities” should be replaced by “group of States or international organizations” and that an international organization should be entitled to address a claim against a State just as it could against another international organization. If the obligation was owed to a group of which the organization was part, that meant that the situation fell within its functions, and there was therefore no reason to reintroduce the principle of speciality in paragraph 1.

19. The same was not true of paragraph 3. There, the fact that the obligation was owed to the international community as a whole did not mean that the function of the organization defined on the basis of the principle of speciality entitled the organization to invoke responsibility. That said, and although he agreed with those members who had stressed the point, that seemed to him to be the meaning of the words “and if the organization ... has been given the function to protect the interest of the international community underlying that obligation”, at the end of paragraph 3. Paragraph 3 might benefit from being worded differently, but the idea, which must surely be approved, was contained in it. Thus, he would have no objection to paragraph 3, provided that it was made clear that the international organization that had been given that function had the same entitlement *vis-à-vis* States that breached an obligation owed to the international community as a whole. Nor had he any objection to paragraphs 4 and 5.

20. He wished to make a number of comments on the subject of countermeasures. However, in the interests of the smooth running of the Commission’s work, he would defer those remarks until a later meeting.

21. Ms. ESCARAMEIA said that, contrary to what Mr. Pellet had claimed, she did not take a more restricted view than the Special Rapporteur concerning the invocation of responsibility of international organizations; on the contrary, she endorsed the Special Rapporteur’s proposal and was even in favour of extending that capacity to other entities. Her proposal had been to draft a “without prejudice” clause to cover those entities, since, in her view, States and international organizations could not be presumed to represent the totality of the interests of the international community as a whole. Only with regard to countermeasures was she in favour of a more restrictive approach.

22. Mr. DUGARD said that the provisions of the articles on responsibility of States clearly could not be transposed automatically to those on the responsibility of international organizations. The Special Rapporteur was therefore to be commended for the expertise and discernment with which he had adjusted the first set of articles to the requirements of the second.

23. It was common cause that the most controversial provisions in the articles on responsibility of States were contained in articles 42, 48 and 54. It was also a well-known secret that the reason the Commission had preferred not to recommend that the draft articles on responsibility of States should immediately be given the form of a convention was its concern that those particular provisions might be watered down by an international conference convened to examine them. The fact that the Special Rapporteur dealt with those highly contentious provisions in his sixth report made the report particularly important. Although, in general, he was satisfied with the way in which the Special Rapporteur had handled the study, there were a number of points he wished to raise regarding draft articles 46, 51 and 57, which corresponded to articles 42, 48 and 54 of the draft articles on responsibility of States.

24. First, he objected to the omission of a provision corresponding to article 44 of the draft articles on responsibility of States and the Special Rapporteur’s studious avoidance of the issue. He would begin by commenting briefly on the relationship between diplomatic protection and international organizations. According to draft article 46, a State had the right to invoke the responsibility of an international organization not only where direct injury was caused to the State itself, but also in cases involving indirect injury, in which an international organization injured a national of a State and the State brought proceedings on its own behalf in the interest of the individual. There was no need to return to the question whether diplomatic protection was not a fiction, or whether what was being asserted was the right of the State or, ultimately, that of the individual. The fact was that international law accepted that a State could bring a claim on behalf of an individual who had been injured, where the latter was a national. Consequently, one could not avoid the subject of nationality of claims and exhaustion of local remedies in the current draft articles.

25. The Commission had foreseen and addressed that issue in the context of its discussions on diplomatic protection. In his fifth report on diplomatic protection, presented in 2004,⁴⁰ he had proposed a draft article 24, to read: “[t]hese articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization”. However, in paragraph 20 of the same report, he had suggested that “[d]espite the closeness of this subject to diplomatic protection, it seems that it is one that belongs to the Commission’s study on the responsibility of international organizations”. Agreeing with him, the Commission had, in 2004, rejected his proposed draft article 24 and had instead decided to deal with the matter in its study on international organizations. He therefore shared the view expressed by other speakers that the Commission could not simply avoid all mention

⁴⁰ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/538.

of article 44 of the draft articles on responsibility of States and that it was imperative to address the issues it raised.

26. Another difficulty concerned the apparent conflict between articles 44 and 48 of the draft articles on responsibility of States, to which the Special Rapporteur had alluded briefly when introducing his report. The question was whether article 48, paragraph 1 (*b*), which appeared to allow a State to protect a non-national in cases in which the obligation breached was owed to the international community as a whole, was trumped by article 44 and by the draft articles on diplomatic protection. A number of scholars, notably Enrico Milano,⁴¹ had argued very forcefully that the innovative provision contained in article 48 was flawed because the draft articles on diplomatic protection and article 44 of the draft articles on responsibility of States entitled States to protect only nationals, not non-nationals. That problem had been considered by Judge Simma in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which, relying on the articles on responsibility of States, Judge Simma had argued cogently that a State had the right to protect a non-national. The issue had also been addressed by the Commission during its consideration of the final group of draft articles on diplomatic protection. In his seventh report on diplomatic protection,⁴² he had drawn attention to the allegations by some scholars that the Commission had conferred a right on States to protect non-nationals in cases in which the interests of the international community as a whole were involved, while simultaneously taking away that right. The truth of the matter was that the Commission had made a mistake. He had discussed the problem raised by those articles with the Special Rapporteur on State responsibility and they had agreed that it had not been addressed by the Commission when adopting draft articles 44 and 48. The issue had, however, been expressly dealt with in footnote 240 to paragraph (2) of the commentary to draft article 16 on diplomatic protection adopted on second reading, which stated that “[a]rticle 48, paragraph 1 (*b*) is not subject to article 44 of the articles on responsibility of States for internationally wrongful acts, which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles”.⁴³ That footnote left absolutely no doubt as to the Commission’s position with regard to articles 44 and 48 and its wish to avoid any confusion. While article 44 appeared to take away the right conferred in article 48, paragraph 1 (*b*) of the articles on responsibility of States, the draft articles on diplomatic protection made it clear that this was not the case. The Commission was under some obligation to uphold that position with respect to the current draft articles. If the Special Rapporteur did not wish to address the issue in a special provision, it must at least be very clearly spelled out in the commentary.

⁴¹ E. Milano, “Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?”, *Netherlands Yearbook of International Law*, vol. 35 (December 2004), pp. 85–142, at pp. 103–108.

⁴² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/567.

⁴³ *Yearbook ... 2006*, vol. II (Part Two), p. 51.

27. Turning to the question of whether a non-injured international organization, or a non-injured State for that matter, would be entitled to bring a claim against another international organization for the breach of an obligation owed to the international community as a whole, he noted that although the Special Rapporteur had qualified that as a difficult issue in paragraph 32 of his report, the question was not too far-fetched to contemplate. He would venture to say that perhaps the dust had settled sufficiently on the 1999 NATO intervention in Kosovo for the Commission to discuss it dispassionately as an example of a case in which the United Nations might have brought a claim against NATO for overstepping its powers in respect of the maintenance of international peace and security. The Russian Federation, as a non-injured State, could also have contemplated instituting such proceedings, a scenario discussed in paragraph 31 of the report.

28. Whether it was desirable for a non-injured international organization, or a non-injured State, to bring a claim against another international organization, was another question. He tended to the view that such a right should be reserved for the United Nations, which would involve conferring a special status on the Organization. The Commission had already discussed that issue in respect of the present draft articles and had decided that the United Nations should not be given a special status. However, as the ICJ did not have jurisdiction over international organizations, it was unlikely that such an issue would ever come before it, as was illustrated by the fact that Yugoslavia had had to bring its claims against the member States of NATO. It was therefore not beyond the bounds of possibility that such instances might occur. On the other hand, the Special Rapporteur had handled the question very effectively in article 51, paragraph 3, by establishing that the organization invoking responsibility must have been given the function to protect the interest of the international community underlying that obligation.

29. On the subject of countermeasures, he agreed with the Special Rapporteur that it would be difficult to find a convincing reason for exempting international organizations from being possible targets of countermeasures. He was not entirely convinced by the objections raised by José Alvarez, cited in the footnote to paragraph 41 of the sixth report. It was common knowledge that, even at the present time, Member States of the United Nations that disliked certain actions of the Organization expressed their dissatisfaction by withholding funds. One need only recall the refusal by France and the former Soviet Union to pay their dues after the establishment, by resolution 1000 (ES-I) of 5 November 1956, of the first United Nations Emergency Force (UNEF I) in 1956. He supported the Special Rapporteur’s approach to that matter in draft article 52. As to the difference of opinion between Mr. Nolte and the Special Rapporteur at the previous meeting over paragraphs 4 and 5 of that draft article, he tended to take the view of the Special Rapporteur that there was no presumption contained in paragraph 4 or paragraph 5. On the other hand, there was much to be said for Mr. Nolte’s reformulation of those paragraphs; that, however, was essentially a matter for the Drafting Committee.

30. Draft article 57 corresponded to article 54 of the draft articles on responsibility of States, which, at the time

of its adoption, had been regarded as a highly innovative provision by the Commission and had therefore been formulated as a saving clause. In paragraph (6) of the commentary to article 54 of the draft articles on responsibility of States, the Commission noted that “there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest”. Paragraph (7) noted that, for that reason, “[t]he article speaks of ‘lawful measures’ rather than ‘countermeasures’”. Paragraph (6) further noted that the provision was drafted as “a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law”.⁴⁴ He wished to conclude by asking the Special Rapporteur whether international law had indeed developed further in that regard since 2001. Although he suspected that it had not, he was of the view that the matter should at least be addressed in the current draft. He disagreed with the Special Rapporteur’s conclusion in paragraph 57 of his report that the Commission’s only option was to restate article 54 on responsibility of States: the Commission also had the option of reconsidering article 57 and determining whether to treat it as a saving clause or whether it was ready to employ the term “countermeasures” instead of “lawful measures”.

31. Mr. GAJA (Special Rapporteur) welcomed the background provided by Mr. Dugard to the draft articles on responsibility of States, in relation to the question whether a provision concerning nationality of claims and exhaustion of local remedies should be included in the present draft articles. He agreed with Mr. Dugard that a mistake in drafting had been made with regard to the relationship between articles 44 and 48 of the draft articles on responsibility of States. The reference to article 44 in article 48, paragraph 3, could appear to deprive States other than the State of nationality of the capacity to invoke responsibility for breaches of *erga omnes* obligations pursuant to article 48, paragraph 1 (b). Consequently, he endorsed the position taken by Mr. Dugard and the Commission in footnote 240 to paragraph (2) of the commentary to draft article 16 on diplomatic protection,⁴⁵ which explained that article 48, paragraph 1 (b) of the draft articles on responsibility of States was not subject to article 44. A clarification could be incorporated in the current draft, if the Commission decided to draft a provision that paralleled article 44. His reason for not including such a provision had been that nationality of claims and exhaustion of local remedies requirements applied only to certain, limited categories of claims, and only rarely in cases in which an international organization was the responsible entity; he had never sought to deny the applicability of those requirements in certain circumstances. The question currently facing the Commission was whether, in principle, a draft article on the lines of article 44 of the draft articles on responsibility of States was needed. If the majority of members considered it necessary, then drafting such a provision would be a straightforward matter, as he had already completed the necessary research into practice concerning the issue.

32. Mr. NOLTE, clarifying the statement he had made at the previous meeting, said that he had commented not on draft article 46, but solely on draft article 52, paragraphs 4 and 5, and the possible entitlement of member States of an international organization to take countermeasures against that organization. The principle of speciality had to be borne in mind in that context and he therefore proposed that draft article 52 should make it clear that it did not create a presumption in favour of countermeasures being taken against the allegedly responsible international organization.

33. Turning to draft article 51, paragraph 3, and the question of whether an international organization was entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole, he noted that, in support of the argument that it could, paragraph 36 of the sixth report had quoted the contention of the Commission of the European Communities that “it is hardly conceivable that a technical transport organization should be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole”.

34. In his own view, however, certain considerations militated in favour of the possibility that a technical transport organization might, under certain circumstances, be allowed to take countermeasures against a military alliance. The first was that the member States of that organization might have transferred the exclusive power to take certain decisions concerning transport to the organization. If those member States had thereby deprived themselves of the right to take unilateral measures, then why should the fact that they had delegated their power to a technical organization result in neither the member States nor the organization being able to take countermeasures in the area of transport? Paragraph 60 of the report discussed that point in the context of draft article 57, but limited the possibility of taking countermeasures in an area over which competence had been transferred to an international organization to regional economic integration organizations. An air traffic control organization, for example, might not be linked to a regional economic integration organization but might still have certain exclusive powers which would have to be used in order to implement certain countermeasures.

35. There was, however, a more general issue involved and, for that reason, the answer that a technical transport organization had not been empowered to apply countermeasures was too simplistic. Of course, if the organization had not been given such powers, it could not take countermeasures against a military alliance. But the real question was what considerations determined whether the technical transport organization had been empowered to take countermeasures for violations of peremptory norms by other organizations. The answer seemed not to depend primarily on the technical scope of the organization’s activity, but rather on whether its members had conceived it as an instrument for many purposes, including the adoption of countermeasures for violations of peremptory norms, or whether they had intended to neutralize, or depoliticize, the management of a technical area by entrusting it to a specific organization. It was unlikely

⁴⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 139.

⁴⁵ See footnote 43 above.

that the reply could be found simply by referring to the organization's rules—since they usually said nothing on the issue—or to the organization's technical nature. Once again, the draft articles should leave room for an interpretation of an international organization's character.

36. He was unsure whether the draft articles dealt adequately with the complexities of the eventuality of one international organization invoking the responsibility of another international organization. The mere fact that the injured organization was not a member of the responsible organization did not seem to be a sufficiently determinative factor. The European Community was not a member of the Southern Common Market (MERCOSUR) and NATO was not a Member of the United Nations, yet the position with respect to invoking responsibility seemed to be different in the two cases. The fact that all members of NATO were Members of the United Nations suggested that, for the purposes of invoking responsibility, NATO should be treated more like a Member of the United Nations, whereas the European Community must clearly be treated as a non-member of MERCOSUR.

37. Secondly, although it was hard to disagree with the Special Rapporteur's cautious statement in paragraph 46 of his report that "should an organization fail to apply its own rules when taking countermeasures, the legal consequence is not necessarily that countermeasures would have to be regarded as unlawful", it might nonetheless give the wrong impression, especially if it was read in the light of the Special Rapporteur's comments on draft article 46 in paragraph 11 of the report, which suggested that the rules of an international organization were comparable to the internal law of States. The internal law of States was normally disregarded, for good reasons, when assessing the international legality of a State's action, whereas the rules of international organizations tended to be of greater consequence when evaluating the legality under international law of the activities of the organizations concerned. That was because those rules also determined the scope of an international organization's competence, *inter alia*, so as to enable third parties to rely on them, and were more directed towards the international public, including non-members. Hence it was necessary to distinguish between various types of rules.

38. Lastly, he endorsed previous speakers' views concerning the exhaustion of local remedies and questions of admissibility, and said he would welcome more explicit treatment of those issues in the draft articles.

39. Mr. PERERA thanked the Secretariat for its invaluable services, and in particular for its preparation of topical summaries of the Sixth Committee's debates on the items before the Commission, and of comprehensive documentation on the new topics that the Commission would be considering in the latter part of the session.

40. In his sixth report, the Special Rapporteur had highlighted some key issues regarding the invocation of the responsibility of international organizations. The first was the question whether there was a need for a draft article on the admissibility of claims along the lines of article 44 of the draft articles on responsibility of States, which would define the conditions for establishing the international responsibility of an international organization and for the

invocation of that responsibility by a State or another international organization. Such a provision would involve the well-known principles of the nationality of claims and the exhaustion of local remedies, which were intrinsic in the context of diplomatic protection.

41. The Special Rapporteur made the pertinent point that the question of conditions for the exercise of diplomatic protection arose essentially in relation to State responsibility in the context of relations among States, and that the practical relevance of diplomatic protection did not find a parallel in the context of the responsibility of international organizations except, perhaps, in the case of a claim by a State against an international organization. Nevertheless, having listened to Mr. Dugard's remarks, he personally had come around to the view that there were good grounds for examining the applicability of the principle of the nationality of a claim in the context of a State making a claim on its own behalf in respect of a direct or indirect injury caused to one of its subjects.

42. Having considered the widely diverging views on the applicability of the rule of the exhaustion of local remedies, he was of the opinion that the critical issue was whether an international organization, like a State, possessed a judicial system and jurisdictional powers, or other means of providing redress. He was inclined to respond in the negative, having regard to the character of international organizations in general. If a decision were taken to omit a draft article along the lines of article 44 of the draft articles on responsibility of States, he would suggest that the commentary should deal in detail with the customary character of both principles as set forth in a number of judgements, for example in the *Mavrommatis* case in relation to the nationality of claims and in the *ELSI* case in relation to the principle of the exhaustion of local remedies.

43. The second key issue was whether an international organization other than an injured organization was entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole. As the Special Rapporteur had pointed out, practice in that regard was not very indicative, the most significant example being that of the European Union, which must be seen as a precedent of an exceptional nature. Debates in the Sixth Committee and the written views of international organizations had underlined the fact that the ability of an international organization to invoke responsibility for violations of obligations owed to the international community as a whole would be determined by the specific mandate of that organization, as defined by its constituent instrument. He would therefore be in favour of including an express reference to the need for a constitutional mandate, as determined by the constituent instrument and the rules of the organization, as the determining factor in that respect in both draft article 51, paragraph 3, and draft article 46.

44. The chapter on countermeasures related to an area where practice was virtually non-existent, save for that involving the European Union in procedures under the Understanding on Rules and Procedures Governing the Settlement of Disputes annexed to the Marrakesh Agreement Establishing the World Trade Organization. He agreed with Mr. McRae that retaliation measures in the

context of the WTO, such as the withdrawal of concessions, were essentially a contractual remedy under that special treaty regime, and that it would be difficult to draw a general inference of broader application. As several previous speakers had noted, the European Union constituted an organization with a high degree of regional integration and the WTO dispute settlement procedures were of a complex and specialized nature. It would therefore be difficult to rely on that limited practice for the purposes of the draft articles. Therefore, a cautious approach to countermeasures was required. The suggestions made by Mr. Nolte and Ms. Escameia in respect of draft article 52, which had emphasized the centrality of the overall character and the rules of the organization, were a step in the right direction and therefore deserved further consideration.

45. Draft article 57 ventured into an area in respect of which the Commission had observed in paragraph (3) of the commentary to the corresponding draft article 54 on responsibility of States that “practice is limited and rather embryonic”.⁴⁶ Paragraph (6) stated: “As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.”⁴⁷ Hence the Commission made the decision to draft the provision as a saving clause. Those observations applied with equal if not greater force to the responsibility of international organizations, not only in the specific context of draft article 57, but also in the overall context of the chapter on countermeasures. It was therefore necessary to proceed with the utmost caution in that area, which was uncharted territory. For that reason he supported the suggestion that a working group should be set up to further examine the draft articles on countermeasures. He had no objection to draft articles 46 to 51 being referred to the Drafting Committee.

46. Mr. HMOUD said that a set of draft articles on the invocation of the responsibility of international organizations and on countermeasures, which would apply to the different types of international organization—as defined in the draft articles—seemed appropriate. The adaptation of the articles on responsibility of States to the case of international organizations would be logical, provided that the independent legal personality of an organization operated in the same manner as that of a State. However, more careful consideration should be given to the question of whether the widely varying natures and characters of international organizations warranted the application of different rules to different organizations. In addition, the lack of precedents relating to international organizations meant that further analysis might be required before concluding that an article on responsibility of States applied *mutatis mutandis* to the responsibility of international organizations.

47. Certain policy considerations would also have to be taken into account before adopting principles on

countermeasures in the draft articles, although from a legal perspective there was nothing standing in the way of the adoption of such principles.

48. Regarding draft article 46, on invocation of responsibility by an injured State or international organization, he concurred with the opinion expressed in the report that it might be difficult to provide examples of injury to an international organization when the obligation breached was owed to several entities or to the international community as a whole and the breach specially affected the organization or radically changed the position of all the injured entities. It should, however, be stressed that it was the nature and character of an organization that led to its being injured in such cases. In that respect, it was unlike a State and that aspect of the matter might require further elaboration.

49. On the admissibility of claims, he took the view that, even though the report provided reasons for excluding an article setting out rules on the nationality of a claim and the exhaustion of local remedies, the fact that practice was not settled in relation to the exhaustion of local remedies did not preclude the inclusion of such an article. Whether it was reasonable to require the exhaustion of the internal remedies of an international organization would depend on the structure and rules of the organization. While States’ local remedies usually involved judicial or administrative mechanisms, international organizations had more diverse mechanisms for local remedies, which might or might not be effective and adequate. He therefore suggested the incorporation of a draft article providing for the nationality of the claim, which would also require the exhaustion of the internal remedies of the responsible organization, with the proviso that those remedies must be effective and adequate. The commentary should then provide examples of international organizations’ mechanisms offering effective and adequate remedies.

50. As for draft article 51, he agreed that it was essential to qualify the right of a non-injured international organization to invoke the responsibility of another organization for a breach of an obligation owed to the international community as a whole. Yet that right should not be confined to organizations whose functions were to protect the interests of the international community. Any organization should be able to invoke such responsibility when it was acting within its mandate to protect common interests of its members, where such interests were undermined by the obligation breached. The standard whereby an international organization’s function was the protection of the common interests of the international community was very high, and it was disputable whether any existing international organization had the sole function of protecting the common interests of the international community as a whole. Thus, wider parameters for the right to invoke responsibility should be set.

51. Countermeasures continued to be a controversial legal concept for various reasons. Historically, reprisals had involved the use of force and that was why there had been opposition to the formulation of rules on countermeasures, even though it had since been accepted that such measures must not involve the use of force. Another reason was that any suggestion that it might be possible to

⁴⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 137.

⁴⁷ *Ibid.*, p. 139.

take the law into one's own hands should be repudiated. However, if there was a dispute settlement forum with jurisdiction over the dispute, the rules governing the dispute settlement mechanism as they applied to the parties might restrict the right to resort to countermeasures and supersede any other rules to the contrary. The same could be said of *lex specialis* rules, as in the case of the WTO, which had its own system of countermeasures applicable within that organization's framework.

52. However, opposition to the doctrine of countermeasures was necessarily related to the concept itself and the question of whether it should be part of international law. If countermeasures were accepted, then there would be no legal reason to confine the possibility of adopting them to States, and it would then be necessary to ascertain whether any particular conditions had to be met when applying the doctrine to international organizations.

53. The rules of the international organization were undoubtedly pertinent. If such rules allowed or prohibited a member of the international organization from taking countermeasures against the organization, then obviously such rules had to be respected. Nevertheless, the situation was more complex when the rules were silent, as was generally the case. The threshold should then be higher and it should not be possible to resort to countermeasures if they would have a significant effect on the position of the international organization or would threaten its proper functioning. Similarly, if the responsible organization was a member, the injured international organization should be allowed to take countermeasures only if they were consistent with the organization's rules and did not significantly prejudice the position of the responsible organization or threaten its existence. Those qualifications should be added to article 52, paragraphs 4 and 5.

54. He failed to see the logic of exempting an international organization applying countermeasures against a non-member State from the requirement to adhere to its own rules. Since a State was presumed to act in accordance with its internal legal procedure when it took countermeasures, there was no reason not to consider the legality of countermeasures taken by an international organization when it acted against its own rules. If its functions did not allow it to take such measures, or if the organ taking it had acted *ultra vires*, the targeted party should be able to contest the legality of such measures on the basis of the international organization's rules. That was particularly important in view of the fact that the Commission was trying to assert the principle of legality in the implementation of countermeasures in order to make the doctrine more defensible. Accordingly, a paragraph to that effect should be added to draft article 52.

55. Lastly, on the issue of an international organization taking countermeasures on behalf of a member, he noted the addition to the draft articles of a special provision concerning regional economic organizations whose members had delegated to them competence over certain matters and the right of such organizations to act on behalf of their members. He did not understand why the provision restricted the scenario to regional economic integration organizations and seemed tailored to one specific organization. Organizations of that kind did not

claim to be federal States by virtue of their economic integration. Secondly, since competence had been delegated by the member to the organization, the latter should act only within the confines of the member's original competence, having regard also to the extent of the countermeasures that the member would have been able to take had it acted by itself and not through the international organization. That principle meant that the organization could avail itself only of such countermeasures as could have been taken by the member. For instance, the organization could not take countermeasures that involved the whole organization *vis-à-vis* the injuring entity, because the member, not the organization, was the injured party. He therefore suggested that the phrase "only to the extent that such measures would have been lawfully possible for the member had it taken those measures itself" should be added at the end of draft article 57, paragraph 2. The paragraph should also be general in scope and not confined to regional economic integration organizations.

56. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

The meeting rose at 11.45 a.m.

2963rd MEETING

Thursday, 15 May 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (*continued*) (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the sixth report of the Special Rapporteur (A/CN.4/597).

2. Mr. PELLET said that after having dealt, at the previous meeting, with the question of "amicable" invocation of responsibility through a claim, including in the guise of diplomatic or functional protection, it remained for him to consider the question of the other, less "gentle" means of implementing responsibility, namely the application of countermeasures—of which he was not a fervent advocate, even though he acknowledged that it was necessary to come to terms with them.

3. One of his principal concerns, which held good for countermeasures as well as for the invocation of responsibility, concerned the fact that the opposite scenario, that of countermeasures that a State could take against an international organization, was not envisaged in the draft articles; he very much hoped that the Special Rapporteur or, if the Special Rapporteur preferred, a working group, would come up with some additional draft articles devoted to that scenario.

4. The Special Rapporteur took various examples as his starting point in order to demonstrate his contention that the draft articles could not disregard countermeasures. While he agreed with that conclusion, he was not entirely convinced by the reasons given. Mr. McRae and Mr. Perera had been right to stress that the decisions of the WTO Dispute Settlement Body did not constitute a very convincing starting point for that demonstration, since the “countermeasures” in question were authorized by the Appellate Body, sometimes with the participation of an arbitral tribunal. The example of the Dispute Settlement Body was strictly limited to international economic integration organizations and, for the moment, to the European Communities. With regard to other types of organization, WTO law was not edifying, even by analogy, and it was difficult to extend its applicability to those other organizations. The question then arose as to what kind of countermeasures the organizations could actually take. It was there that the shoe pinched: if the injured organization did not have the competences that would allow it to take effective countermeasures, it might be asked whether in that case States should take up the challenge. That was the view taken by a number of legal writers, including Ehlermann.⁴⁸ That could constitute a logical pendant to draft article 43, but if such were the case, those countermeasures “by substitution” would of course have to be very rigorously delimited.

5. In actual fact, two questions arose, between which the preceding speakers had not clearly distinguished. The first was whether an international organization had the competence to take countermeasures and whether it had the capacity to do so. If it did, the second question was what kind of countermeasures it could take. Mr. McRae was right to say that one should probably begin with the second question, but that did not mean that the first need not be considered.

6. An international organization could undoubtedly only take measures that were explicitly or implicitly permitted by its constituent instrument: on that point almost all the speakers had been in agreement. Yet, to begin with, such possibilities were extremely rare; and, secondly, they belonged, under the rules of the organization, to the internal sphere (suspension of voting rights or membership, expulsion from the organization, etc.). In that case they were sanctions, not countermeasures in the strict sense of the term. Furthermore, the purpose of those measures was not necessarily to restore international lawfulness, still less to induce those targeted to make reparation for the injurious consequences of their acts; they had a clear

punitive connotation that countermeasures did not—or at any rate should not—have. And it was because they should not be punitive in character that, although he had not much sympathy with countermeasures even in principle, he would not go so far as to agree with Mr. McRae and Mr. Nolte, who wished to start from a presupposition or a presumption that was hostile to them. Even though they needed to be strictly delimited, countermeasures had the very commendable function of inducing the State or international organization targeted by them to fulfil its obligations in the area of responsibility.

7. International organizations had very few means, *de jure* but also *de facto*, of taking countermeasures. Was the conclusion to be drawn that the entire chapter on countermeasures should be abandoned? That would surely be going too far, in view of the existence of regional economic integration organizations and, more generally, of organizations that behaved like States and were entitled to do so under their statutes, States having delegated important competences to them. In fact, many of the Commission’s (or the Special Rapporteur’s) difficulties stemmed from the existence of the European Union. Had it not existed, it would probably never have occurred to anyone to come up with the peculiar idea that the responsibility of international organizations could be incurred in the same way as that of States, still less that international organizations themselves could actively invoke the responsibility of other States. The fact remained that the European Union did exist, and one of the main questions raised by the draft articles was not countermeasures as such, but whether the Commission should adopt general formulations (knowing as it did that, essentially, only the European Union was specifically concerned), or whether the European Union—or rather, regional economic integration organizations—should be singled out for special treatment. While in practice it was the European Communities that had given rise to problems thus far, there was every reason to suppose that the same problems would arise in the future as more and more regional economic integration organizations elsewhere than in Europe (in Latin America, Africa, the Arab world and Asia) acquired increasingly wide-ranging powers. It was important to guard against “eurocentrism” and “europhobia”, both of which would be over-reductive and counterproductive.

8. It seemed that the Special Rapporteur was uncertain how to reply to that question. From a reading of the draft articles he had proposed to the Commission, one might suppose that the Special Rapporteur had unambiguously sided with the adherents of non-differentiation—which he himself supported *prima facie*—even though his reports and his comments on the draft articles accorded a special place, quantitatively at any rate, to the European Communities and the European Union. However, in his sixth report, in paragraph 2 of draft article 57, the Special Rapporteur suddenly introduced the concept of regional economic integration organizations. That was justifiable, provided that the formula was broadened to include all cases in which there had been a transfer of competences; in other words, provided that once organizations could exercise State powers, there was no reason for the Commission to confine its consideration to regional economic integration organizations—a point on which he endorsed Mr. Nolte’s remarks made at the previous meeting. It

⁴⁸ See C.-D. Ehlermann, “Communautés européennes et sanctions internationales—une réponse à J. Verhoeven”, *Revue belge de droit international*, vol. 18 (1984–1985), pp. 96–112.

remained to be seen whether that broad limitation, which would make it possible to consider that there was a general category of organizations with powers delegated by States, should perhaps be included in the part of the draft articles dealing with countermeasures. For, once an international organization had international legal personality and had received a transfer of competences from the State, there was no reason not to transpose to the organization the rules applicable to the State.

9. In any case, that extremely thorny question deserved a more complex treatment than the one accorded to it by the Special Rapporteur, which he found too hasty and which drew the overly broad conclusion that it was possible for an international organization to take countermeasures. In his own view, international organizations could take measures only if they were acting “as States”, following the delegation by the latter of some of their competences, and in the exercise of those competences. Furthermore, he was not convinced by the argument, put forward in paragraph 53 of the report, that “a uniform regime of the questions dealt with in these articles, whether they are taken against a responsible State or a responsible international organization, would have a practical advantage”. It was through statements of that kind that the Commission left itself open to the criticism that it was content to transpose the law of State responsibility to the topic of responsibility of international organizations. One should not take a given course of action merely because it was more practical, but because it was more logical or more effective.

10. Needless to say, what he had just said led him to propose a substantial recasting of draft article 52 (Object and limits of countermeasures), but it was above all draft article 57 (Measures taken by an entity other than an injured State or international organization) that posed problems for him. It consisted of two paragraphs that, though they were to be found under the common title that the Special Rapporteur had borrowed from article 54 of the draft articles of 2001 on responsibility of States for internationally wrongful acts,⁴⁹ dealt with matters too disparate to be the subject of a single article. The main change to paragraph 2 should be to extend it to cover a broader category of organizations, those to which member States or member international organizations had transferred a competence—and perhaps one should also add, to be realistic, a competence to act in their place and stead. On the other hand, he was not sure he agreed with Ms. Escameia that the competence needed to be expressly provided for in the organization’s mandate. If members had transferred their competences to the organization, it seemed to him that they must necessarily also have transferred the competence of ensuring respect for those same competences. In other terms, once a State or international organization had transferred to an international organization, in certain matters, substantive competences, that organization could “act as a responsible entity”, including by taking countermeasures.

11. The problems posed by paragraph 1 of draft article 57 were much thornier and, in his view, more serious. A fervent advocate of draft article 54 of the articles on

responsibility of States, he would have preferred a stronger formulation and one that, at the least, corresponded to the preliminary draft text adopted by the Drafting Committee in 2000.⁵⁰ Yet, contrary to what the Special Rapporteur wrote, he did not see why the only course to be taken in that regard was to reproduce the content of that article in the current draft. Once again, because it was sovereign, the State possessed all the international rights and duties recognized by international law and compatible with the equal rights of other States. That was not the case with international organizations, whose powers were limited, not only by the rights that other entities might possess, but first and foremost by their constituent instruments. There could be no doubt that an international organization should have the right to take lawful measures to put an end to breaches of obligations owed to the international community as a whole, and it would even be desirable to use a more robust formulation than the one currently to be found in paragraph 1 of draft article 57. On the other hand, it seemed indispensable to reproduce in that provision the phrase appearing in draft article 51, paragraph 3, and to say that, when that was the case, the international organization could act only if it “has been given the function to protect the interest of the international community underlying that obligation”. Unless that was spelled out, it would be tantamount to placing international organizations on the same footing as States.

12. While commending the Special Rapporteur’s skill and learning, he was inclined to deplore the former’s excessively narrow conception of the topic, a narrowness that was all too crudely apparent in Part III, and he strongly urged the Special Rapporteur not to confine himself to the question of the “passive” responsibility of international organizations, but instead to deal also with their active responsibility *vis-à-vis* not only other international organizations, but also States.

13. Turning to the question of the new practice of the Commission, which since 2007 had held a debate with outside actors (the human rights treaty bodies in 2007 and the legal advisers of States in 2008), he proposed that in 2009 that exchange of views should be held with the legal counsels of international organizations, who took a keen interest in the set of draft articles under consideration.

14. The CHAIRPERSON said that Mr. Pellet’s proposal was a very interesting one, which merited consideration by the Planning Group.

15. Ms. XUE said that, given the limited practice of international organizations with regard to responsibility, she fully understood the difficulties the Special Rapporteur had faced in finding empirical evidence to support his work. Although draft articles 46 to 57 seemed fairly similar to the corresponding articles on responsibility of States, the analysis in the report was very useful for an understanding of the approach taken by the Special Rapporteur. Part III was clearly the most difficult and controversial section, as the applicability of the draft articles to international organizations was a much more complex and problematic issue than in the case of the articles on

⁴⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 137.

⁵⁰ *Yearbook ... 2000*, vol. II (Part Two), annex to chapter IV, pp. 69–71.

responsibility of States. The Commission should, as recommended by the Special Rapporteur in his introduction, review the texts provisionally adopted in the light of all the available comments before completing the first reading. Indeed, when it was about to conclude its work, international organizations and Governments would be in a better position to reflect on the draft articles as a whole and to see whether they were appropriate for international organizations.

16. With respect to the implementation of international responsibility, Part III contained a number of elements that should be deemed to be normative claims for the progressive development of international law: for instance, the definition of the injured party, the individual claim formulated for a collective interest, the representative claim by a third party and the concept of “the international community as a whole”, which departed from the classical terminology used in the Vienna Convention on the Law of Treaties (hereinafter “1969 Vienna Convention”). Controversial or not, those draft articles were based on certain interpretations of the current practice of States and individual claims. With regard to international organizations, very few cases could be discerned as having an empirical basis. Although, in theory, there seemed to be no reason not to adopt the same rules for international organizations as for States, in practice those rules might not be applicable or suitable for certain types of organization.

17. In paragraph 9 of his report, the Special Rapporteur affirmed that “[t]he criteria for defining when an entity is injured by an internationally wrongful act of a State or an international organization do not appear to depend on the nature of that entity”, a statement that was unquestionable in the context of international claims. However, when considering the legal relations deriving from secondary rules of international responsibility in order to decide who had the legal capacity to invoke that responsibility, the Special Rapporteur’s assertion was no longer tenable, because the nature of the injured party had effects on the formulation of an international claim under the rules of international responsibility, for example if the injured parties were individuals or entities other than States or international organizations. Although the Special Rapporteur made that principle quite clear at the beginning of paragraph 6 of his report, the first sentence of paragraph 9 could lead to misunderstanding.

18. Draft article 46 (Invocation of responsibility by an injured State or international organization) mainly concerned the question of who had the legal capacity to bring a claim for an internationally wrongful act committed by an international organization. When the obligation breached was owed to a State or international organization individually, the legal relationship derived from secondary rules under draft article 46 (a) seemed quite clear. It was appropriate to put the international organization and the State on the same footing, as both were held directly accountable for their acts at the international level under international law and both were capable of bringing claims on an international plane, as had been confirmed by the ICJ in the *Reparation for Injuries* case. Subparagraph (b), on the other hand, raised a number of questions for Ms. Xue, all the more so because she still had serious reservations with regard to the corresponding rules

in the context of responsibility of States. In multilateral treaty relations or under customary international law, if an individual State was allowed to invoke international responsibility on behalf of the international community or a group of States, there was a risk of certain States taking self-appointed police action. Likewise, if international organizations were permitted to act on behalf of States or other international organizations, or even on behalf of the international community as a whole, the result might be even more serious interventions without proper authorization. The formulation of subparagraph (b) was too general and vague to prevent possible abuses of rights in practice. While recognizing that the possibility of international organizations being injured in the circumstances set out in subparagraph (b) could not be ruled out, the Special Rapporteur failed to explain why, in practice, pertinent examples of representative claims by international organizations were rare. Obviously, when a group of parties including some international organizations was injured, the organizations concerned would in practice be in a stronger position than States parties to formulate an international claim against the author of the wrongful act. Thus, for instance, when member States and the European Union were all considered as affected by the breach of an international obligation owed to them, the European Union would be in a much stronger position as a party to exercise the right to invoke the international responsibility of another international organization. Consequently, such actions were determined first and foremost by the internal rules of the organization, rather than by the rules of international responsibility. In most cases, an international organization invoked the responsibility of another international organization only when such breach directly affected its own right or interest. It should thus be clearly stated in the commentary that when a State or international organization invoked the responsibility of another international organization in the context of multilateral legal relations under draft article 46 (b), the breach of the international obligation must affect the State or international organization and it must be within the latter’s mandate to preserve such interest. The conditions regarding the standing of the injured party were aimed at maintaining a legal balance between the parties.

19. With regard to draft articles 47 (Notice of claim by an injured State or international organization) and 48 (Loss of the right to invoke responsibility), the Special Rapporteur, in deciding which was the organ competent to invoke the responsibility of the wrongdoer, drew a comparison between national law and the internal rules of international organizations and considered it unnecessary to make a specific reference to those rules. That argument was not entirely convincing because, in the case of an international organization, it was often the agents of the organization who were the injured party, rather than the organization itself. That dual personality might lead to practical difficulties in determining when a claim could be made and who must make it. If the competent organ of the international organization did not intend to bring a claim, whereas the injured individual insisted on a claim being brought, the current wording did not provide a solution, as both parties might have standing in international law. On that point, the Commission should seek further views from international organizations, in order to learn more about the general practice.

20. She supported the Special Rapporteur's proposal not to include an article on admissibility of claims, although she did not rule out the possibility that a State might in certain circumstances exercise diplomatic protection on behalf of its nationals against an international organization, whether or not the injured individual worked for the organization. When the Commission had considered the topic of diplomatic protection, it had agreed that functional protection by an international organization was a separate issue; however, some members had raised the matter again at the previous meeting. The issue of functional protection, like that of diplomatic protection in the context of State responsibility, was a special one, in that not only did the general rules of international law apply, but the internal rules of each international organization also applied. On the issue of exhaustion of local remedies, the example of the *United States and 15 European States (2000)* dispute before the Council of the International Civil Aviation Organization (ICAO) cited in paragraph 17 of the report was interesting, and it would be helpful to learn what had been the response of that Council on that question.⁵¹ The Special Rapporteur seemed to have accepted the view that the local remedies rule applied when adequate and effective measures were provided within the organization concerned, but that was a tailor-made rule applicable only to organizations such as the European Union. Logically, if the organization *per se* was the alleged wrongdoer against a non-member State or another international organization, it should not be the judge in its own case. It would be a different matter if the claim were brought by a member State.

21. On draft article 49 (Plurality of injured entities), she agreed with the general thrust of the article and the Special Rapporteur's analysis, but queried its relationship with draft article 46 (b). In paragraph 22 of the report, the Special Rapporteur pointed out that when an international organization was injured together with certain States, those States would probably be members of the organization but might conceivably be non-members. In the latter case, article 49 would apply directly, but in the former, the rules and practice of the organization could be applied in order to determine whether its members could invoke separately the responsibility of the wrongdoer for the same internationally wrongful act. The Special Rapporteur was no doubt only trying to leave enough room for manoeuvre to allow account to be taken of the various possible cases, but that point should be explicitly mentioned in the commentary.

22. With regard to draft article 50 (Plurality of responsible entities), she agreed with the Special Rapporteur on the principle that the injured party was not entitled to receive compensation higher than the damage it had suffered, but she did not understand why a claim for reparation could not be made against both the primary and the subsidiary responsible entity, when a member State was

identified as a subsidiary responsible party. The two parties could be held responsible on different accounts, and there seemed to be no need for separate legal actions.

23. Draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization), which was new and as controversial as article 48 of the articles on responsibility of States, would require the test of future international practice. First, under the terms of its paragraph 1, it became difficult to draw the line between an injured and a non-injured party. When the notion of collective interest could give rise to a variety of loose interpretations, it became meaningless to try to define an injured party in a multilateral situation. The example given in paragraph 33 of the report, referring to Burma, concerned a unilateral political act, and the matter was much more complicated than it looked. Perhaps it was exactly in such complex cases that sanctions imposed by regional organizations should be treated with caution and not given any general characterization. Paragraphs 2 and 3 raised the same policy consideration with regard to actions taken by the non-injured State and international organization. Moreover, if one were to characterize actions taken by international organizations within their mandate as coming under the rules of responsibility, it would be hard to maintain the theory of primary and secondary rules. The comment by the Organization for the Prohibition of Chemical Weapons, cited in paragraph 36, could not be interpreted as invoking secondary rules of international responsibility, because it was that organization's mandate, under the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, to prohibit and prevent any breach of the Convention. Even if that Organization's actions served the interest of the international community as a whole, they were a consequential effect and not the legal basis for its action—in other words, they were governed by primary rules rather than by secondary rules. Lastly, with regard to possible police action and abuse of rights, the draft articles constituted an extremely ambitious drafting exercise in the progressive development of international law, but one that was highly controversial and contentious in practice, because such wide scope for standing had always given rise to international disputes. How to find a means of remaining coherent when inserting such a clause in the draft articles on responsibility of international organizations was not a purely theoretical question.

24. With regard to countermeasures, she was of the view that, in the current state of international law, States or international organizations should not be encouraged to use countermeasures in international relations. Unless otherwise explicitly provided for by the States parties, such unilateral acts should be allowed only under strict conditions intended to ensure the protection of essential rights and interests as a means of dealing with internationally wrongful acts. When the use of force was ruled out, economic and other sanctions were the main way of exerting pressure on the wrongdoer to comply with its international obligation. While countermeasures were urgent, temporary and interim measures, subject, *inter alia*, to the principles of necessity and proportionality, they were also coercive, unilateral and power-based in character. To a certain extent they reflected the reality of current international relations, which were based on power politics.

⁵¹ Decision of the ICAO Council on the Preliminary Objections in the Matter "United States and 15 European States (2000)" of 16 November 2000 (www.state.gov/documents/organization/6841.doc). For the preliminary objections, see www.state.gov/documents/organization/6839.doc. For the response of the United States of America to the preliminary objections presented by the Member States of the European Union, see www.state.gov/documents/organization/6840.doc (accessed 9 October 2012).

25. As international organizations were composed of States, they derived their strength not from their own power but from the collective will of their members. Unlike national decision-making, which was both governed by national law and limited by international obligations, decision-making in an international organization was governed by its constituent instrument and its internal rules, which were largely deemed to be international law. When an international organization was alleged to be in breach of an international obligation *vis-à-vis* a member State, a non-member State or another international organization, there were always political and legal processes for negotiation and settlement, one way or another. As international organizations were procedurally bound to take action by virtue of their internal rules, they had little scope for taking individual actions such as countermeasures, and it was hard to imagine them adopting unlawful measures to press their interests. In that regard, Mr. Pellet's analysis of the capacity of international organizations to take countermeasures was very convincing, even though she did not agree with his conclusions. On the other hand, she did not understand the Special Rapporteur's position set out in paragraph 46 of the report. First, such a characterization would have the effect of changing the nature of countermeasures under the rules of international responsibility; and secondly, the distinction between relations with members and non-members seemed arbitrary in terms of the lawfulness of such measures. Furthermore, that position did not seem consistent with the Special Rapporteur's analysis in paragraph 49, to the effect that if a conduct was *per se* lawful, it could not be considered to be a countermeasure. If an international organization acted within its rules, such actions were then not countermeasures and were governed by primary rules rather than secondary rules. Furthermore, from a practical point of view, it was hard to envisage that an international organization would fail to implement the dispute settlement procedures in good faith, as provided for in draft article 55, paragraph 4.

26. With regard to the international organization's contractual relations, it was the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "1986 Vienna Convention") and the rules of international customary law regarding treaties that should be applicable. For example, if a contracting international organization failed in its international obligation to pay a State for the delivery of certain goods, the contracting State could suspend its obligation to deliver those goods—an action which could hardly be characterized as a countermeasure, but clearly fell within the treaty, as Mr. Pellet had also pointed out. That explained why there were almost no pertinent empirical examples on which to rely. The example cited in the footnote to paragraph 41 clearly showed that any provision on countermeasures against an international organization could be used, or indeed abused, by powerful member States that did not approve of the organization's policy or operations. Even if it was established that the international organization had breached its international obligation, it would be unacceptable for member States or other international organizations to take countermeasures in order to paralyse its operations. For example, if a United Nations peacekeeping operation unit committed an internationally wrongful

act by breaching its international obligations to the host country, could the host country take countermeasures to hinder the operation or make it impossible, with a view to inducing it to comply with those obligations? One could argue that the countermeasure was not in accordance with draft article 53, paragraph 1, but one could also make the counterargument that those measures were legitimate under that draft article. That kind of situation could obviously occur in reality, but it was not necessary to justify it, particularly as legal rules were supposed to promote the institution of international organizations, not to weaken it. With regard to countermeasures taken by an international organization against another international organization, the example given by Mr. Dugard of possible countermeasures by the United Nations against NATO seemed a bit far-fetched. International law was only one aspect of the political decision-making process. One could very well imagine possible cases for future law, but it was always necessary to act within the basic structure of international relations.

27. When the Commission had initially touched on the question of countermeasures in the context of the present topic, she had not been sure how those rules would apply to international organizations. Having considered draft articles 52 to 57, she was convinced that those provisions should not be included in the draft articles, for they did not serve the Commission's policy goals either in theory or in practice. She therefore supported the referral of draft articles 46 to 51 to the Drafting Committee, but not of the provisions concerning countermeasures. However, if the Commission were to decide to set up a working group to study the matter further, she would like to join in that effort.

28. Mr. FOMBA said that one of the questions left pending by the Special Rapporteur was the existence of special rules to take account of the particular characteristics of certain organizations, which contradicted the assumption of the principle of equality of international organizations.

29. Draft article 46 (Invocation of responsibility by an injured State or international organization) was satisfactory on the whole, even though its wording could be improved. Draft article 47 (Notice of claim by an injured State or international organization) differed slightly from its counterpart in the articles on responsibility of States, but those drafting changes raised no particular problem.

30. Draft article 48 (Loss of the right to invoke responsibility) also had a minor modification, one that was acceptable. The Special Rapporteur rightly noted that a State could exercise diplomatic protection against an international organization, for instance an organization that administered a territory or resorted to force. Likewise, it was true that the exhaustion of local remedies rule was valid only if such mechanisms actually existed. Moreover, the Special Rapporteur thought it unlikely that an international organization would address a claim to another international organization. He himself wondered whether a positive or a negative conclusion was to be drawn from that. He had no clear-cut position on the matter.

31. Draft article 49 (Plurality of injured entities) had been adapted from the corresponding article on responsibility

of States to cover additional cases, which was a welcome move. The same was true of draft article 50 (Plurality of responsible entities), the principal innovation of which was the addition of a sentence setting forth the principle of the subsidiary responsibility of a member State of an international organization. Draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization) also contained some innovations, including its paragraph 3, which rightly set forth the idea that the entitlement of international organizations must be considered as specific and limited in comparison to that of States, as the logical consequence of their nature and legal personality.

32. The question of countermeasures was important and the Commission could not afford to overlook it. There again the rule of analogy should be applied, while taking into account the specific characteristics of international organizations. In draft article 52 (Object and limits of countermeasures), the Special Rapporteur proposed two new paragraphs to deal with the question of the effects of the rules of international organizations on countermeasures. The drafting of that provision might be reviewed, either by the Special Rapporteur or by a working group.

33. Draft article 53 (Obligations not affected by countermeasures) contained no major changes, except for the last subparagraph, which rightly proclaimed the rule of the inviolability of the local agents, archives and documents of a responsible international organization. However, one might wonder what the legal basis of that rule was—*lex lata* or *lex ferenda*—and whether it applied to all international organizations without distinction.

34. In draft article 55 (Conditions relating to resort to countermeasures) it was not desirable, in the French text, to replace with the expression “*les mesures déjà prises*”, the expression used in the corresponding provision of the draft articles on responsibility of States (“si [les contre-mesures] sont déjà prises”).

35. In draft article 57 (Measures taken by an entity other than an injured State or international organization), the Special Rapporteur proposed several changes of form that posed no problem. At the very most one could replace the phrase “*tout État et toute organisation*” by “*tout État ou toute organisation*” in the first sentence of the French version. On the substance, however, paragraph 2 was an innovation that raised some questions, the first of which was whether the provision was necessary, and, if so, what its content should be. Three solutions were possible: the Commission could retain only paragraph 1, which regulated the problem in the case of international organizations in general; it could leave open the question of regional economic integration organizations, limiting itself, for example, to a “without prejudice” clause; or it could also retain paragraph 2, while coming up with a wording that commanded consensus. At first sight, the first two options seemed preferable, either separately or together.

36. In conclusion, he supported the referral of Part II of the draft articles to the Drafting Committee. He was inclined to do the same for the part referring to countermeasures, but remained open to some other solution, such as the creation of a working group.

37. Mr. AL-MARRI welcomed the presentation by the Special Rapporteur of a detailed account of each stage of the draft articles, in which he stressed the analogy with the articles on responsibility of States adopted in 2001. The topic currently under consideration was much more complex, for while relations between States and international organizations were, in the last analysis, fairly limited, those between international organizations themselves continued to evolve, particularly in the area of peacekeeping, where their functions and *modus operandi* were increasingly often called into question. It was useful to refer to the experience of States with regard to “the implementation of the international responsibility of the State”, but it was also necessary to proceed with great caution, for it was not possible to tackle responsibility of States and that of international organizations in the same manner. It would also be useful to incorporate the views of Governments on the question, particularly those of States that were not members of an international organization at the European level. The practice of the European Union did not seem relevant, for, as was well known, that entity was far more than simply an international organization, and had rights and obligations comparable to those of a federal State.

38. Draft articles 46, 47 and 48, based respectively on articles 42, 43 and 45 of the draft articles on responsibility of States, posed no major problem. The Special Rapporteur had wisely decided not to reproduce article 44 of the draft articles on responsibility of States, concerning admissibility of claims, which raised issues of diplomatic protection and exhaustion of local remedies. It would be unwise to set two international organizations at odds.

39. Draft article 50 (Plurality of responsible entities), also drawing on the corresponding draft article on responsibility of States, referred to the possible responsibility of an international organization, but also to that of other international organizations or States, whether or not members of an international organization. Yet it was logical that if a State incurred responsibility because it was a member of an international organization, responsibility should be limited to that of the organization. Draft article 51 dealt with a more complex question, namely the right of a non-injured international organization to invoke the responsibility of another international organization. That was a particular case; one, furthermore, to which the Commission had devoted a great deal of time when finalizing the corresponding provision (article 48) in the articles on responsibility of States.

40. As for countermeasures, there again great caution was necessary. The question had already given rise to lively controversy in the context of the articles on responsibility of States. Nor should it be forgotten that most international organizations had a charter, like that of the United Nations, regulating their activities. There, too, the practice of the European Union was not useful, as it was too specific. Although draft articles 52 to 57 also drew on the draft articles on responsibility of States, they nevertheless differed from them, particularly draft article 57, which referred to the very particular case of an organization taking countermeasures in the interests of one of its injured members. Paragraph 2 of that draft article was not clear: it was hard to see how the State could be alleged to

be injured if it no longer had competence, having transferred it to the organization. The Commission should therefore take its time before reaching a final decision on the question of countermeasures.

41. Mr. WISNUMURTI said he approved of the general approach adopted by the Special Rapporteur. It seemed appropriate to draw heavily on the articles on responsibility of States while also taking into account the special character of international organizations. However, he did not agree with the Special Rapporteur's decision not to include a provision on admissibility of claims along the lines of article 44 on responsibility of States, which addressed questions relating to diplomatic protection and imposed conditions regarding nationality of claims and exhaustion of local remedies. The Special Rapporteur thought that such a provision would be redundant because, in the context of international organizations, diplomatic protection did not have the same practical relevance as it had with regard to State responsibility, and that, furthermore, the nationality condition did not apply to international organizations, and the exhaustion of local remedies rule could be relevant only where the claim by the organization also concerned injury caused to one of its agents as a private individual. Like other members who had spoken on the matter, he personally thought that the Commission should anticipate cases where a claim of responsibility would be invoked against an international organization requiring nationality of the claim and exhaustion of local remedies.

42. On a drafting point, he agreed with the suggestion made by Ms. Escameia that, in the interests of consistency, the word "entity" or "entities" should be replaced, in draft articles 49 to 51, by "State or international organization". Draft article 51 was a welcome adaptation of article 48 of the draft articles on responsibility of States. On breaches of an obligation owed to the international community as a whole, the Special Rapporteur distinguished, in two separate paragraphs, between a State's entitlement to invoke responsibility and that of an international organization, pointing to the distinct character of international organizations, and specifying that in order to exercise that right, they must be mandated to protect the interest of the international community underlying that obligation.

43. He agreed that the draft articles must deal with countermeasures, which were an important aspect of the implementation of international responsibility. It was interesting to note that the Special Rapporteur had addressed the situation in which the rules of a responsible or injured international organization restricted or precluded countermeasures. Those two situations were the subject of new paragraphs 4 and 5 of draft article 52, which the Drafting Committee could perhaps reformulate in positive language, as suggested by Mr. Nolte. Draft articles 53 to 56, which were rightly modelled on the corresponding provisions of the articles on responsibility of States, posed no problem.

44. Draft article 57 covered two important issues: first, the fact that the provisions on countermeasures were without prejudice to the right of any State or international organization to invoke the responsibility of an international

organization and to take lawful measures against it; and secondly, the possibility for an international organization to take countermeasures against a responsible international organization on behalf of one of its injured members—whether a State or an international organization—that had transferred competence over certain matters to it. It would however be preferable, in paragraph 2, to refer to international organizations, as the reference to regional economic integration organizations might limit the utility of the provision, particularly as the reference to transfer of competence over certain matters would be sufficient to limit its scope. The paragraph should be reformulated so as to begin with the right of an international organization that was not an injured party to invoke responsibility on behalf of one of its injured members; that would be more consistent with the title of the article. In any case, the provisions on countermeasures should be further discussed in a working group.

45. Mr. KOLODKIN said that the question of the inclusion of a provision analogous to article 44 of the draft articles on responsibility of States merited further reflection, possibly in a working group. If the Commission decided to include such a provision, it would have to consider two questions, namely: the exercise, by the State, of diplomatic protection against the responsible international organization; and the exercise, by an international organization, of functional protection against the responsible international organization or State. In the first case, the nationality condition remained relevant. On the other hand, the requirement of exhaustion of local remedies in order to bring a claim against an international organization was not really admissible. In that regard, Mr. Perera had already pointed out that, as international organizations did not generally have jurisdiction over a territory, they did not have access to legal mechanisms that could be considered as domestic remedies that must be exhausted. The example of the European Union was not convincing as it was a very special kind of international organization, one whose practice was not relevant to an analysis of international organizations in general. On the other hand, the question of exhaustion of local remedies could arise when the international organization exercised administrative functions over a given territory.

46. As for the provisions concerning the exercise of functional protection by the international organization itself, the exhaustion of local remedies rule was admissible if the protection was exercised *vis-à-vis* a State, but not if it was exercised *vis-à-vis* another international organization, unless that organization administered a territory. In his view, if the remarks he had just made were incorporated in the draft articles, and bearing in mind what had been said on article 48 of the draft articles on responsibility of States, there would be no need to refer to those provisions in draft article 51. It would be more useful to specify that the admissibility of claims rule was not applicable to the situation covered by draft article 51.

47. He had the gravest doubts as to the possibility that non-governmental organizations (NGOs) could invoke the responsibility of an international organization. He failed to understand why the ICRC, for example, to which Ms. Escameia had referred, would be entitled to intervene on behalf of the international community. That

would, in his view, be far too radical a step in the direction of the progressive development of international law. Perhaps ICRC itself should be asked whether it would wish to be empowered to invoke the responsibility of an international organization that had breached international humanitarian law. That seemed unlikely, for it would entail a drastic change to the *modus operandi* of the organization, which would then be denied the possibility it currently enjoyed of acting in full confidentiality and impartiality.

48. Reference needed to be made to the questions of the taking of countermeasures both by and against an international organization. He was therefore in favour of the inclusion of the relevant provisions in the draft articles. On the practice concerning countermeasures applied by international organizations, it would be useful to study the relevant practice of the United Nations in the form of measures taken by the Security Council. In Mr. Pellet's view, measures taken by the Security Council were not countermeasures but sanctions. He himself was not totally convinced that this was the case. In his own view, in certain situations the Security Council could indeed be deemed to adopt countermeasures. When, for example, it took measures against a State that had breached international law, they were intended to induce it to cease its unlawful conduct and resume compliance with its international obligations. In the event, those countermeasures could be associated with non-compliance with international legal obligations, entailing, for example, suspension of international treaties *vis-à-vis* the State targeted. Besides, if breaches of treaty obligations were totally excluded from the scope of countermeasures, did that mean that countermeasures were applicable only in cases of a breach of customary international law? What would happen in cases in which the rule breached was one both of customary and of general international law? At the very least, the question of the Security Council merited consideration in the context of countermeasures. Yet the Special Rapporteur had made no mention of that issue in his report.

49. One of the factors limiting countermeasures applied by international organizations related to their competence—not simply in terms of their constituent instrument but also, more precisely, of their mandate. It would be useful to consider inserting in draft article 52 a provision comparable to the one rightly included in draft article 51, paragraph 3.

50. He sided with the Special Rapporteur in the latter's disagreement with Mr. Nolte concerning draft article 52, paragraph 4. In his view, it was not justifiable to increase the restrictions on the right of a member State to take countermeasures against international organizations that had breached their international obligations. Thus, in the example of a breach by an international organization of a headquarters agreement, it would be difficult to imagine a situation in which the host State would not have the right to take countermeasures against the organization unless such a right was provided for in the rules of the organization. From a practical standpoint, in such a situation it would be normal for the question of non-compliance with its obligations by an international organization to be considered first by its competent organ. Only thereafter might countermeasures be taken, if no result was obtained.

However, that was more a policy issue than a point of law. That headquarters agreements generally provided for dispute settlement procedures was one thing; the question of the relationship between the right to take countermeasures and obligations owed in the context of dispute settlement was quite another. That problem was reflected in paragraph 2 of draft article 53.

51. He endorsed the criticisms expressed by Mr. Hmoud, Mr. Nolte, Mr. Pellet, and Ms. Xue concerning the expression "regional economic integration organization" to be found in draft article 57, paragraph 2. Although frequently used in international legal instruments, the expression was inadequate. He was not opposed to the referral of that draft article to the Drafting Committee. He considered, however, that other questions, such as that of countermeasures, might usefully be discussed in a working group.

52. Mr. PELLET said it was regrettable that the Special Rapporteur's report made no mention of the distinction that should be drawn between countermeasures and sanctions. Furthermore, he was uneasy with Mr. Kolodkin's position concerning certain decisions adopted by the Security Council, which it would be hard to describe as countermeasures. In his own view, the purpose of countermeasures was to induce a State that had breached certain obligations to comply with those obligations. The Security Council was not the guardian of the law, its mission was not to restore international lawfulness, but, in the words of Article 39 of the Charter of the United Nations, "to maintain or restore international peace and security", which could even cover non-compliance with international law.

53. Moreover, it could not be said that the Security Council intervened to ensure that an obligation owed to it was respected. It was not to the Security Council that States' obligations in matters of international peace and security were owed. There, then, a different set of issues was at stake, concerning which one could not speak of countermeasures.

54. Lastly, he considered that a distinction should be drawn between the framework of general international law and that of the internal legal order of international organizations. After much hesitation, he had finally come to the conclusion that, under general international law, international organizations could, in some very rare circumstances, take countermeasures, but that was not a question of any great interest. It would be more interesting to analyse the measures that international organizations could take under their internal legal order against their member States—measures that were not countermeasures.

55. Mr. GAJA (Special Rapporteur) pointed out that measures taken by the Security Council were taken against States Members of the United Nations, in other words, against States. The question just raised by Mr. Pellet was therefore not pertinent, as the report dealt with measures taken against international organizations.

56. Mr. KOLODKIN said that Mr. Pellet's remarks were strange, in that the measures taken were countermeasures adopted by organizations against other international organizations, not against States. Not so very long

before, Mr. Pellet had invited the Commission to adopt a more active position and to consider not only the question of the relation of responsibility between international organizations, but also that between international organizations and States. The report of the Special Rapporteur contained a number of theoretical suppositions, including the supposition that this type of relation existed. He considered that, theoretically speaking, the question of measures likely to be taken by the Security Council arose not only with regard to States but also with regard to regional, subregional and other international organizations.

57. The problem that arose with international organizations was that of the relation between the rules of the organization, its constituent instrument, on the one hand, and general international law on the other. An international organization was, however, governed first and foremost by its internal rules, and only afterwards by general international law. Thus, all measures taken by the United Nations were measures under the Charter of the United Nations.

58. In his view, the question whether the Security Council was the guardian of international law was a philosophical one. Mr. Pellet believed it was not. However, if, according to the Charter of the United Nations, the Security Council was the principal organ entrusted with the maintenance of international peace and security, it was also the guardian of international law in very many situations.

The meeting rose at 1 p.m.

2964th MEETING

Friday, 16 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the remainder of the first part of the sixtieth session, in which two days were allocated to the celebration of the sixtieth anniversary of the Commission. A great deal of effort had gone into the organization of the celebrations, and he urged members to participate in them fully. A Solemn Meeting would take place on the morning

of 19 May 2008 in the Council Chamber of the Palais des Nations, and would be followed by one and a half days of seminars involving Legal Advisers of Member States.

2. The programme of work also indicated that a Drafting Committee on the topic of the responsibility of international organizations would be formed. Any members wishing to participate should contact the Chairperson of the Drafting Committee, Mr. Comissário Afonso. The Working Group on effects of armed conflicts on treaties was to be reconvened. Members wishing to participate should contact its Chairperson, Mr. Caflisch.

3. Mr. HASSOUNA, supported by Mr. SABOIA, said that members were looking forward both to the Solemn Meeting and to the seminars to be held in Geneva as part of the celebration of the Commission's sixtieth anniversary.

Responsibility of international organizations (*continued*) (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

4. Mr. HMOUD, referring to remarks made at the previous meeting by Mr. Kolodkin, said that the relationship between the system of sanctions under Chapter VII of the Charter of the United Nations and the system of counter-measures was an important issue, that had been discussed by the Commission in connection with the articles on responsibility of States for internationally wrongful acts,⁵² when a distinction had deliberately been drawn between matters covered by that text and those addressed under Chapter VII of the Charter of the United Nations. Paragraph (3) of the general commentary to chapter II of Part Three of the draft articles stated that "[q]uestions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules".⁵³ He did not believe, however, that the Special Rapporteur had intended that language to exclude measures under Article 41 of the Charter of the United Nations. Be that as it might, the point was that Chapter VII established a special regime, and the articles could not be said to be applicable to that regime. Obligations under the Charter of the United Nations took precedence over other treaty obligations. In the *Lockerbie* cases, however, the ICJ had stated—unfortunately—that decisions under Chapter VII of the Charter of the United Nations took precedence over other obligations of a State. In his opinion, however, such decisions were political in nature, not treaty obligations, and accordingly fell under the principle of legality. Fortunately, the Court had left the door open for a judicial review by itself of the legality of Security Council resolutions, and it was to be hoped that it would do so in the future.

5. Another issue was whether the punitive nature of measures under Article 41 of the Charter of the United Nations made it possible to distinguish them from

* Resumed from the 2957th meeting.

⁵² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., paras. 76–77.

⁵³ *Ibid.*, p. 128.

countermeasures. The phenomenon of countermeasures originated with reprisals, which, by their very nature, were punitive, so there was no clear-cut difference between the two regimes. The regime of countermeasures under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes incorporated the element of proportionality in order to ensure that a measure was lawful rather than punitive—fuel for the argument that countermeasures and measures under Chapter VII of the Charter of the United Nations should not be punitive.

6. On the other hand, both types of measure were intended to induce a State to cease an unlawful act, whether a threat to international peace and security under Chapter VII of the Charter of the United Nations or an act directed against other States. As to what happened if a Security Council resolution went beyond Article 41 of the Charter of the United Nations, some scholars argued that the principle of legality must apply; others claimed that the principles of the Charter of the United Nations, at the least, must be respected; and Professor Thomas Franck maintained that even if the act of the Security Council violated obligations *erga omnes*, it should nevertheless not fall within the purview of international law. He himself had in mind a case in which the Security Council had arguably induced a violation of normative rules under international law.⁵⁴ In such a case, should countermeasures be permitted, since the Security Council's action went beyond the special regime that constituted that body's authority, indeed beyond the principles of legality? Another issue was whether other States subjected to measures under Chapter VII of the Charter of the United Nations that went beyond the principle of legality could take countermeasures against the international organization or the State or States involved.

7. Ms. XUE said that the two issues of countermeasures and sanctions must not be confused. While both had counter-effects and both were responses to breaches of international obligations, they were totally different in nature and constituted different regimes under international law. The legal implications of lumping together sanctions and countermeasures would be that certain sanctions would become subject to the conditions envisaged for countermeasures, thereby greatly reducing the importance of the sanctions regime. Security Council sanctions were particularly powerful because they were designed to maintain international peace and security. They had a special role to play, hence the particular procedural rules applying to their use. Such measures were completely different from the countermeasures currently being addressed by the Commission in the context of rules on responsibility. The regime of countermeasures was a very narrow, exceptional one.

8. As to whether international organizations had obligations under customary international law, certainly they did, but since they were set up by States under constitutive instruments, their obligations are primarily derived from contractual relations. When their international obligations were breached, the means of redress were generally

statutory. There was thus very little room for States or other international organizations to take countermeasures against international organizations.

9. Mr. HASSOUNA said that the main question was whether the Security Council was a guardian of law, or whether it simply bore the primary responsibility for the maintenance of international peace and security. In his view, the Security Council was a political body, but one that also performed functions pursuant to the obligation to respect international law; otherwise, its resolutions would be *ultra vires*. It had on occasion played not just a political but a quasi-judicial role: for example, when it had established a commission on delimitation of the boundary between Iraq and Kuwait,⁵⁵ through which the issue had been settled successfully, or in a similar dispute between Ethiopia and Eritrea,⁵⁶ when it had met with less success. The Security Council thus did not merely apply sanctions, but could also take legal steps that settled disputes, thereby enforcing international law.

10. Ms. JACOBSSON thanked the Special Rapporteur for an interesting sixth report, and for outlining his plans for the forthcoming seventh report. She wished to focus on the right to take countermeasures and had five points to make.

11. First, different rules were needed for States that were members of an organization and those that were not. States that are not members of an organization could resort to countermeasures, should the organization be in breach of an obligation. The extent to which member States could take countermeasures, against an organization was a much more complicated matter, and the two situations must be clearly identified in the draft articles and be subject to different legal rules.

12. Second, a conflict between a member of an organization and the organization must, as far as was possible, be resolved in accordance with the rules of the organization. That was a material consideration and was not the same as saying that the organization could divest itself of responsibility by reference to its internal law or implied powers.

13. Third, members of the organization should avail themselves of its internal procedures, a point that should be reflected in a separate provision in the draft articles. That was a procedural consideration. It was also the reason why an article was needed on admissibility of claims.

14. Fourth, countermeasures were the last resort—the last measure to take in order to induce the organization to comply with its obligations. It must be made clear how countermeasures differed from other types of measures, such as retaliation, sanctions and decisions by the Security Council.

15. Fifth, the Commission needed to establish a working group on countermeasures.

⁵⁴ T. M. Franck, "The 'powers of appreciation': who is the ultimate guardian of UN legality?", *American Journal of International Law*, vol. 86, No. 3 (July 1992), pp. 519–523.

⁵⁵ See Security Council resolution 687 (1991) of 3 April 1991, paragraphs 2–4.

⁵⁶ See Security Council resolution 1312 (2000) of 31 July 2000, paragraph 6.

16. Turning to her arguments in support of those conclusions, she said she agreed entirely with the Special Rapporteur that, although practice was scarce with regard to the right to take countermeasures against an international organization, countermeasures were an important aspect of implementation of international responsibility which could not be ignored in the present draft (paragraph 41 of the report). His point on the scarcity of relevant practice was borne out by the fact that to date, only a few organizations had responded to the request for comments. Although on the whole those comments were positive, the lack of responses from a wider range of organizations might be a sign of the difficult nature of the legal issues involved. Many organizations were probably reluctant to reply simply because they did not have a firm view on the matter, or perhaps because they did not want to make their position known. She cautioned against giving too much weight to the relatively small number of responses received, and cited the comments by the European Commission as one example of the difficulties that might arise.

17. The European Union was not an international organization in the proper sense of the term—at least, not yet. If and when the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force, the legal status of the European Union would change, and it would be entrusted with competence to conclude international agreements. Whether it would become an international organization was a matter of debate. Until now, it had been a group of European countries that cooperated closely on certain economic and political questions. In some important areas, such as trade and fisheries, its member States had delegated some of the jurisdictional rights they enjoyed as sovereign States—above all, legislative competence and power to conclude certain types of international agreements—to certain institutions in the Union, the most important being the European Communities. However, it was still up to the individual States to implement and enforce the legislation both in relation to their own citizens and to other nationals. The European Union had not assumed the right or obligation to enforce the legislation or to execute the implementation of legal obligations under international treaties. Enforcement measures could include measures against illegal fishing in the exclusive economic zone, whether or not undertaken by a European Union member. Hence, it could not be said that member States had delegated their sovereignty to the European Union institutions: they retained their responsibility as States.

18. Technically, the European Communities were responsible for a violation of an international obligation if their legislation was in violation of, for example, the United Nations Convention on the Law of the Sea, but the individual States might well be responsible for taking enforcement measures. In some areas, competence was shared, and it was not always easy to ascertain where responsibility ultimately lay. International treaties concluded by European Union member States sometimes contained disconnection clauses, which set aside parts of the obligations in the treaty when a given area was already regulated by European Community law.

19. She had voiced a word of caution because references were frequently made to the European Union as if it were a proper international organization, and particularly since the responses in the documents were not technically from the European Union as an organization, but from the European Commission, i.e. one of its institutions. The European Commission's mandate was set out in the treaties adopted by the member States, and therefore its position reflected only one of the many institutions under the European Union umbrella.

20. As one of the guardians of European Community law, the European Commission was an important player, but it did not, for example, represent the European Union in foreign policy or security matters. That was, and would continue to be, the Council of Europe's remit. The view of the Council on matters relating to the International Law Commission's work was still not known and was not likely to be.

21. Thus, the Commission could not draw far-reaching general conclusions from the European Commission's response. Until the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force, it was the European Communities, not the European Union, that were party to international agreements such as the United Nations Convention on the Law of the Sea and WTO agreements. That was highly relevant to the topic under consideration, since it showed the difficulty of identifying the responsible organization. Until the responsible entity was determined, it would not be possible to establish whether a wrongful act was attributable to it and thus to take countermeasures. It might be even more difficult to pinpoint the entity that would be the proper target for countermeasures. There was a substantial risk that the organization or State that resorted to countermeasures might violate its own obligations by targeting the wrong entity.

22. Thus, the link between attribution, responsibility and the right to take countermeasures was crystal clear. What did that mean for the topic? First, it shed light on the comment made on more than one occasion by Mr. McRae, who argued that there was a need to differentiate between different types of organization. That might very well be true; but if the task proved too difficult, the draft articles must at least differentiate between the right of members and of non-members of an organization to take countermeasures.

23. Some organizations, such as WTO and the European Communities, had already established such procedures. It had been asserted that the European Communities had passed legislation that violated international law, for example in the *Ahmed Ali Yusuf and Al-Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* case (now under appeal before the Court of Justice of the European Communities). In response to the increased power of the European Union, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community would give European Union member States even wider possibilities to act.

24. Whereas there could be no doubt that an international organization was and must be accountable for its actions, including breaches of international obligations, it did not necessarily follow that the member States of the organization should be allowed a general and unduly broad right to take countermeasures against it; that might undermine inter-State cooperation and lead to a chaotic situation. She endorsed the comments in that regard by Mr. Nolte and Ms. Xue. If a State claimed that the organization of which it was a member was in breach of an obligation, and took countermeasures, and the organization then disputed the claim and announced that it would, in turn, take countermeasures against that member State, arguing that it had violated its obligations, the result would be not only a stalemate, but an unnecessary crisis, one that would probably run counter to the object and purpose of the organization.

25. The ultimate countermeasure was to withdraw from a treaty, which was clearly undesirable. That was not a purely theoretical situation, and was one of the reasons why an article was needed on admissibility of claims, as had been pointed out by Ms. Escameia and a number of other members.

26. International law gave States and international organizations a number of ways of reacting to certain acts. States might resort to measures of retortion within the framework of international law. It was perfectly legal to take what were often referred to as “unfriendly” measures as an expression of displeasure with a certain behaviour. That was often done not only by individual States, but also by organizations or groups of States, such as the European Union.

27. The next step was countermeasures, and in order to take them, a number of criteria had to be met. Although there was no universal agreement on a definition, it was clear that countermeasures were measures which would otherwise be contrary to international obligations and were taken in response to an internationally wrongful act.

28. The term “sanction”, for its part, was even more imprecise. A sanction might be imposed within the framework of a Security Council decision, for example as an enforcement measure under Chapter VII of the Charter of the United Nations, but the Security Council’s mandate was much wider, being restricted only by the requirement that the measure be taken in order to maintain or restore international peace and security.

29. The question, then, was whether measures taken by the Security Council were countermeasures in the traditional sense of the term. She did not think they were, even though they might be adopted in reaction to a breach of an international obligation. It was in that context that the issue raised by José Álvarez in his article on the website of the American Society of International Law⁵⁷ was relevant. States had not established the United Nations in order to take countermeasures against it if it acted in breach of its obligations under international law. States assumed

that the Organization would act within the parameters of international law. In fact, not even a decision by the Security Council was or was likely to be subject to a judicial review, whether the Commission liked it or not, and despite the door opened by the ICJ in the *Lockerbie* case.

30. Cases of a material breach of a treaty obligation were dealt with under applicable treaty law. Lastly, there was the situation in which a treaty, such as the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, provided for a regime of retaliation or contractual remedies, as convincingly described by Mr. McRae.

31. The discussion had shown that the Commission had not yet differentiated between the above-mentioned measures. It must decide what was and what should be included, and it must make it clear that measures taken by the Security Council fell outside the scope of the topic. It would also be useful to decide whether or not to deal with material breaches.

32. Mr. VASCIANNIE, referring first to the question of the invocation of responsibility by an injured State or international organization (draft article 46), said he accepted the premise that if a State was injured, it was immaterial, for the purposes of invoking responsibility, whether the injury was caused by a State or an international organization. He also accepted that an international organization could bring a claim on an international plane against another international organization.

33. As a matter of law, however, it was also true that an international organization could bring a claim against a State, regardless of whether the State was a member of the international organization. That was established in the 1949 advisory opinion of the ICJ on *Reparation for Injuries* and, with respect to non-member States, in the Court’s famous *dictum* regarding the capacity of 50 States, representing the members of the international community, to give objective legal personality to an international organization. As had been emphasized by some members of the Commission, however, the Special Rapporteur had not included claims by an international organization against a State within the scope of draft article 46, thus creating a curious lacuna; the Special Rapporteur should explain that omission more fully.

34. In respect of the circumstances in which responsibility might be invoked, draft article 46 provided for three possibilities: when the obligation was owed to the State or international organization individually (paragraph (a)); when the obligation was owed to a group of parties, including the State or international organization, or the international community, and the State or international organization was specially affected (paragraph (b) (i)); and when the obligation was owed to a group of parties or the international community and it was of such a character that its breach radically changed the position of the parties with respect to the further performance of the obligation (paragraph (b) (ii)). Thus, the trigger in paragraph (b) (i) was that the State or international organization must be “specially affected”, and in paragraph (b) (ii) it was that there was a “radical change” in obligations. Those triggers to draft article 46 were taken from article 42 of the draft

⁵⁷ J. E. Álvarez, “International organizations: accountability or responsibility?”, *Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States and Organizations*, Ottawa, 27 October 2006.

articles on responsibility of States,⁵⁸ which in turn was based on the definition of “material breach” in the 1969 Vienna Convention. They were acceptable, but would necessarily require a case-by-case analysis of whether a State or international organization was specially affected or whether there had been a radical change of obligations. Under the circumstances, the commentary should provide examples for each category.

35. Draft article 46 would apply with respect to obligations both in treaties and in general international law. For that reason, he was not entirely certain that the word “parties” in draft article 46 (b) (ii), was appropriate, given that it tended to be used more for treaties than for customary international law.

36. On the issue of notice (draft article 47), he agreed that there should not be an indication as to the source of a claim from within an international organization. That was consistent with the approach taken in the articles on responsibility of States; the alternative might place too heavy a burden on the internal rules of an organization. The approach was also consistent with the case concerning *Certain Phosphate Lands in Nauru*, where a flexible approach had been taken by the ICJ on the bringing of a claim of State responsibility. One could probably argue that, in the interests of clarity, international organizations should be encouraged to give notice of their claims in writing.

37. The Special Rapporteur proposed the exclusion of rules concerning nationality of claims and the exhaustion of local remedies, or at any rate did not include them. On the nationality of claims, if a State claim against an international organization was meant, what was the argument for excluding the requirement of nationality of claims from the draft articles? The Special Rapporteur indicated that claims of that nature were rare, but not inconceivable, and then went on to say, in paragraph 16 of his sixth report, that “[s]hould a State exercise diplomatic protection against an international organization, nationality of the claim would be a first requirement”. If nationality would be a first requirement, there was a case for including it in the current draft articles. The fact that a set of claims might be rare had not been used as an argument for excluding them from the general rules on invocation of responsibility elsewhere in the draft articles, and especially in draft article 46. Why, then, was rarity elevated to a guiding principle in the case of State claims against an international organization?

38. As to a claim by an international organization against another international organization, nationality would not be relevant, but if the claim was an indirect one, then perhaps by analogy the claimant international organization should be required to establish, as a precondition for admissibility, that the individual behind the claim was an agent of the international organization at the material time.

39. On the more difficult question of exhaustion of local remedies, the Special Rapporteur acknowledged the prevailing opinion that “the local remedies rule applies when

adequate and effective remedies are provided within the organization concerned” (para. 16). That was consistent with the notion that local remedies must be exhausted where they existed, and it did not depart from the idea, set out in the *ELSI* case, that “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”. Thus, where there were no remedies, there was no need to exhaust them. However, the draft articles should be prepared to say that if there was a remedy within the international organization, it should be exhausted. On that point, incidentally, he had no special fear of European structures, because it would be a question of fact in each case whether an appropriate remedy was available. It would be helpful if examples of that issue could be cited in the commentary.

40. With regard to draft articles 48 and 49, although he accepted the principles set out and the discussion of them in the commentary, their formulation was weakened by the use of the word “entities”. The word “parties”, as employed in draft article 46 (b) (ii), might not be appropriate either. It would be better to specify each of the possibilities, namely States and international organizations, given that the word “entities” could also include, for example, multinational corporations. In that connection, he was not in favour of extending the scope of the current chapter and the chapter on countermeasures to include the ICRC, a move that could have unpredictable consequences. What criteria would be used to justify including it, but not other NGOs?

41. He was in favour of incorporating a set of articles on countermeasures, more or less along the lines suggested by the Special Rapporteur. In principle, he believed that, as in the case of relations between States, countermeasures might play a role in relations between States and international organizations and, to some extent, in relations between two international organizations. As a matter of general observation, countermeasures could hardly be described as a weapon of the weak against the strong, but international law certainly allowed countermeasures in relations between States, subject to certain conditions, such as those set out in Omer Yousif Elagab’s careful work on the subject.⁵⁹ He shared the view that the instances of countermeasures concerning international organizations cited by the Special Rapporteur largely reflected contractual relations within the European Union; those arrangements might have only a limited impact on the general state of the law, especially since other integration movements, such as the Caribbean Community (CARICOM), had so far avoided the degree of integration attained in Europe. That said, some of the State-to-State rules on countermeasures might be applied by analogy to the responsibility of international organizations. Thus, he supported draft article 52, including paragraphs 4 and 5, and draft articles 53 to 56.

42. Draft article 57, however, was problematic. First, its wording did not allow for easy interpretation. Secondly, the idea in its paragraph 2 that a State might require a

⁵⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 117.

⁵⁹ O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Oxford, Clarendon Press, 1988.

regional economic integration organization to take countermeasures on its behalf might have the undesirable effect of causing a dispute to escalate by bringing in more States than those initially involved. Nor was any plausible explanation offered as to why an entity denominated a regional economic integration organization should be given special status. That was not consonant with current law, and it was difficult to see why draft article 57, paragraph 2, would constitute progressive development. He noted that neither the CARICOM regional economic organization nor its member States had canvassed the possibility recommended in that provision.

43. Mr. VÁZQUEZ-BERMÚDEZ congratulated the Special Rapporteur on his sixth report, which, notwithstanding difficulties associated with the scarcity of practice in the area, contained a useful in-depth analysis of matters relating to the invocation of responsibility of an international organization and of the question of countermeasures.

44. The Special Rapporteur suggested that before completing its consideration of the draft articles on first reading, the Commission should be given an opportunity to review the texts provisionally adopted in the light of subsequent comments by States, and of the fact that some of the articles had been examined in judicial practice. His own view was that the Commission should show flexibility in its working methods in that regard, since the goal was to achieve a better result, even if that result was only provisional. He endorsed the Special Rapporteur's suggestion, bearing in mind that the set of draft articles was virtually complete, which would enable the Commission to have an overall picture of them. Furthermore, if in his next report the Special Rapporteur intended to make concrete proposals for the revision of certain draft articles, it would be useful for the Commission to be able to analyse those proposals and, if appropriate, amend the draft articles concerned; that way, States and international organizations would see that their comments had been addressed and in some cases perhaps even incorporated before the second reading.

45. However, as to the suggestion that some articles might need to be amended in the light of recent judicial practice, he wished to sound a note of caution. The draft articles should be exhaustively analysed and formulated so as to constitute a widely acceptable and lasting contribution to the codification and progressive development of international law.

46. He welcomed the Special Rapporteur's stated intention of considering the question of special rules which might take into account the specific characteristics of certain organizations.

47. Draft article 46 (b) used the phrase "group of parties" to refer to a group of States and international organizations. The use of the term "parties" could, however, be misleading, since it generally referred to parties to an agreement, whereas under draft article 46 (b), the obligation breached could relate to, for example, regional custom, given that the draft article actually referred to any breach of an international obligation. Moreover, in later draft articles the Special Rapporteur used the term

"entities" as a blanket term for States and international organizations. That term too was problematic, as some speakers had noted, and, in order to remain consistent with the rest of the draft articles, it would be preferable to refer explicitly to States and international organizations. More thought should be given to finding a suitable wording.

48. Draft article 46, which was closely modelled on article 42 of the articles on responsibility of States, set out the circumstances in which a State or international organization could consider itself an injured party entitled to invoke the responsibility of another international organization. If the obligation breached was owed to an international organization individually, there was no problem; but, in the absence of a precedent with regard to the conditions set out in paragraph (b), a more detailed analysis should be made of the importance of the functions and powers of the organization in question in applying those conditions to specific cases in which the international organization considered itself injured.

49. With regard to the admissibility of claims, he concurred with the view that the draft articles should include a provision on the nationality of claims and the exhaustion of local remedies, if adequate and effective remedies were provided under the organization's rules. As noted in the report, it was not inconceivable that a State might exercise diplomatic protection against an international organization, in particular an organization that administered a territory or used force; in such cases, nationality of the claim would be a first requirement.

50. With regard to draft article 51, the right of non-injured States to invoke the responsibility of an international organization presented no problems where the obligation breached was owed to the international community as a whole. The finding by the ICJ in the *Barcelona Traction* case was apposite in that context: had the Court found, with regard to obligations towards the international community as a whole, that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*" [para. 33 of the judgment]. In the case of international organizations, it was not simply a matter of their status as subjects of international law or members of the international community but also of the powers conferred on them by their rules, including implicit powers, in relation to the content of the obligation breached. It would therefore be wise to expand in some way the requirement contained in paragraph 3, under which an organization invoking responsibility had to have "been given the function to protect the interest of the international community underlying that obligation", since such a function was not necessarily spelled out in the organization's rules, even if the organization had powers expressly or implicitly linked with the nature of the obligation breached.

51. With regard to countermeasures, although the Special Rapporteur was right in saying that it would be hard to find a convincing reason for exempting international organizations from being possible targets of countermeasures, it was also the case that there was very little existing practice. For that reason, an exhaustive analysis should be undertaken of the implications of reproducing

the content of corresponding provisions of the articles on responsibility of States, and it should be ensured that sufficient safeguards existed to avoid abuses. Countermeasures should be used only in exceptional circumstances.

52. The report referred to the practice of WTO, with examples of countermeasures taken by certain States against the European Communities with the authorization of the Dispute Settlement Body. Paragraph (10) of the commentary to article 50 of the draft articles on responsibility of States for internationally wrongful acts pointed out, however, that the WTO system was deemed to be *lex specialis*.⁶⁰ Indeed, article 23 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes required that when members sought “the redress of a violation of obligations or other nullification or impairment of benefits” under WTO agreements, they should abide by the rules and procedures on dispute settlement and should not make a determination that a violation had occurred or suspend concessions, except in accordance with the rules and procedures of the Understanding.

53. It would be useful for the topic of countermeasures to be discussed by a working group. It would also be helpful if, as Mr. Pellet had suggested, a joint meeting could be held with the Legal Advisers of international organizations, so that the Commission’s consideration of the topic could be made less abstract.

54. Mr. GAJA (Special Rapporteur) said that, by raising questions and doubts, expressing criticisms and dissecting his report, the members of the Commission had highlighted all the issues confronting it with regard to the question of the responsibility of international organizations. Further discussion was clearly necessary on some issues on which the Commission remained divided.

55. He would first address a couple of radical proposals that no doubt reflected deep conviction on the part of their authors, but might not be considered timely and, in any case, were unrealistic. Once the scope of international obligations set out in Part Two had been limited in draft article 36 to those “owed to one or more other organizations, to one or more States, or to the international community as a whole”, it would follow that the invocation of responsibility by other entities or persons could not be included in Part Three. His proposal to draft a “without prejudice” provision, which had not attracted many comments in the Commission, remained an option, even though no corresponding provision was to be found in the articles on responsibility of States.

56. The second radical proposal, put forward by Mr. Pellet and taken up by others, was that the implementation of responsibility of a State that was in breach of its obligation towards an international organization should be included in the draft articles, since otherwise there would be a lacuna in the law of responsibility of States. The omission was not, however, the result of a recent decision, but was consistent with the approach adopted by the Commission from the outset. Had it been otherwise, the Commission would have systematically amended a number of the draft articles on responsibility of States. To give just one

example, certain provisions concerning circumstances precluding wrongfulness—draft articles 20, 22 and 25—considered only relations between States. In order to complete the text, the Commission would have needed to add provisions concerning valid consent by an international organization to the commission of a given act by a State (art. 20); countermeasures taken by a State against an international organization (art. 22); and the invocation of necessity where an obligation existed towards an international organization (art. 25). He believed that the Commission had been wise not to tamper with the 2001 draft articles on responsibility of States, instead leaving it to the interpreter to work out the rules that applied to the relations between a responsible State and an injured international organization when that State breached an obligation existing towards that organization. It might well be that, in 10 or 15 years’ time, a different approach might be appropriate and an international conference would agree on a single text covering both States and international organizations. For the time being, however, the Commission would be wise to leave the articles on responsibility of States unchanged and to regulate only matters relating to the responsibility of international organizations and those considered in draft article 51.

57. Some members of the Commission had viewed the wording of draft article 46 as implying that international organizations were regarded, under that article, as generally entitled to invoke responsibility, regardless of their capacity or size. He conceded that the terminology “invocation of responsibility”, which came from the articles on responsibility of States, might be misleading. If a civil law approach had been adopted, as the Commission had done when considering those draft articles on first reading, the position correlative to “obligations” would have been termed “rights”. One would first have established when an international organization would acquire such a right, and only then would the question of implementation be addressed. The articles on responsibility of States as adopted on second reading refrained from using the term “rights”, but certainly implied that the international organization concerned had a special status in relation to the breach of an obligation, either because the obligation was individually owed to the organization or because of the more complicated circumstances set out in draft article 46 (b). The question of an organization’s entitlement did not suddenly arise at the implementation stage. The organization concerned first had to acquire a right correlative to an obligation. What draft article 46 appeared to say, in substance, was that, should an international organization conclude an agreement with another international organization, and acquire a right under that agreement, it could invoke the responsibility of that organization, should the right be infringed. That was the simplest scenario, but also the most likely. There was no intention of extending invocation of responsibility beyond what would arise in the case of States. The draft article related to the case of an international organization specially affected by a given breach.

58. The rules of an international organization would play an essential role in defining whether it could acquire those rights for the infringement of which it would then invoke responsibility. The assumption that

⁶⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 131.

an organization would act consistently with its own rules could be expressed in a provision to be included among the general principles. The statement of that assumption should not, however, imply that an international organization never acquired responsibility when it acted contrary to its rules. It might be responsible for the breach of an obligation *vis-à-vis* its members under its rules, but it might also be responsible for the breach of other obligations under general international law. Nor could it be said that the breach of its rules necessarily implied responsibility on the part of an international organization. A non-member State would hardly be entitled to demand that the organization should respect its rules. A non-member was not bound by those rules, unless it had consented to acquire obligations under them. Similarly, the organization did not have an obligation to act within its rules *vis-à-vis* a non-member, again unless the organization had consented to be so bound.

59. The qualification proposed in draft article 51, with regard to the invocation by an international organization of responsibility for the breach of an obligation towards the international community as a whole, reflected the views expressed by various States and international organizations. He noted, in that connection, that the Organization for the Prohibition of Chemical Weapons had made a general statement, and had not specifically considered its own entitlement. He concurred with the view expressed by Mr. Hmoud that, in paragraph 3 of the draft article, the definite article in the phrase “given the function” conveyed a misleading impression. That criterion had, however, received some support, and also some criticism, with some speakers seeking to restrict the qualification on the grounds that it gave an international organization too much scope to invoke responsibility, and others seeking to broaden the provision. On balance, however, the reaction had been favourable.

60. A number of drafting suggestions had been made with regard to draft articles 46 to 51, some of which touched on matters of substance, such as the implications of the concept of “subsidiary” responsibility in draft article 50. There had been no opposition to referring draft articles 46 to 51 to the Drafting Committee, which could address all those matters.

61. The Commission was divided on how the question of nationality of claims and exhaustion of local remedies should be approached and whether those matters should be addressed at all. A working group also convened for other purposes could be given the task of considering whether a provision could usefully be drafted on the admissibility of claims. As Mr. Kolodkin had pointed out, there were two separate cases: that of a claim by a State against an international organization, and that of a claim by one international organization against another. The former case should be fairly straightforward: article 44 of the articles on responsibility of States would serve as a model and the only point at issue was the extent to which the requirements of article 44 would apply with regard to international organizations. The Commission could leave article 44 unchanged in substance and provide examples in the commentary. Such examples might concern entities other than the European Union, since there were international organizations for which administrative tribunals

might be competent with regard to claims that could later give rise to diplomatic protection.

62. With regard to a claim by an international organization against another organization, the requirement of the nationality of claims would not apply. As was pointed out in paragraph 19 of this report, the local remedies rule would be relevant only insofar as the claim by the organization also concerned damage caused to one of its agents as a private individual. Such cases, however, represented only a limited category of claims that could be preferred against an international organization. Having listened to the debate in the Commission, he was still inclined to favour omitting any article on the topic, but he had no strong views either way.

63. The question of countermeasures was the most difficult for the Commission but the easiest for him to sum up. The Commission was so divided as to whether there should be a chapter on countermeasures and, if so, to what extent international organizations should be considered entitled to adopt them, that the best course would be to form a working group, which could attempt to find a consensus. If the solution chosen was to be merely a “without prejudice” provision on countermeasures, as suggested by Mr. Fomba, there would be no opportunity to state, as the current wording of draft article 52, paragraphs 4 and 5, did, that as a general rule countermeasures had no place in the relations between an international organization and its members—an omission that he personally would regret. That general statement, the aim of which was to curb countermeasures, was nowhere explicitly spelled out in State practice or in the literature.

64. He wished also to draw attention to an error in the text of draft article 57, paragraph 1: the reference to “article 51, paragraph 1” should read “article 51, paragraphs 1 to 3”.

65. In conclusion, he wished to propose that draft articles 46 to 51 be referred to the Drafting Committee and that a working group be convened to discuss both the question of an article corresponding to article 44 of the draft articles on responsibility of States and the question of countermeasures. He proposed that Mr. Candioti chair the working group.

66. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 46 to 51 to the Drafting Committee and that a working group should be set up, chaired by Mr. Candioti, to consider countermeasures, and possibly other issues.

It was so decided.

67. Responding to a request for clarification by Mr. HMOUD, Mr. CANDIOTI said that the working group’s mandate would cover both countermeasures and the question of the missing draft article on admissibility of claims.

The meeting rose at 11.45 a.m.

2965th MEETING

Wednesday, 21 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Visit by the Under-Secretary-General for Legal Affairs, the Legal Counsel

1. The CHAIRPERSON, after noting with satisfaction the intensive and fruitful work that the sixtieth anniversary of the Commission had occasioned, welcomed Mr. Michel, Under-Secretary-General for Legal Affairs, Legal Counsel, and invited him to share his comments and reflections with the Commission.

2. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the International Law Commission had lived up to the expectations placed in it at the time of its creation, by contributing to the building of a better world in which the rule of law prevailed. Experience had shown that the work of codification of international law was successful when useful exchanges took place between the Commission and Governments, directly and also through the intermediary of the Sixth Committee. The Codification Division played a crucial role by ensuring that those exchanges took place in the best possible conditions, and particularly by serving as the secretariat of the Commission and of the Sixth Committee. It had made considerable efforts to improve the dissemination of international law, *inter alia* through its numerous publications. Considerable efforts had also been made to exploit the new information technologies to the full, and two new websites would be set up in 2008, the first for the *United Nations Juridical Yearbook*,⁶¹ the second on diplomatic conferences that had adopted international conventions on the basis of draft articles prepared by the Commission.⁶² The revitalization of the Audiovisual Library in International Law, which had been established by resolution 52/152 of 15 December 1997, was another aspect of that ambitious programme.⁶³ As part of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, the Audiovisual Library had been redesigned as a teaching and research tool that would include a permanent collection of lectures by internationally acknowledged experts from different regions and legal systems, covering a wide range of subjects of lasting interest for the training of public and private sector legal professionals, audiovisual recordings of diplomatic

conferences and meetings at which major legal instruments (such as the Charter of the United Nations, the Universal Declaration of Human Rights,⁶⁴ the Convention on the Prevention and Punishment of the Crime of Genocide, and the 1969 Vienna Convention on the Law of Treaties) had been adopted, together with a brief presentation of each instrument, a historical overview of the procedure that had led to its adoption and links to the texts of the respective instruments, and a research library providing a number of links to United Nations legal resources such as its jurisprudence, treaties, yearbooks and other publications and other documentation concerning international law. The Audiovisual Library of International Law, which would be inaugurated in the autumn of 2008, would be accessible free of charge via the Internet⁶⁵ to all institutions and individuals worldwide, not least in the developing countries. The new Treaty Section website would also be inaugurated in the coming months.⁶⁶ It would be provided with a dedicated search engine allowing unlimited access to the texts of treaties and depositary notifications concerning them.

3. The United Nations remained the international centre of intense legal activity, as was witnessed by the recent expansion in the range of legal issues considered by the General Assembly in the Sixth Committee and in special committees. First, with regard to the promotion of and respect for the rule of law, the General Assembly, in its resolution 62/70 of 6 December 2007, had reiterated its request to the Secretary-General to prepare an inventory of the activities and programmes within the United Nations system devoted to the promotion of the rule of law at the national and international levels for submission at its sixty-third session. That inventory, which took the form of a repertory giving an overview of the Organization's capacity to undertake those activities, would serve as a practical guide for the work done by United Nations organs in that field to meet the specific needs of Member States.⁶⁷ In the same resolution, the General Assembly had expressed support for the Rule of Law Coordination and Resource Group responsible for coordinating system-wide activities concerning the rule of law with a view to ensuring quality, policy coherence and follow-up to the 2005 World Summit. It had also stressed the important role that the International Law Commission could play in promoting the rule of law and had invited it, together with the ICJ and the United Nations Commission on International Trade Law, to comment, in their respective annual reports to the General Assembly, on their current roles in that regard.

4. Secondly, the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission⁶⁸ had met for the first time in 2007⁶⁹ following allegations of sexual exploitation and abuse especially

⁶⁴ General Assembly resolution 217 A (III) of 10 December 1948.

⁶⁵ www.un.org/law/avl.

⁶⁶ <http://treaties.un.org>.

⁶⁷ Report of the Secretary-General, "The rule of law at the national and international levels" (A/63/64).

⁶⁸ General Assembly resolution 61/29 of 4 December 2006.

⁶⁹ The first session took place at United Nations Headquarters in New York, from 9 to 13 April 2007. For the report of the session, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 54* (A/62/54).

⁶¹ www.un.org/law/UNJuridicalYearbook/.

⁶² <http://legal.un.org/diplomaticconferences/index.html>.

⁶³ General Assembly resolution 62/62 of 6 December 2007, para. 12.

concerning mission zones and the staff responsible for bringing stability to them and helping the victims of social and political upheavals to recover after conflicts. The Committee's mandate was to determine how the Organization could strengthen its policy of zero tolerance of sexual exploitation and abuse on the basis of the report of the group of legal experts established by the Secretary-General, under General Assembly resolution 59/300 of 22 June 2005, to look into the question.⁷⁰ Thanks to those efforts, the General Assembly had been able to adopt resolution 62/63 of 6 December 2007, in which it had strongly urged all States to consider establishing jurisdiction, particularly over crimes of a serious nature that could have been committed by their nationals while serving as United Nations officials or experts on mission. It had also requested the Secretary-General to bring allegations of crimes committed by United Nations officials and experts to the attention of the States against whose nationals such allegations were made, and to request from those States an indication of their efforts to investigate and, as appropriate, prosecute crimes of a serious nature. At its spring 2008 session, held in New York on 7, 8, 9 and 11 April 2008, the Ad Hoc Committee had endeavoured to determine how international cooperation could be enhanced. The working document drawn up for that purpose by its Chairperson⁷¹ would be considered again in the autumn of 2008 by a working group of the Sixth Committee, which would also consider the report on implementation of resolution 62/63 to be prepared by the Secretary-General on the basis of the information provided by States,⁷² which should enable it to be ascertained whether any jurisdictional gaps existed which the Ad Hoc Committee might seek to fill in its future work.

5. Thirdly, with regard to the administration of justice at the United Nations, the General Assembly had adopted resolution 62/228 of 22 December 2007, providing for additional measures to establish the new procedure. It had, in particular, reiterated its decision to create a single integrated and decentralized Office of the Ombudsman for the United Nations Secretariat, funds and programmes, and a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal. Furthermore, the Ad Hoc Committee on the Administration of Justice at the United Nations, established by the General Assembly on the recommendation of the Sixth Committee,⁷³ had held its first session from 10 to 18 and on 21 and 24 April 2008 and had made important progress in its consideration of the draft statutes of the two Tribunals.⁷⁴ The work of redrafting would continue over the coming months; delegations were holding informal intersessional consultations on the draft statutes, the Fifth Committee would consider the question again at the

resumed sixty-second session and the item would remain on the agenda of the General Assembly's sixty-third session, the continuing objective being to introduce the new procedure early in 2009.

6. Fourthly, with regard to measures to eliminate international terrorism, since 2001 an ad hoc committee and a working group of the Sixth Committee had been attempting to resolve the questions raised by the drafting of a comprehensive convention against international terrorism,⁷⁵ which in the main related to the elements to be excluded from the scope of application of the convention. In 2007, the coordinator responsible for outstanding issues had circulated a document summarizing the elements identified in the course of extensive contacts with delegations,⁷⁶ and the work on achieving a better understanding of those elements had continued during the autumn of 2007 in the Working Group of the Sixth Committee and during the winter of 2007 in the Ad Hoc Committee. It was still hoped that the work would lead to the adoption of a convention on the matter.

7. As to the other activities of the Office of Legal Affairs, the Division for Ocean Affairs and the Law of the Sea, in response to recent calls by the General Assembly⁷⁷ and other forums for increased integrated ocean governance and the adoption of ecosystem approaches to ocean management, including in areas beyond the limits of national jurisdiction, had been actively involved in those efforts, *inter alia* by preparing a training manual and a course on the implementation of such approaches.⁷⁸ The Division also serviced forums in which integrated oceans governance was discussed, including the informal consultative process on oceans and the law of the sea and the ad hoc open-ended informal working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. It also served as the secretariat of the Commission on the Limits of the Continental Shelf,⁷⁹ which made recommendations to coastal States on matters related to the establishment of the outer limits of the continental shelf beyond 200 nautical miles. That Commission's recommendations were based on an examination of complex scientific and technical data submitted by States in their reports. The Division's capacity-building activities had been developed in response to the increasing needs of Member States. In particular, training courses were being developed and delivered in emerging areas such as biodiversity, marine protected areas and the delineation of the extended continental shelf.

8. While, on the whole, the Organization's privileges and immunities were respected by Member States, nevertheless, it continued to experience difficulties in ensuring that they were respected by the relevant national authorities, in particular its immunity from legal process.

⁷⁰ The report of the Group of Legal Experts on recommendations to ensure the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980).

⁷¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 54* (A/63/54), annex II.

⁷² Document A/63/260 and Add.1.

⁷³ Decision 62/519 of 6 December 2007. See www.un.org/law/administrationofjustice.

⁷⁴ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 55* (A/63/55).

⁷⁵ See www.un.org/law/terrorism/index.html.

⁷⁶ See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 37* (A/62/37), annex.

⁷⁷ General Assembly resolution 61/222 of 20 December 2006, para. 119, and General Assembly resolution 62/215 of 22 December 2007, para. 99.

⁷⁸ For more information on the TRAIN-SEA-COAST Programme, see www.un.org/Depts/los/tsc_new/TSCindex.htm.

⁷⁹ www.un.org/Depts/los/clcs_new/clcs_home.htm.

For example, legal actions had been instituted against it in the national courts of Member States concerning labour-related issues. While Governments were requested to assert the United Nations immunities before national courts, it had become increasingly difficult to ensure that the Organization's independence, *modus operandi* and self-regulatory mechanisms were respected by such courts and the relevant government branches. At the same time, it should be stressed that the Organization continued to cooperate with Member States in the administration of justice, which had become more important in view of the Organization's commitment to ensuring criminal accountability of its officials and experts.

9. With regard to international justice, the importance of which must be underlined, the Office of Legal Affairs was responsible for carrying out certain functions of the Secretary-General under the Statute of the International Court of Justice. In addition to those statutory functions, the Secretary-General was also responsible for the maintenance of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice,⁸⁰ the purpose of which was to encourage member States to settle their disputes peacefully by lending financial assistance to those States that might not have the requisite funds readily available. The Trust Fund currently had funds amounting to slightly more than US\$ 2 million, following the recent financial award granted to Djibouti in its dispute against France in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. Finally, the election of judges to the five vacancies at the Court was tentatively scheduled to be held on 6 November 2008 during the sixty-third session of the General Assembly, and a list of the nominated candidates would be published, as was customary, in August or September 2008.

10. With regard to the International Criminal Court,⁸¹ the Office of the Prosecutor had decided to open a formal investigation into the situation in the Central African Republic, where there were, in particular, many allegations of rape and other acts of sexual violence against women. As to the situation in the Democratic Republic of the Congo, where the Court relied heavily on cooperation from the United Nations, former Ituri warlords Germain Katanga and Mathieu Ngudjolo Chui had been surrendered to the Court and the arrest warrant against Bosco Ntaganda had been unsealed. While Katanga and Ngudjolo Chui were awaiting their confirmation hearings, the trial phase of the Prosecutor's case against Thomas Lubanga Dyilo was scheduled to begin on 23 June 2008.

11. However, the investigation into the situation in Darfur initiated by the Prosecutor at the request of the Security Council⁸² had made little progress. As long ago as his briefing to the Council on 5 December 2007, the Prosecutor had criticised the failure of the Government of the

Sudan to cooperate.⁸³ A further briefing was scheduled for 5 June 2008. Although he did not wish to comment on that sensitive issue, it must be borne in mind that Security Council resolution 1593 (2005) explicitly obligated the Government of the Sudan to cooperate fully with the Court in that matter. The Sudanese authorities must comply with their international obligations; impunity for the serious crimes committed in Darfur was unacceptable.

12. With regard to the situation in northern Uganda, which had also seen significant developments, the Prosecutor was conducting a formal investigation at the request of the Government of Uganda. In the framework of the Juba peace process, the Lord's Resistance Army and the Government of Uganda had concluded a series of agreements with a view to ending a conflict that had lasted more than 20 years, devastated the north of the country and affected many neighbouring countries. While it was true that the refusal of the leader of the Lord's Resistance Army, Joseph Kony, to sign the final peace agreement as scheduled must be seen as a setback, that did not mean that the Juba peace process had failed, as was occasionally asserted, and it was to be hoped that the process could be brought to a successful completion in the very near future. The challenge in that connection was that Joseph Kony and some of his commanders were indicted by the International Criminal Court, which raised the difficult question of the relationship between peace and justice. Nevertheless, he strongly believed that, in the case of northern Uganda, it should be possible to find a solution whereby both the desire for a sustainable peace and the duty of justice could be satisfied. In addition, the Prosecutor had indicated that he was monitoring the situation in two other countries, Afghanistan and Colombia.

13. The Division's cooperation with the International Criminal Court, the centrepiece of an international system of criminal justice, continued to expand. A special event was planned to celebrate the tenth anniversary of the adoption of the Rome Statute of the International Criminal Court by the Conference of Plenipotentiaries on 17 July 1998. As the Secretary-General had declared on a number of occasions, the International Criminal Court could count on the support of the United Nations in the future, just as it had done in the past.

14. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which in some respects could be regarded as precursors of the International Criminal Court, though without the latter's permanent character, were both working towards the completion of their mandates, pursuant to Security Council resolution 1503 (2003) of 28 August 2003, in which the Security Council had called upon them to complete all trials by the end of 2008 and all appeals by the end of 2010. With those completion dates fast approaching, the two Tribunals were working with the Security Council's informal working group on the Tribunals to determine which residual functions would necessarily continue beyond completion and whether some form of residual mechanism or mechanisms would be needed to carry out those functions. A number of judicial,

⁸⁰ For the terms of reference, guidelines and rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, see the report of the Secretary-General (A/47/444, annex).

⁸¹ For the above-mentioned situations (paras. 10–11), see the Situations and Cases link on www.icc-cpi.int/en_menus.

⁸² Security Council resolution 1593 (2005) of 31 March 2005.

⁸³ See the procès-verbal of the 5789th meeting of the Security Council on 5 December 2007 (S/PV.5789).

prosecutorial and registry functions would not simply come to an end with the completion of those mandates. The most difficult issue was that of fugitives, and it was becoming increasingly urgent for the States concerned to ensure the arrest and transfer to the Tribunals of those fugitives responsible for the most serious international crimes, including Karadžić, Mladić and Kabuga. Should they remain at large upon the completion of the mandates, there would be a need to ensure their accountability, one of the possibilities envisaged being some form of standing mechanism or mechanisms, with rosters of available judges and prosecutors to ensure international trial proceedings.

15. There had also been significant developments in the field of transitional justice, and hybrid tribunals faced a wide range of challenges. The Special Court for Sierra Leone, for example, was at a crucial juncture, with the trial of Charles Taylor continuing in The Hague and only enough voluntary funding available to take the Court through the next few months. With its operations due to be completed by the end of 2009 or early 2010, it had also to plan for completion and the possibility of establishing a mechanism to carry out residual functions such as hearing further appeals, commutation of sentences, ongoing witness protection and the question of the Court's relationship with domestic jurisdictions.

16. Unlike the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia were part of Cambodia's national judicial system, and thus worked within and as part of its national legal system. At the same time, however, they were required, under the agreement between the United Nations and the Government of Cambodia,⁸⁴ to function in accordance with international standards of justice, fairness and due process of law. The process of combining Cambodian norms with international standards had been a difficult one, but the internal rules and procedures of the Extraordinary Chambers had been successfully adopted. Five accused were currently in custody, and the Extraordinary Chambers, which comprised both international and Cambodian judges, were working towards the commencement of the first trial by late summer 2008.

17. Steady progress had been made towards the establishment of the Special Tribunal for Lebanon, established under Security Council resolution 1757 (2007) of 30 May 2007. Judges had been selected, the Prosecutor appointed, the Management Committee established and adequate funds provided for the establishment of the Tribunal and its first year of operation. The Registrar had already begun his work. A headquarters agreement had been signed with the Government of the Netherlands, which would host the Tribunal in the urban area of The Hague.

18. Drawing members' attention to the Strategic Framework 2010–2011, which had been distributed to them, he said that the support given to the work of the International

Law Commission constituted one of the main targets of the Codification Division. In conclusion, he informed the Commission that he was addressing it for the last time as the Legal Counsel of the United Nations. His annual visit to the Commission had been close to his heart, and he left the Organization with the satisfaction of having worked to the best of his ability to advance the rule of law and to end impunity. The Commission's celebration of its 60 years of accomplishments bore witness to the centrality of its role in the progressive development of international law and its codification, and augured well for the future.

19. The CHAIRPERSON thanked the Legal Counsel for his statement and invited members to put questions to him.

20. Mr. PELLET asked whether users would continue to be required to pay in order to access the new Treaty Section website, a state of affairs that he found scandalous, or whether the United Nations was finally going to offer the free-of-charge public information service that it was its duty to provide. With regard to relations between the Commission and the Sixth Committee, it had often been suggested that one way of improving them would be to enhance the role of the special rapporteurs. However, not all of them were in New York during the discussion of the Commission's report, and the Codification Division's present resources enabled only one special rapporteur to make the journey each year. It would be interesting to learn whether funds could be made available to enable the special rapporteurs to attend at least the few days of debates covering their own topics. Lastly, he asked for further details of the role that the Commission was expected to play in the promotion of the rule of law.

21. Ms. ESCARAMEIA asked whether the Audiovisual Library in International Law would be accessible to universities. She too would welcome further indications of the way in which the Commission should approach the question of its role in the promotion of the rule of law, as it was requested to refer to the matter in its report on the work of its current session. On the question of special rapporteurs, not only was it important that they should be able to participate in the debate in the Sixth Committee, but they also needed sufficient financial resources to enable them to carry out their research work.

22. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the present Treaty Section website should already be accessible free of charge, partly thanks to Mr. Pellet's remarks on the matter, and that he would ensure that the new site was accessible to all free of charge, together with the Audiovisual Library. On the question of the special rapporteurs, it was true that the resources available to them had been reduced. However, the circumstances prevailing when that decision had been taken had changed, and he considered that the dialogue with the special rapporteurs should be further developed and that they should be given more resources. Accordingly, he would make a point of bringing the matter to the attention of his successor. Lastly, on the rule of law, it would be preferable to determine jointly with the Secretariat and the Director of the Codification Division what was expected of the Commission, for its contribution must be coordinated with that expected of other entities.

⁸⁴ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 1.

23. Mr. HASSOUNA asked to what extent the seminar with legal advisers held the previous day would enable the Commission to improve its methods of work and its cooperation with the Sixth Committee. On the Special Tribunal for Lebanon, he noted that the work of the International Independent Investigation Commission on Lebanon was still under way and that one of its members had been appointed Prosecutor of the Court, which raised the question of how that person was to reconcile those two functions. Lastly, he asked whether the fact that a domestic solution appeared to have been found to the Lebanese crisis would facilitate the Tribunal's work.

24. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) endorsed the conclusions of the seminar with legal advisers held the previous day and said that enhancement of a genuine dialogue between the Commission and the legal advisers was extremely important as it helped to move the Commission's work forward.

25. With regard to the Special Tribunal for Lebanon, he reminded members that the mandate of the Commission of Inquiry was due to end on 15 June 2008,⁸⁵ but that the Government of Lebanon had requested its extension until the end of the year. The possibility of the International Independent Investigation Commission continuing to function with one of its members working in parallel as Prosecutor had been considered but did not seem to be the most desirable solution. If the mandate of the International Independent Investigation Commission were to be extended, the Prosecutor would not take up his duties while the work of that Commission continued. There could be no question of exerting pressure on the Investigation Commission, as the challenge that it and the Tribunal must meet was for them to be seen as a truly independent judicial process. That process must not be used as a political instrument in the regional context, for that would undermine the credibility both of the Investigation Commission and of the Special Tribunal for Lebanon.

26. On the relationship between that Tribunal and the internal situation in Lebanon, he was of the view that the Tribunal must not be a further divisive element, as the situation was already very tense. Instead, it must serve as a genuine judicial organ, and to do so must have the necessary resources to enable it to reveal the truth, punish those responsible and put an end to impunity as rapidly as possible. In that regard, the conclusion of a peace agreement would clearly be helpful.

27. Mr. GALICKI asked what was the Legal Counsel's opinion concerning the phenomenon, apparent in recent years, of the multiplication of international judicial institutions. In particular, he wondered, with regard to the criminal courts, whether there was a risk of conflicts between them in the future, especially as their legal basis was sometimes called into question.

28. Mr. NOLTE asked whether there had been any new developments concerning the possibility of recourse against sanctions adopted by the Security Council. He mentioned the matter because in January 2008 an Advocate General of the Court of Justice of the European Communities had delivered an opinion in the *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* case that, if it were adopted, would have serious repercussions on the regime of sanctions.

29. Mr. FOMBA asked how the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice was funded, how long it had been operational, and how many States had already benefited from its resources.

30. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the Secretary-General's Trust Fund relied on voluntary contributions by Member States. Its resources currently stood at about US\$ 2 million. With regard to its functioning, the Trust Fund tended to make disbursements on the basis of the amount of funds it currently held. Consequently, its resources were dwindling, but only slowly, which encouraged Member States not to increase their contributions. The Trust Fund had existed for a number of years, but the rules governing its functioning had been so strict that few States had been able to benefit from them. Now that the rules had been changed, its operations should be simpler.

31. With regard to the multiplication of international judicial institutions, he personally felt that there were both advantages and disadvantages. With specific regard to the international criminal tribunals, he believed that the future of international criminal justice lay with the International Criminal Court. However, the existing tribunals must complete their work, and he would also not rule out the possibility that, in some very particular situations, hybrid tribunals might be created in the future. Furthermore, owing to the principle of complementarity, it would be necessary to build the capacity of the judicial systems of those States that wished to bring them into line with international standards, so that they could themselves deal with the cases referred to international courts.

32. On targeted individual sanctions, at the end of 2006 the Security Council had adopted a number of resolutions that had enabled it to improve its methods of work and those of its committees, and had appointed a "focal point" on the question in the Secretariat.⁸⁶ In 2005, the Secretary-General had addressed a letter to the members of the Security Council indicating the fundamental requirements that would allow the sanctions process to be fair and transparent. If those requirements were compared with the current situation, it would be seen that further progress needed to be made. On the whole, he believed that, if the Court of Justice of the European Communities endorsed the opinion of Advocate General Maduro, this would not have the effect of undermining the sanctions regime, but, on the contrary, would contribute to strengthening it.

⁸⁵ For the extension of the mandate of International Independent Investigation Commission to 15 June 2008, see Security Council resolution 1748 (2007) of 27 March 2007. The Security Council later extended the mandate of the International Independent Investigation Commission to 31 December 2008 (see Security Council resolution 1815 (2008) of 2 June 2008).

⁸⁶ Security Council resolution 1730 (2006) of 19 December 2006.

Shared natural resources (*continued*)* (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

NOTE BY THE SPECIAL RAPPORTEUR REGARDING A PREAMBLE

33. Mr. YAMADA (Special Rapporteur) introduced the draft preamble contained in document A/CN.4/L.722. The draft had been prepared on the basis of precedents elaborated by the Commission and various treaties on groundwater resources. It referred to the importance of groundwater; Article 13, paragraph 1 (a) of the Charter of the United Nations; General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources; the Rio Declaration;⁸⁷ and Agenda 21,⁸⁸ the need to protect groundwater resources; the vulnerability of aquifers to pollution; the need to ensure the development of groundwater resources in the context of the optimum and sustainable development of water resources for present and future generations; the importance of international cooperation and good-neighbourliness; the special needs of developing countries; and the importance of promotion of international cooperation.

34. He requested the Commission to refer the draft preamble to the Drafting Committee.

It was so decided.

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

[Agenda item 1]

35. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of responsibility of international organizations would be chaired by himself, and was composed of the following members: Mr. Brownlie, Mr. Dugard, Mr. Fomba, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada, together with Mr. Gaja (Special Rapporteur) and Ms. Escameia (Rapporteur, *ex officio*).

36. Mr. CAFLISCH (Chairperson of the Working Group on effects of armed conflicts on treaties) said that the Working Group would be composed of Mr. Brownlie (Special Rapporteur), Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Ms. Jacobsson, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Ms. Escameia (Rapporteur, *ex officio*).

The meeting rose at 12.20 p.m.

* Resumed from the 2959th meeting.

⁸⁷ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, Annex I.

⁸⁸ *Ibid.*, Annex II.

2966th MEETING

Friday, 23 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON said that the one-and-a-half-day seminar with Legal Advisers, held on 19 and 20 May 2008, had been a resounding success. He wished to thank all those who had contributed to organizing the meeting, including the coordinating committee chaired by Mr. Pellet, the Secretariat, and especially Ms. Arsanjani, Secretary to the Commission, for their invaluable support and great efficiency in making the requisite arrangements.

2. Many interesting issues had been raised at the seminar. Particularly useful discussions had been held on the questions of qualifications of members; the procedure for their election; topics for consideration by the Commission; its methods of work; and the outcome of that work. An *aide-memoire* on the outcome of the seminar would be prepared by the Secretariat in due course.

3. Mr. CANDIOTI invited members to inform him of their interest in participating in the work of the Working Group on the responsibility of international organizations.

4. The CHAIRPERSON said that the meeting would be adjourned to enable members to review the results of the meeting with legal advisers.

The meeting rose at 10.10 a.m.

2967th MEETING

Tuesday, 27 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties⁸⁹ (A/CN.4/588, sect. A, A/CN.4/600,⁹⁰ A/CN.4/L.723 and Corr.1,⁹¹ A/CN.4/L.739 and Corr.1,⁹² A/CN.4/L.740⁹³)

[Agenda item 2]

NOTE BY THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the members of the Commission to consider the note prepared by the Special Rapporteur on a draft guideline 2.1.9.⁹⁴

2. Mr. PELLET (Special Rapporteur) explained that, after proposing draft guideline 2.6.10, on statement of reasons for objections,⁹⁵ he had realized that the Guide to Practice lacked a corresponding guideline on statement of reasons for reservations themselves. The note he was presenting sought to rectify that oversight. In fact, it was as useful to give reasons for a reservation as for an objection, to assist all those called upon to assess the scope and validity of the reservation, namely other States parties, treaty monitoring bodies and dispute settlement bodies. A statement of reasons was also useful as a means of enabling the reserving State to demonstrate the merits of its reservation and explain why there were difficulties in applying the treaty in its entirety, as was illustrated by the example the reservation of Barbados to article 14 of the International Covenant on Civil and Political Rights given in paragraph 10 of his note.

3. It should, however, be made clear that while the statement of reasons for a reservation could shed light on those reasons and assist in understanding it, it could not add to or subtract from the reservation itself. Even when a lengthy statement of reasons was provided, a vague reservation would remain vague. Furthermore, while it should be recommended that States give the reasons for their reservations, as well as for their objections, it would nevertheless be going too far to oblige them to do so. The guidelines were simply recommendations, and too rigid a formulation would go well beyond positive law and the spirit of the provisions concerning reservations in the 1969 and 1986 Vienna Conventions, which left States plenty of room for manoeuvre.

4. The idea of including a guideline recommending that reservations should be accompanied by a statement of reasons had already commanded a broad consensus at the Commission's previous session. It would thus seem that draft guideline 2.1.9 could be referred to the Drafting

Committee, which would ensure that it was harmonized with the draft guideline on statement of reasons for objections.

Draft guideline 2.1.9 (Statement of reasons) was referred to the Drafting Committee.

Organization of the work of the session (continued)

[Agenda item 1]

5. Mr. CANDIOTI (Chairperson of the Working Group on the responsibility of international organizations) announced that the Working Group would be composed of the following members: Mr. Comissário Afonso, Ms. Escameia (Rapporteur, *ex officio*), Mr. Gaja (Special Rapporteur), Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

The meeting rose at 10.20 a.m.

2968th MEETING

Thursday, 29 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Tribute to the memory of Bernhard Graefrath and Sir Francis Vallat, former members of the Commission

1. The CHAIRPERSON said he had received the sad news that two former members of the Commission had passed away. The Commission had learned only recently of the death of Bernhard Graefrath more than a year previously. Professor Graefrath had been a member of the Commission from 1987 to 1991. The Commission had also been informed of the death of Sir Francis Vallat. He had had the privilege of knowing Sir Francis personally and had had many opportunities to appreciate his outstanding human and professional qualities, as well as his valuable contribution to the work of the Commission. Sir Francis had been a member of the Commission from 1973 to 1981.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

⁸⁹ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2007*, vol. II (Part Two), chap IV.

⁹⁰ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁹¹ Mimeographed; available on the Commission's website.

⁹² *Idem.*

⁹³ *Idem.*

⁹⁴ Note by the Special Rapporteur on draft guideline 2.1.9 on the statement of reasons for objections, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586.

⁹⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 111. For the discussion of this draft guideline, see *Yearbook ... 2007*, vol. II (Part Two), paras. 60, 81 and 103.

Effects of armed conflicts on treaties⁹⁶ (A/CN.4/588, sect. D, A/CN.4/589,⁹⁷ A/CN.4/592 and Add.1,⁹⁸ A/CN.4/L.721,⁹⁹ A/CN.4/L.726,¹⁰⁰ A/CN.4/L.727/Rev.1 and Add.1¹⁰¹)

[Agenda item 5]

REPORT OF THE WORKING GROUP

2. Mr. CAFLISCH (Chairperson of the Working Group on effects of armed conflicts on treaties), introducing the report of the Working Group (A/CN.4/L.726), said that the Working Group had been re-established for the purpose of finishing its work, begun at the previous session, of reviewing the draft articles proposed by the Special Rapporteur in his first three reports.¹⁰² That work had, for the most part, been completed at the previous session, and, on the recommendation of the Working Group, a number of draft articles had been referred to the Drafting Committee,¹⁰³ together with a series of recommendations—also prepared by the Working Group—that were intended to guide the work of the Drafting Committee.

3. As indicated in paragraph 3 of its report, the Working Group had had four remaining issues to consider. Those issues were: first, the question of the applicability, in relation to draft article 8, of the procedure set forth in article 65 of the 1969 Vienna Convention for the termination or suspension of treaties; second, the question of the applicability, also in relation to draft article 8, of articles 42 to 45 of the Vienna Convention, and, in particular, of article 44 on the separability of treaty provisions; third, draft article 9, on the resumption (or “revival”) of suspended treaties; and lastly, draft articles 12, 13 and 14, relating to third States as neutrals, the termination or suspension of treaties by operation of the Vienna Convention, and the competence of parties to negotiate a specific agreement regulating the maintenance in force or revival of treaties, respectively. He was pleased to report that in the course of two meetings, the Working Group had concluded its consideration of all four items, prepared a series of revised draft articles and formulated some further general recommendations, to which he would return in due course.

4. With regard to the issue of the procedure for termination or suspension, the Working Group had formulated a new draft article 8, based, in part, on article 65 of the 1969 Vienna Convention, that established a notification scheme whereby a party engaged in an armed conflict and wishing to terminate or withdraw from a

treaty should notify the other State party or parties to the treaty, or the depositary. Such notification would not affect the right of a party to the treaty to object to the notification of withdrawal or suspension of the operation of the treaty or its termination. Under proposed draft article 8 *bis*, such termination, withdrawal or suspension would not affect the obligations of the State under other rules of international law.

5. The Working Group was further of the view that a regime of separability of treaty provisions should be included in the draft articles. Accordingly, it proposed for the consideration of the Commission draft article 8 *ter*, which was based on article 44 of the 1969 Vienna Convention. That draft article established the general rule that where the possibility of termination, withdrawal or suspension was provided for in the treaty, that right had to be exercised with respect to the whole treaty, except either where that treaty expressly provided otherwise or where the three conditions listed in its subparagraphs (a), (b) and (c) were satisfied. Those conditions had been extracted verbatim from the Vienna Convention. The question of the loss of such a right to terminate, withdraw from or suspend the operation of a treaty was the subject matter of draft article 8 *quater*, which reproduced verbatim article 45 of the Vienna Convention.

6. When coming to draft article 9, on the resumption of suspended treaties, the Working Group had decided to retain the core of the text proposed by the Special Rapporteur, while replacing the earlier reference to the intention of the parties with a cross-reference to the criteria indicated in draft article 4. It would be recalled that, at the previous session, the Working Group had proposed a new formulation for draft article 4, which had provided for the following criteria for the determination of the susceptibility of treaties to termination or suspension in the event of an armed conflict: (a) resort to articles 31 and 32 of the 1969 Vienna Convention; and (b) resort to the nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty. Accordingly, those same criteria would be applied in determining the resumption of treaties.

7. The Working Group had further decided that draft articles 12 to 14, as proposed by the Special Rapporteur, while largely expository in nature, were useful and should be retained. While no change was proposed with regard to draft article 12, the Working Group suggested a minor adjustment in draft article 13, and had prepared a new version of draft article 14 concerning the practice of States entering into agreements, subsequent to an armed conflict, to regulate the revival of treaties.

8. The new text of draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14 read:

Article 8 (Notification of termination, withdrawal or suspension)

1. A State engaged in armed conflict wishing to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary.

2. The notification takes effect upon receipt by the other State party or State parties.

⁹⁶ For the Commission's discussion of the draft articles proposed by the Special Rapporteur, see *Yearbook ... 2007*, vol. II (Part Two), chap. VII, paras. 269–322.

⁹⁷ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁹⁸ *Idem*.

⁹⁹ *Idem*.

¹⁰⁰ Mimeographed; available on the Commission's website. See also paragraphs 8–12 below.

¹⁰¹ Mimeographed; available on the Commission's website. See also the 2973rd meeting below.

¹⁰² The first report is reproduced in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552; the second report in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570; and the third in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578.

¹⁰³ *Yearbook ... 2007*, vol. II (Part Two), chap. VII, para. 324.

3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to such termination, withdrawal or suspension of the operation of the treaty.

Article 8 bis (Obligations imposed by international law independently of a treaty)

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a result of the application of the present draft articles or of the provisions of the treaty, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 8 ter (Separability of treaty provisions)

The right of a party, provided for in a treaty, to terminate, withdraw from or suspend the operation of the treaty shall, unless the treaty otherwise provides or the parties otherwise agree, be exercised only with respect to the whole treaty except where:

- (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.

Article 8 quater (Loss of the right to terminate, withdraw from or suspend the operation of a treaty)

A State may no longer terminate, withdraw from or suspend the operation of a treaty if:

- (a) it has expressly agreed that the treaty remains in force or continues in operation; or
- (b) it can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 9 (The resumption of suspended treaties)

The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the criteria established in draft article 4.

Article 14 (The revival of treaty relations subsequent to an armed conflict)

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

9. In addition, he wished to mention that, in the light of comments and observations received from international organizations (A/CN.4/592 and Add.1), the Working Group reiterated its recommendation, made at the previous session, that the question of including treaties affecting international intergovernmental organizations within the scope of the draft articles should be left in abeyance until a later stage in the consideration of the topic. The Working Group also proposed that the Drafting Committee should, where applicable, be instructed to consider the inclusion of reference to withdrawal from multilateral treaties as another possible result of armed conflict.

10. In conclusion, he wished to thank the Special Rapporteur and the members of the Working Group for the spirit of cooperation they had shown and for the

assistance they had provided to the Chairperson. Thanks were also due to the members of the Secretariat, who had greatly facilitated the task of the Working Group. It was the Working Group's recommendation that the Commission should decide to refer to the Drafting Committee draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14 as proposed by the Working Group, and draft articles 12 and 13 as proposed by the Special Rapporteur, together with the other recommendations of the Working Group contained in its report.

11. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group.

It was so decided.

12. The CHAIRPERSON said that, if he heard no objection, he would further take it that the Commission wished to refer draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14, as proposed by the Working Group, and draft articles 12 and 13 as proposed by the Special Rapporteur, together with the recommendations of the Working Group contained in its report, to the Drafting Committee.

It was so decided.

Responsibility of international organizations (continued)* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

PROGRESS REPORT OF THE WORKING GROUP

13. Mr. CANDIOTI (Chairperson of the Working Group on the responsibility of international organizations) said that, although it had so far met only once, the Working Group had judged it opportune to report to the plenary on the progress it had made after carefully considering the question of the advisability of including in the draft articles a provision on admissibility of claims. Taking into account the views that had been expressed in the plenary, the Special Rapporteur had presented to the Working Group a new draft article, which read:

“Draft article 47 bis (Admissibility of claims)

“1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

“2. An injured State or international organization may not invoke the responsibility of another international organization if the claim is subject to any applicable rule on the exhaustion of local remedies and any available and effective remedy has not been exhausted.”

14. The Working Group had agreed on the advisability of including such a provision in the draft articles.

* Continued from the 2964th meeting.

Some preliminary drafting comments and proposals had been put forward, concerning, in particular, paragraph 2 of the new draft article, mostly aimed at improving its wording. Some members had suggested that paragraph 2 should be divided into two parts, dealing respectively with a claim by an injured State and a claim by an injured international organization. One member had pointed out that the requirement that the remedy should be “available and effective”, while so defined in article 44 of the draft articles on responsibility of States for internationally wrongful acts,¹⁰⁴ had not been replicated in article 14 of the draft articles on diplomatic protection.¹⁰⁵ However, those were merely preliminary comments and the task of considering the draft article in detail was one that fell to the Drafting Committee. Accordingly, the Working Group recommended that additional draft article 47 *bis* should be referred to the Drafting Committee.

15. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft article 47 *bis* to the Drafting Committee.

It was so decided.

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

[Agenda item 1]

16. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of the effects of armed conflicts on treaties was composed of Mr. Caflisch, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti and Ms. Xue, together with Mr. Brownlie (Special Rapporteur) and Ms. Escameia (Rapporteur, *ex officio*).

The meeting rose at 10 a.m.

2969th MEETING

Friday, 30 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens¹⁰⁶ (A/CN.4/588, sect. C, A/CN.4/594¹⁰⁷)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the expulsion of aliens (A/CN.4/594).

2. Mr. KAMTO (Special Rapporteur) said that, during the consideration, at the preceding session, of the third report on the expulsion of aliens¹⁰⁸ and, in particular, draft article 4 entitled “Non-expulsion by a State of its nationals”, the Commission had taken the view that the question of the expulsion of persons with two or more nationalities should be studied in more detail and resolved within draft article 4 or in a separate draft article.¹⁰⁹ It had also taken the view that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study.¹¹⁰

3. In his third report, he had observed that it was not desirable to deal with the issue of dual or multiple nationals in connection with draft article 4, as protection from expulsion should be provided in respect of any State of which a person was a national. That should help strengthen the rule prohibiting the expulsion of nationals, as supported by all members of the Commission.

4. He believed that the issue of nationality—whether it involved one nationality or multiple nationalities—could, in particular, have an impact in the context of diplomatic protection in cases of unlawful expulsion. However, in order to follow up on the Commission’s guidelines in that regard, he had devoted his fourth report to the consideration of that issue, leaving until the next session the preparation of draft articles on restrictions to the right of expulsion, of which some members wished to know the provisions in order to decide on the content of draft article 3. The fourth report was divided into two main parts, one on expulsion in cases of dual or multiple nationality and the other, on loss of nationality, denationalization and expulsion, which should be considered separately.

5. With regard to expulsion in cases of dual or multiple nationality, he questioned whether the principle of non-expulsion was strictly applicable to an individual with two or more nationalities, including that of the expelling State. In other words, could a person liable to expulsion be considered an alien by the expelling State if he or she had not lost any of his or her nationalities? In that regard, he pointed out that some States did, in fact, treat their nationals who also held another nationality as aliens for purposes other than expulsion (paras. 8 and 9 of the report).

¹⁰⁶ For the Commission’s discussion of draft articles 1 to 7, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

¹⁰⁷ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

¹⁰⁸ Reproduced in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

¹⁰⁹ See *Yearbook ... 2007*, vol. II (Part Two), pp. 65–66, paras. 226–232.

¹¹⁰ *Ibid.*, p. 65, para. 227.

¹⁰⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76, at p. 120.

¹⁰⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 26 *et seq.*, para. 50, at pp. 44–46.

6. Secondly, was a State in violation of international law if it expelled an individual with dual nationality without first withdrawing its own nationality from that individual? The rule prohibiting the expulsion of a State's own nationals tended to support the idea that such an expulsion would be contrary to international law. Although cases of expulsion of dual nationals without prior denationalization by the expelling State were not unusual, practice in the opposite direction could also be observed.

7. Based on an absolute approach to the rule of non-expulsion by a State of its own nationals, some persons claimed that any expulsion of a dual or multiple national had to be preceded by his or her denationalization by the expelling State. That was, for example, the opinion of the Director of the International Migration Law and Legal Affairs Department of the International Organization for Migration, for whom paving the way for the expulsion of nationals would be a "step backward" in the development of the law and who would prefer the Commission to discuss the conditions under which a State might or might not deprive its nationals of its nationality in order then to expel a "stateless person" or prevent his or her return. In his own view, the question of an exception to the principle of expulsion by a State of a national was still open to discussion, particularly as, in modern-day practice, States did expel their own nationals. Moreover, the rule stated in draft article 4 was hedged about with a number of safeguards. The Commission therefore had to decide whether to establish an absolute rule of non-expulsion. Requiring the expelling State to denationalize dual nationals prior to expulsion was not without risks, however, because, as indicated in paragraph 11 of the report, that would not necessarily be in the expelled person's interest. Were he or she to return to the expelling State, for example as a result of a change of government, his or her application would be complicated by the denationalization, since he or she would be treated as an alien requesting admission to a foreign State, or else the expelling State would have to restore its nationality.

8. In light of the foregoing, the Special Rapporteur was of the view that the principle of the non-expulsion of nationals did not apply to persons with dual or multiple nationality unless the expulsion could lead to statelessness, and that the practice of some States and the interests of expelled persons themselves did not support the enactment of a rule prescribing the denationalization of a person with dual or multiple nationality prior to expulsion.

9. The legal issues raised by expulsion could be still more complex, depending on whether the expelling State was the State of dominant or effective nationality. That point was dealt with in fairly great detail in paragraphs 14 to 24 of the report. He continued to have doubts about the interest and practical utility of entering into such considerations, which would involve the Commission in a study of the regime of nationality and take it away from the topic of the expulsion of aliens. The possible scenarios to which the question of multiple nationality and the effect of dominant nationality could give rise could more appropriately be discussed in the framework of a study on the protection of the property rights of expelled persons, which he planned to undertake later.

10. The Special Rapporteur considered that a distinction must be made between the question of the loss of nationality and denationalization in relation to expulsion, which were governed by different legal mechanisms, even though their consequences were similar in the case of expulsion. The loss of nationality was the consequence of an individual's voluntary act, whereas denationalization was a State decision of a collective or individual nature. Although nearly all national legislation contained rules relating to the loss of nationality, the same was not true of denationalization. The problems that arose in that regard were discussed in paragraphs 30 to 34 of the report. The conclusions he had reached after considering all the questions discussed in the fourth report were contained in paragraph 35, where he once again stated that he was not convinced that it would be worthwhile for the Commission to prepare draft rules for those situations, even in the interest of the progressive development of international law.

The meeting rose at 10.25 a.m.

2970th MEETING

Tuesday, 3 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 2.1.6 [2.1.6, 2.1.8], 2.1.9, 2.6, 2.6.5 to 2.6.11, 2.6.12 [2.6.13], 2.6.13 [2.6.14], 2.6.14 [2.6.15], 2.7 and 2.7.1 to 2.7.9 adopted by the Drafting Committee on 7, 9, 13, 14, 16 and 28 May 2008, as contained in the report of the Drafting Committee (A/CN.4/L.723 and Corr.1), which read:

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 international organizations, a communication relating to a reservation to a treaty shall be transmitted:

* Resumed from the 2967th meeting.

(a) if there is no depositary, directly by the author of the reservation to the contracting States and contracting international 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 international organizations for which it is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. 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.

2.1.9 Statement of reasons

A reservation should to the extent possible indicate the reasons why it is being made.

2.6 Formulation of objections

2.6.5 Author

1. Any contracting State or any contracting international organization may make an objection to a reservation.

2. Any State or international organization that is entitled to become a party to a treaty may make a declaration by which it purports to object to a reservation. Such a declaration becomes an objection within the meaning of paragraph 1 at the time the State or the international organization expresses its consent to be bound by the treaty.

2.6.6 Joint formulation

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written form

An objection must be formulated in writing.

2.6.8 Expression of intention to preclude the entry into force of the treaty

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the formulation of objections

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.10 Statement of reasons

An objection should to the extent possible indicate the reasons why it is being made.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

1. An objection to a reservation made by a State or an international organization before a reservation has been confirmed in accordance with draft guideline 2.2.1 does not itself require confirmation.

2. A declaration formulated under draft guideline 2.6.5, paragraph 2, with regard to a reservation of a State or an international organization made before this reservation has been confirmed in accordance with draft guideline 2.2.1 does not itself require confirmation.

2.6.12 [2.6.13] Time period for formulating an objection

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end

of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13 [2.6.14] Conditional objections

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.14 [2.6.15] Late objections

An objection to a reservation formulated after the end of the time period specified in draft guideline 2.6.12 [2.6.13] does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial withdrawal of an objection

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in draft guideline 2.6.12 [2.6.13] provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

2. At its 2917th, 2919th and 2020th meetings, on 10, 15 and 16 May 2007, the Commission had decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15 and 2.7.1 to 2.7.9 to the Drafting Committee and to review the formulation of draft guideline 2.1.6 in the light of the discussion.

3. At its 2940th meeting, on 20 July 2007, it had decided to refer draft guidelines 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee, and at its 2967th meeting, on 27 May 2008, it had also decided to refer a new draft guideline 2.1.9 to the Drafting Committee.

4. In all, the Drafting Committee had had before it 38 draft guidelines, namely, 37 new draft guidelines and one draft guideline already adopted and which had needed to be reviewed.

5. The new draft guidelines could be divided into four categories: first, draft guidelines relating to the formulation of objections (2.6.3 to 2.6.15); second, draft guidelines relating to the withdrawal and modification of objections to reservations (2.7.1 to 2.7.9); third, draft guidelines relating to acceptance of reservations (2.8 to 2.8.12); and, fourth, a draft guideline relating to a statement of reasons for reservations (2.1.9).

6. In addition, it should be recalled that the Drafting Committee would also have to consider seven draft guidelines from the previous year belonging to two categories: first, draft guidelines relating to competence to assess the validity of reservations (3.2 and 3.2.1 to 3.2.4); and, second, draft guidelines relating to the consequences of the non-validity of a reservation (3.3 and 3.3.1).

7. To date, the Drafting Committee had considered several draft guidelines concerning objections, particularly those in the first two categories. Its work was continuing.

8. So far, the Drafting Committee had held seven meetings on the topic, on 6, 7, 9, 14, 16 and 28 May 2008. The expertise and collaboration of the Special Rapporteur had greatly facilitated the Committee's work, as had the invaluable assistance of the Secretariat.

9. The first two draft guidelines on which the Drafting Committee had begun consideration had been draft guideline 2.6.3, entitled "Freedom to make objections", and draft guideline 2.6.4, entitled "Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation".

10. During the discussion, the Drafting Committee had concluded that those two draft guidelines posed complex problems relating to the validity of objections. Consequently, it had decided to defer their consideration until the following year, by which time the Commission would have completed its examination of questions of validity.

11. The Drafting Committee had had the mandate to revise, if need be, draft guideline 2.1.6, entitled "Procedure for communication of reservations", which had been provisionally adopted by the Commission in 2002.¹¹¹ Indeed, after the adoption by the Committee of the then-draft guideline 2.6.13, "Time period for formulating an objection", it had seemed appropriate to revisit draft guideline 2.1.6. Members of the Commission would recall that the third main paragraph of that guideline dealt

with the period during which an objection to a reservation could be raised.

12. The Drafting Committee had considered an option presented by the Special Rapporteur and consisting mainly in deleting that paragraph, which, in view of draft guideline 2.6.13, had become obsolete. That option had also included the deletion of the last phrase of the previous paragraph ("or, as the case may be, upon its receipt by the depositary"), since any communication relating to a reservation could be considered as having been made only upon its receipt by the State or organization.

13. The Drafting Committee had eventually adopted a simplified and more concise version of the paragraph, expressing the same idea. That was the current second paragraph of guideline 2.1.6. The Drafting Committee had agreed that the old paragraph 3 was superfluous and should be deleted. The commentary would be amended accordingly.

14. Draft guideline 2.1.9 had been referred to the Drafting Committee on 27 May 2008 at its 2967th meeting after consideration by the plenary of the note by the Special Rapporteur on that matter.¹¹² That draft guideline had not given rise to any debate in the plenary and had seemed to enjoy unanimous support. In the form originally proposed by the Special Rapporteur, it had merely repeated *mutatis mutandis* the corresponding draft guideline 2.6.10 concerning statement of reasons for objections.

15. The Drafting Committee had examined first the issue of whether the reasons should be part of the actual text of the reservation or could be submitted later in a separate text. During the discussion, it had been pointed out that the draft guideline had the character of a recommendation and that consequently, even if it were desirable to have the statement of reasons simultaneously with the text of the reservation, it would not be necessary to include it in the text of the guideline. It was also doubtful whether a clear distinction could be made between the reservation proper and its reasons whenever they were found in the same text. Moreover, the statement of reasons was part of the "*dialogue réservataire*". The commentary could duly clarify that issue.

16. The second question discussed was whether the words "motives" or "motivation" should be used rather than "reasons" in all language versions. The view had been expressed that "motives" might have a wider meaning than "reasons". However, in the end the Committee had decided to keep the current terminology: "*motifs*" in French and "reasons" in English.

17. The Committee had also decided that guideline 2.1.9 would have the exact wording, *mutatis mutandis*, of draft guideline 2.6.10, which it had adopted earlier and which would be presented shortly. The title of the guideline had also remained as proposed by the Special Rapporteur, namely "Statement of reasons".

18. Draft guideline 2.6.5 had given rise to a very complex and difficult debate in the Drafting Committee,

¹¹¹ *Yearbook ... 2002*, vol. II (Part Two), p. 38. The revised draft guideline is reproduced in *Yearbook ... 2008*, vol. II (Part Two), para. 124.

¹¹² See footnote 94 above.

focusing on the question of who might be the author of an objection. While there had been no disagreement over the fact that contracting States and international organizations could make objections, there had been two schools of thought on the question whether States and international organizations entitled to become parties to a treaty could make objections. Some members had been of the view that any State or international organization entitled to become a party to a treaty could formulate objections; that the idea had been reflected in the original drafting as proposed by the Special Rapporteur; and that the exclusion of objections made by non-contracting parties could not be reconciled with the definition of objections as already adopted in guideline 2.6.1. Others had felt that States or international organizations entitled to become parties to a treaty could not have the same rights as contracting parties and, therefore, could not formulate objections in the full meaning of the term. According to that view, those States could make declarations that would become objections only when the State or international organization author of the declaration became a contracting party to the treaty. That school of thought had questioned the legal effects of such declarations and had contended that they could not be equivalent to those of objections made by contracting parties.

19. Both schools had invoked the 1969 Vienna Convention to reinforce their arguments. For the first school, the Convention was silent on that point. The fact that, in accordance with article 23, paragraph 1, a reservation and an objection were communicated to States entitled to become parties to a treaty strengthened the position that full objections might be formulated by that category of States and international organizations.

20. For the second school, the silence of the 1969 Vienna Convention was an indication that the drafters had not meant to give the category of States or international organizations the right to make objections in exactly the same way as the contracting parties. Moreover, the supporters of the second school had considered that a careful reading of article 20, paragraph 5, of the Convention might show that objections could be formulated only by contracting parties. It necessarily followed that any declaration by that category of States and international organizations purporting to object could not have the same legal effects as a full objection.

21. The current drafting of draft guideline 2.6.5 reflected the fact that the positions of the two schools of thought had remained irreconcilable. In a sense, it constituted a fragile and delicate compromise which might not be entirely satisfactory for either school but might nevertheless allow an honourable solution.

22. The initial drafting had been relatively simple, with a single paragraph composed of two short subparagraphs. The current drafting had resulted in two paragraphs. The first paragraph stated the indisputable fact that any contracting State or contracting international organization could make an objection to a reservation. The new second paragraph dealt with the question of States or international organizations entitled to become parties to a treaty. The wording of that paragraph reflected the compromise reached: it provided that any State or international

organization that was entitled to become a party to a treaty could make a declaration whereby it purported to object to a reservation. However, the exact nature of such a declaration was not specified. Suffice it to say that for the supporters of the use of the term “objection” in all cases, it undoubtedly constituted an objection. The second sentence tried to clarify an otherwise somewhat blurry situation by specifying that such a declaration became an objection within the meaning of paragraph 1 of the draft guideline at the moment the State or international organization expressed its consent to be bound by the treaty.

23. As a consequence of the compromise reflected in the content of the draft guideline, the Drafting Committee had decided to change the title to simply “Author”. The Committee had thought that the title as modified was clear enough, since the draft guideline was found in the section dealing with objections; at the same time, any attempt to amplify it would risk making the title too long and cumbersome.

24. Draft guideline 2.6.6 had not given rise to an extensive debate in the Drafting Committee. It had been noted that it was similar to two draft guidelines already adopted, namely draft guidelines 1.1.7 [1.1.1] (“Reservations formulated jointly”) and 1.2.2 [1.2.1] (“Interpretative declarations formulated jointly”). Suggestions had therefore been made to align this draft guideline with the wording of the two others. The content had not been in dispute. Ultimately, however, the Committee had opted for the title “Joint formulation”, following the example of the title of draft guideline 2.6.5. It was understood that this meant joint formulation of objections. In the same spirit, the words “a number of States” had been replaced by “several States”. Moreover, the word “nature” after “unilateral” had been replaced by “character”, which was now the same in both the English and the French versions. That of course created a certain discrepancy with the draft guidelines previously adopted, which should be corrected on second reading of the draft guidelines. Draft guideline 2.6.6 was now entitled “Joint formulation”.

25. Draft guideline 2.6.7 had been adopted as proposed by the Special Rapporteur. It was entitled “Written form” and addressed the question of the form in which an objection needed to be formulated. It had not given rise to any particular debate, as had also been the case in the plenary.

26. Draft guideline 2.6.8 dealt with objections intending to preclude the entry into force of the treaty as between the author of the objection and the author of the reservation. The view had been expressed that the draft guideline should eventually be revisited once the Commission had examined the consequences of invalid reservations. Moreover, it had been felt that its wording should be aligned with that of the 1969 Vienna Convention. The question had also been raised as to the exact meaning of the last phrase (“when it formulates the objection”).

27. It had been pointed out that a State or an international organization could first formulate a “simple objection” and could subsequently declare that it intended to preclude the entry into force of the treaty as between itself and the reserving State or international organization. That argument had been based on the silence of the

1969 Vienna Convention on that issue. The view had also been expressed that one of the purposes of the Guide to Practice was to complete and elucidate the Convention. Some suggestions had also been made concerning a possible link between draft guidelines 2.6.8 and 2.6.13 on the time period for formulating an objection.

28. In that connection, it had been noted that if the intervening period between the formulation of such an objection and the expression of the consent to be bound by the objecting State or international organization was very long, practical problems of uncertainty and legal insecurity might arise. It had therefore been felt that a certain time frame should be indicated in the guideline, to replace the phrase “when it formulates the objection”. After a thorough discussion, the Drafting Committee had taken the view that this intention should be definitely expressed before the treaty would enter into force as between the reserving State or international organization and the State or international organization objecting to the reservation.

29. Lastly, the Drafting Committee had decided to align the wording of the guideline with that of article 20, paragraph 4 (b), of the 1969 Vienna Convention. The word “oppose”, found originally in the title and the text, had been replaced by “preclude”, and the word “clearly” in the third line had been replaced by “definitely”, as in the Convention.

30. Draft guideline 2.6.9 was entitled “Procedure for the formulation of objections” and had been adopted as proposed by the Special Rapporteur without giving rise to any particular discussion.

31. Draft guideline 2.6.10 had been adopted with little debate. The Committee had decided simply to replace the words “whenever possible” (in the English version) by the phrase “to the extent possible”. The draft guideline was entitled “Statement of reasons”.

32. Draft guideline 2.6.11 had been extensively discussed in the Drafting Committee. The discussion had focused on its relationship with new draft guideline 2.6.5. It should be noted, before presenting the parameters of the debate, that the draft guideline addressed a situation in which a State or international organization had made a reservation in accordance with draft guideline 2.2.1, in other words upon signing a treaty, that was therefore subject to confirmation. At that point, if a State or international organization made an objection to such a reservation, the objection did not itself require confirmation once the reservation it objected to had been confirmed.

33. Taking into consideration the compromise reflected in the current wording of draft guideline 2.6.5, it had been felt that draft guideline 2.6.11 should also encompass a similar compromise. That being so, the initial drafting as proposed by the Special Rapporteur could not be retained. While it had covered the case of an objection, it had left open the case of declarations made by States or international organizations entitled to become parties to a treaty and by which they purported to object to a reservation that certain, but not all, members defined as being objections. The debate had focused mainly on the necessity of

adding something more to cover that latter case. Some members of the Drafting Committee had thought that no addition might be necessary since, in any case, the declarations referred to in guideline 2.6.5, paragraph 2, had subsequently been transformed into objections. Other members had been of the view that a paragraph was still needed in order to make it clear that declarations referred to in paragraph 2 of draft guideline 2.6.5 (and ultimately transformed into objections) did not require confirmation either. If such declarations were not transformed into objections, since the State or international organization that had made them had not become a party to a treaty, the question would not arise. For those members, they remained purely and simply declarations of intention.

34. The Drafting Committee had considered the possibility of combining both cases in one paragraph. However, that exercise had proved to be difficult. Consequently, it had been felt that the best way would be to add a second paragraph to the original draft guideline, which essentially repeated the text of the first paragraph, while replacing the term “objection” by the phrase “declaration formulated under draft guideline 2.6.5, paragraph 2”.

35. The first paragraph remained more or less as originally proposed. The English text had been changed slightly to make it clearer: instead of the words “prior to confirmation of the reservation”, it now read: “before a reservation has been confirmed”.

36. The title of the draft guideline remained as originally proposed and read: “Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation”.

37. In view of the adoption of draft guidelines 2.6.5 and 2.6.11, the Drafting Committee had considered that former draft guideline 2.6.12, entitled “Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty”, had lost its *raison d'être*. Indeed, the second paragraph of draft guideline 2.6.5 already covered that category, including the non-requirement of confirmation. As a consequence of that deletion, draft guidelines 2.6.13, 2.6.14 and 2.6.15 had been renumbered. Their former numbers were in brackets.

38. Draft guideline 2.6.12 [2.6.13] was entitled “Time period for formulating an objection”. Article 20, paragraph 5, of the 1969 Vienna Convention partially and indirectly addressed the time period for formulating an objection to a reservation. Accordingly, the present draft guideline, which followed closely the text of paragraph 5, had not posed particular problems in the Drafting Committee. Only in the English text had the phrase “after it is notified” been changed to “after it was notified” to ensure full consistency with article 20, paragraph 5.

39. As a consequence of the adoption of that draft guideline, it had been necessary to remove any duplication between it and draft guideline 2.1.6, already provisionally adopted by the Commission in 2005. To dispel any possible confusion, the Drafting Committee had deleted the third paragraph of guideline 2.1.6, and had also adjusted its second paragraph.

40. Draft guideline 2.6.13 [2.6.14] had also been fully debated in the Drafting Committee. Members would recall that it concerned objections to specific potential or future reservations. The original drafting as proposed by the Special Rapporteur had been very detailed in the sense of actually repeating elements of the definition of objections (draft guideline 2.6.1). The Drafting Committee had been of the view that such repetition was unnecessary and cumbersome. Consequently, it had simplified the wording by deleting those elements pertaining to the definition of objections. It had also decided to change the beginning of the draft guideline by substituting “An objection” for the phrase “A State or international organization may formulate an objection”. It had felt not only that the wording was more concise and elegant but also that it avoided confusion. Indeed, the original wording (“A State or international organization may formulate an objection”) had raised issues of contracting States or international organizations and others entitled to become parties. Of course, the Committee had been aware that this general problem had already been resolved in the compromise included in draft guideline 2.6.5. It had been of the view that further clarification should, if need be, be included in the commentary to the guideline.

41. It had also been decided to change the title from “Pre-emptive objections” to “Conditional objections”, since those objections were in fact conditional and depended on the actual formulation of a corresponding reservation.

42. Finally, the Drafting Committee had decided to delete the last phrase (“until the reservation has actually been formulated and notified”). After debating the point, the Drafting Committee had felt that it was more accurate simply to state that such a conditional objection did not produce the legal effects of an objection, without entering into a more detailed description. Furthermore, once the reservation had been formulated and notified, such effects would be the object of another part of the Guide to Practice, dealing with effects of objections.

43. Draft guideline 2.6.14 [2.6.15] was entitled “Late objections”. The Drafting Committee had wondered whether those late objections should be called objections at all, or instead communications or declarations made outside the established time period. After some debate, the Committee had decided to maintain the term “objections” both in the title and in the text of the draft guideline, on the understanding that the guideline would eventually have to be revisited after proper consideration by the Commission of the effects of objections. The term “objection” as defined in draft guideline 2.6.1 in conjunction with the period during which they could be formulated (as stated in draft guideline 2.6.13) had for the time being been deemed to cover such late communications or declarations. It had also been pointed out that the term “communications” referred to a process rather than to the objection or declaration itself.

44. As finally adopted, the draft guideline was identical to the one proposed by the Special Rapporteur.

45. Currently, the draft guideline stated that such late objections did not produce the legal effects of an

objection made within the time period specified in draft guideline 2.6.13 [2.6.14]. It left open the question of its possible legal effects, if any. Such effects would be considered at a later stage, when the Commission came to deal with effects.

46. Draft guidelines 2.7.1, 2.7.2 and 2.7.3 were the first in section 2.7, which dealt with withdrawal and modification of objections to reservations. The first, draft guideline 2.7.1, was entitled “Withdrawal of objections to reservations” and had been adopted without much debate, in the form originally proposed by the Special Rapporteur. The draft guideline repeated verbatim article 22, paragraph 2, of the 1969 Vienna Convention. Draft guideline 2.7.2 was entitled “Form of withdrawal of objections to reservations”. Again, its wording, which repeated article 23, paragraph 1, of the 1969 Vienna Convention, had not been changed from the original proposal. Draft guideline 2.7.3 was entitled “Formulation and communication of the withdrawal of objections to reservations”. It simply stated that draft guidelines 2.5.4, 2.5.5 and 2.5.6 were applicable *mutatis mutandis* to the withdrawal of objections to reservations. It would be recalled that draft guideline 2.5.4 dealt with the formulation of the withdrawal of a reservation at the international level, draft guideline 2.5.5 with the absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations, and draft guideline 2.5.6 with the communication of withdrawal of reservations. Again, draft guideline 2.7.3 had not given rise to any substantive debate or presented any problem and had been adopted in the form proposed by the Special Rapporteur.

47. Draft guideline 2.7.4 had not raised any particular problems. The only issue had been whether the withdrawal of an objection had any specific effects that should be mentioned. It had been felt, however, that such effects were sufficiently complex not to be dealt with under section 2.7. The surest way to treat the issue was simply to assimilate the withdrawal of an objection to a reservation with the acceptance of the reservation and to specify as much in the title. The question had been raised whether there should be any reference in the guideline to the time period of such an effect, but it had been pointed out that draft guideline 2.7.5 specifically dealt with that matter.

48. The only changes made had been of a drafting nature. The words “on reservation” had been added to the title, after the word “Effect”. In the text itself, the words “or an international organization” had been added after the word “State”. The words “earlier against”, in the English version, had been considered redundant and had been deleted. The title of the draft guideline, following the amendment, was “Effect on reservation of withdrawal of an objection”.

49. Draft guideline 2.7.5, the title of which was “Effective date of withdrawal of an objection”, had not caused any problems, either. It more or less repeated article 22, paragraph 3 (b), of the 1969 Vienna Convention and had been maintained as originally proposed by the Special Rapporteur. Some questions had been raised about its correct placement, but the Drafting Committee had decided to keep it in its current place.

50. Draft guideline 2.7.6 dealt with cases in which an objecting State or international organization might unilaterally set the effective date of withdrawal of an objection to a reservation. The only changes to the Special Rapporteur's original wording concerned the replacement of the words "takes effect" by the words "becomes operative" and the addition of the words "or international organization" after the word "State". As far as the first change was concerned, the commentary to the draft guideline should indicate that fidelity to the 1969 Vienna Convention had dictated the use of the phrase "becomes operative", which should be taken as meaning "takes effect".

51. Draft guideline 2.7.7 was entitled "Partial withdrawal of an objection". The main issue, which had already been mentioned during the debate in plenary, concerned the question of whether the second sentence, on the effects of partial withdrawal, should be retained in the draft guideline, since it related more closely to draft guideline 2.7.8. The Drafting Committee had agreed with that approach and decided to transfer the sentence to the following guideline. Minor changes had also been made to the last sentence. The word "total" had been replaced by the word "complete"; and the words "takes effect" had again been replaced by the words "becomes operative", for reasons of conformity with the 1969 Vienna Convention. The commentary should, again, explain that the meaning of the term was really "takes effect".

52. Draft guideline 2.7.8, entitled "Effect of a partial withdrawal of an objection", remained unchanged, except that, as mentioned earlier, the Drafting Committee had decided to transfer to it the second sentence of draft guideline 2.7.7. The result of the merger was still one sentence, since some elements had been repetitive. Otherwise, the substance of the guideline remained as originally proposed.

53. Draft guideline 2.7.9 had been the subject of a lengthy debate. The main points of that debate had their roots in the debate in plenary, when it had become obvious that a number of members of the Commission considered the wording of the guideline to be too categorical and absolute. Since objections could be made during a 12-month period, there was, in their view, nothing to prevent States and international organizations from making subsequent objections widening the scope of the previous objection.

54. According to the opposing view, it was not permissible, as shown by the original wording of the draft guideline, subsequently to widen the scope of an objection, the reason being that such a widening of scope could jeopardize the security of treaty relations, especially in the case of objections with maximum effect, namely those preventing the entry into force of a treaty as between the author of a reservation and the author of an objection. It had been pointed out that, if such an objection had not been made at the time when the objection had originally been formulated, the treaty had already entered into force as between the reserving State or international organization and the objecting State or international organization. It would therefore be extremely detrimental to treaty relations to allow an objection with maximum effect at a later stage. The Drafting Committee had had an interesting

debate, during which it had become obvious that the opposing views stemmed from different interpretations of article 23, paragraph 3, of the 1986 Vienna Convention. Those favouring the absolute prohibition of the widening of the scope of an objection claimed that the article should be read in conjunction with article 20, paragraph 5, of that Convention. The two schools of thought had, however, shared one view: both agreed that an objection with maximum effect—one which would affect treaty relations between the author of a reservation and the author of an objection—should not be made subsequently.

55. The draft guideline had therefore been worded in a manner reflecting that consensus. In its current form, it stated that a State or an international organization that had made an objection to a reservation might widen the scope of that objection during a 12-month period, provided that such widening did not have as an effect the modification of treaty relations as between the author of the reservation and the author of the objection, with the inevitable result of precluding the entry into force of the treaty between the two parties. The title of the draft guideline remained unchanged: "Prohibition against the widening of the scope of an objection to a reservation".

56. The recommendation of the Drafting Committee was that the Commission should adopt those draft guidelines in their entirety.

57. The CHAIRPERSON invited the Commission to proceed to adopt the draft guidelines contained in the report of the Drafting Committee published in document A/CN.4/L.723 and Corr.1.

Draft guideline 2.1.6 [2.1.6, 2.1.8]

58. Mr. VALENCIA-OSPINA, after assuring the Commission that he would not comment on the substance of the draft guidelines, and that he could therefore go along with the recommendation that the draft guidelines should be adopted *in toto*, expressed concern at the inconsistent use of some terms, both internally, within a given draft, and in relation to other drafts recently adopted or under consideration by the Commission. He had in mind, in particular, the undefined term "contracting organization", which appeared in the first paragraph of draft guideline 2.1.6 and in other draft guidelines relating to reservations, such as draft guideline 2.1.5 ("Communication of reservations"). Draft guideline 2.5.8 ("Effective date of withdrawal of a reservation") contained three model clauses referring simply to "Contracting Parties", while in draft guidelines 2.3.3 and 2.3.4 the reference was to "Contracting Parties to a treaty". He could understand the distinction that might be drawn in the context of a draft guideline or a model clause, though even there some harmonization of terms was desirable. His main concern, however, was that, although the term "contracting organization" was used throughout the draft guidelines on reservations, references to contracting—or reserving, or withdrawing—international organizations had become more frequent, as in draft guideline 2.6.5, which the Drafting Committee had just adopted. He therefore suggested that, for consistency's sake, the word "international" should be inserted before the word "organizations" in the first paragraph and subparagraphs (a) and (b) of draft

guideline 2.1.6. If possible, changes should also be made retrospectively to draft guidelines 2.1.5 and 2.5.8, in the interests of consistency.

59. Mr. PELLET (Special Rapporteur) said he would be reluctant to see such an amendment adopted. First, draft guideline 2.1.6 had already been adopted, and the Drafting Committee's mandate had been simply to bring it into line with the new draft guidelines. Secondly, the 1986 Vienna Convention was itself not consistent, referring sometimes to "contracting organizations" and sometimes to "contracting international organizations". He continued to be opposed to any tampering with the text of that Convention. Thirdly, the Commission should refrain from attempting to tidy up the draft guidelines before the end of the first reading.

60. Mr. VALENCIA-OSPINA said he could see no point in the Drafting Committee's referring its report to the Commission if it was simply to be adopted without discussion. The first reading stage was an appropriate time to iron out any inconsistencies in drafting. If the text was sent to States as it stood, any amendments suggested by them would have to be incorporated on second reading. Moreover, if there were inconsistencies in the drafting of the 1986 Vienna Convention, the Commission should try to improve on them.

61. Mr. PELLET (Special Rapporteur) reiterated his opposition to any attempt to amend the 1986 Vienna Convention, including its article 23, paragraph 1.

62. Mr. VALENCIA-OSPINA said that the crucial difference between the 1986 Vienna Convention and the draft guidelines was that the former provided a definition of "contracting organization", whereas the draft guidelines defined neither "contracting organization" nor "contracting international organization".

63. Mr. CANDIOTTI noted that, in the last paragraph of the Spanish text, the phrase "*notificación al depositario*" was not in line with the English and French texts. Notification was surely made by, not to, the depositary.

64. Mr. PELLET (Special Rapporteur) confirmed that the reference was to notification by the depositary.

65. The CHAIRPERSON suggested that the most appropriate way to decide whether Mr. Valencia-Ospina's proposed amendment should be adopted would be by a show of hands.

66. Following an indicative vote, the Chairperson said he took it that the Commission wished to insert the word "international" before the word "organizations" throughout draft guideline 2.1.6.

It was so decided.

Draft guideline 2.1.6 [2.16, 2.1.8], as amended, was adopted.

Draft guideline 2.1.9

Draft guideline 2.1.9 was adopted.

2.6 Formulation of objections

Draft guideline 2.6.5

67. Mr. PELLET (Special Rapporteur) said it was unusual for a special rapporteur to ask for the floor after the Chairperson of the Drafting Committee had presented his report; certainly he had never done so before during his many years as Special Rapporteur on the topic. On the current occasion, however, he felt that a decision taken by the Drafting Committee posed a serious problem and called into question one of the basic elements of the draft Guide to Practice. Generally speaking, the Committee improved texts submitted by Special Rapporteurs, including his own. Unfortunately, that was not the case with regard to draft guideline 2.6.5.

68. The Chairperson of the Drafting Committee, to whose kindness, patience, efficiency and competence he wished to pay particular tribute, had presented draft guideline 2.6.5 as constituting an honourable compromise. He himself was all in favour of compromises, when they were reasonable and offered a middle way between two equally tenable positions. That did not, however, apply to the wording cobbled together for draft guideline 2.6.5, which did not constitute an honourable compromise.

69. There was no problem with paragraph 1. The same was not true, however, of the statement in paragraph 2 that "[a]ny State or international organization that is entitled to become a party to a treaty may make a declaration by which it purports to object to a reservation". The key question was what constituted "a declaration by which it purports to object to a reservation", and the answer was an objection, according to draft guideline 2.6.1, adopted in 2007,¹¹³ which defined the word "objection" as "a unilateral statement ... made by a State or an international organization ... whereby the former State or organization purports to exclude or to modify the legal effects of the reservation". In other words, the first sentence of paragraph 2 of draft guideline 2.6.5 defined a declaration made by a State that was entitled to become a party to a treaty as just that, an objection, with the result that the second sentence of paragraph 2 was effectively saying "[s]uch an objection becomes an objection ... at the time the State or the international organization expresses its consent to be bound by the treaty", which was clearly absurd. An objection could not "become an objection" under certain conditions. It was, however, true that an objection would produce its effects only under specific conditions, namely if it was a conditional or, perhaps, rather, a "conditioned", objection, which, like an objection to a potential or future reservation, did not produce the legal effects of an objection, as stated in draft guideline 2.6.13. The point he wished to hammer home was that an objection was defined not by its effects but by the intention of its author. It was not the fact that a unilateral declaration produced effects that made it an objection, but the fact that its author wished it to produce such effects. That was the case with the statements referred to in paragraph 2 of draft guideline 2.6.5, which undoubtedly constituted objections.

70. He had a number of reasons for attaching so much importance to the matter. The first—and least

¹¹³ Yearbook ... 2007, vol. II (Part Two), chap. IV, sect. C, p. 32.

important—was that the Commission was disregarding the general economy of the 1969 Vienna Convention with respect not only to the procedure relating to reservations but, more generally, to all communications of declarations relating to treaties. It was effectively depriving of its force the obligation contained in article 23, paragraph 1, of the 1969 Vienna Convention to communicate an objection to the “other States entitled to become parties to the treaty” and, more generally, the provisions of article 77, paragraph 1 (e) and (f), of that Convention on the functions of depositaries towards “States entitled to become parties”.

71. The second reason was that the Commission was totally failing to take into account either the *travaux préparatoires* or existing practice. In that context, he noted that, in the practice of the Secretary-General of the United Nations, objections were the subject of “communications” and not of “depositary notification”, but that they were objections nonetheless.

72. The third reason was that, for no valid reason, the Commission was flying in the face of a view that had surely never been disputed since the ICJ had stated, in the operative part of its famous advisory opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect. [p. 19 of the opinion]

73. Fourth and last, but not least, the draft guideline called into question not only the definition of the word “objection”, which, as he had said, had been adopted in 2007, but also the logic that he had advocated from the outset and that a majority of the Commission had always accepted, even if there had been some disagreement, whereby the unilateral declarations covered by the draft guidelines—and reservations themselves, above all—should be defined in terms not of the effects that they produced but of the effects that their authors intended them to produce.

74. He maintained that the approach he had outlined was correct: an unlawful reservation was nonetheless a reservation. Before a unilateral declaration could be deemed unlawful, it first had to be classified as a unilateral declaration. Before it could be decided whether a reservation was unlawful, it first had to be qualified as a reservation. The same was true of objections. That reasoning, which permeated the whole of the draft text, was called into question by draft guideline 2.6.5, paragraph 2. As Special Rapporteur, he felt responsible for the overall coherence of the Guide to Practice and he could therefore not accept such surreptitious but nevertheless clear questioning of that logic. Unfortunately it appeared to be a kind of partial but destructive revenge exacted by a minority of colleagues who had never accepted that reasoning and who stubbornly persisted in confusing the effects (and lawfulness) of a reservation, an objection or acceptance, with the intentions of the authors of those unilateral declarations.

75. It would be wise, for the sake of the coherence of the draft as a whole, for the plenary to reaffirm that reasoning by rejecting draft guideline 2.6.5 as proposed by the Drafting Committee. If his advice were not followed on that point, he would not play the old trick of threatening to resign, but he would emphatically decline responsibility for what he sincerely believed to be a blow to the underlying logic of the text, whose coherence he had thus far been able to preserve. It went without saying that if, as he hoped, draft guideline 2.6.5 were rejected by the plenary, that would necessarily have repercussions on draft guideline 2.6.11, which would have to be revised for the same reasons. That revision could be undertaken either by the Drafting Committee, or by the plenary on the basis of texts he himself would present.

76. If the option of adopting an amended draft guideline by consensus were to be rejected, he would call for a vote on the adoption or rejection of that dangerous draft guideline, whose fate was inseparable from that of draft guideline 2.6.11.

77. The CHAIRPERSON suggested that the Commission should hold an indicative vote on draft guideline 2.6.5. If the text were rejected, the draft guideline would be referred back to the Drafting Committee for revision, together with the draft guideline 2.6.11.

78. Mr. HASSOUNA said he saw some merit in the statement of the Special Rapporteur. Perhaps the Chairperson of the Drafting Committee could provide some more background information about the different views put forward by its members, so that the Commission could try to reach a consensus rather than proceeding too hastily to a vote.

79. Mr. KAMTO endorsed Mr. Hassouna’s suggestion. Although the Chairperson of the Drafting Committee had explained in detail how the text of each draft guideline had been arrived at, it was possible that a momentary lapse of attention might have caused members to miss something when the report was presented. It would therefore be helpful if the Chairperson of the Drafting Committee could refresh members’ memories, as a vote should be avoided if at all possible. The Commission did not have to hold a vote merely because the Special Rapporteur had requested one. His well-argued proposals were quite clear and could be followed without resorting to a vote.

80. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee), said it would be very hard to provide an accurate summary of the various positions adopted by members of the Drafting Committee. The report had been presented to the plenary in order to provide each member with an opportunity to explain his or her views. Although the Special Rapporteur was plainly opposed to the draft guideline, most of the members of the Drafting Committee considered its wording to be an honourable compromise. Reopening the question would therefore be an extremely complicated matter. The draft guideline was very clear and not all members of the Drafting Committee thought it was inconsistent with the 1969 Vienna Convention.

81. Ms. ESCARAMEIA, speaking as an *ex officio* member of the Drafting Committee, recalled that the Drafting

Committee had spent an entire afternoon discussing draft guideline 2.6.5. It has proved hard to reach consensus, because some members had contended that if an entity was not a party to a treaty, it could not object to a reservation to that treaty. They had provided plenty of reasons for their position and had rejected any reliance on the advisory opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, which related solely to signatories. The debate should not be reopened in the plenary. The extremely unusual situation in which the Commission found itself had arisen because the Special Rapporteur, who had reluctantly supported the text in the Drafting Committee, was now opposing it. She therefore saw no solution other than to proceed to a vote.

82. Mr. NOLTE, speaking as a member of the Drafting Committee, said it was clearly a serious matter if the Special Rapporteur was having second thoughts about the outcome of a debate on the grounds that it ran counter to the whole approach underlying his draft text. He personally would be inclined to reopen the debate, if only the Special Rapporteur were to reciprocate by showing some understanding for the concerns of those who were reluctant to confer the dignity of the term “objection” upon a declaration that could not yet produce the full effects of an objection. Logically, if a declaration rested on a particular intention, it should be given the name corresponding to that intention. Some declarations did not deserve to be called “objections”. If the Special Rapporteur could see any possibility of reconciling the various views, he might be in favour of making one final effort; if, on the other hand, it was simply a question of dogma, a vote would have to be held.

83. Mr. BROWNLIE said that the presentation by the Chairperson of the Drafting Committee and Ms. Escameia’s comments had made it obvious that a great deal of attention had been given to the matter. It therefore seemed unlikely that further debate would lead to a reconciliation of views. Although not always very popular, votes were occasionally the only way out. The Special Rapporteur had made a strong case that the issue before the Commission was a systemic problem of fundamental importance to his draft text. The Commission should give serious consideration to his view, even at that late stage.

84. Mr. YAMADA said it would be impossible to resolve the question by holding a debate in the plenary. He asked whether the Special Rapporteur was proposing that draft guidelines 2.6.5 and 2.6.11 should be referred back to the Drafting Committee and that a decision on them should be postponed.

85. Mr. PELLET (Special Rapporteur) said he would like the plenary to reject the text proposed by the Drafting Committee. Either it could be referred back to the Drafting Committee, or else he could present a new draft text to the plenary. On balance, referring the guideline back to the Drafting Committee was probably the better solution.

86. Mr. GAJA said that in the event of a vote, he would wish it to be placed on record that he had been a dissenting member of the Drafting Committee and had sided with the Special Rapporteur on the question. His first reason for having done so was that the qualification of declarations

as objections in the 1969 and 1986 Vienna Conventions was irrespective of effects, because an objection did not produce any effect until the reserving State became a contracting State. A second element of greater concern was that many objections made by a State before becoming a contracting party existed in practice and had always been called “objections” by the depositary. The draft guideline as proposed would therefore create confusion. Personally he would not be in favour of reopening the question, but if a vote were to be held, the points he had just made should be borne in mind.

87. Mr. PETRIČ said that what was at stake was not a minor drafting change, but a very important point of principle about which the Special Rapporteur clearly felt very strongly. If a vote were taken, it should concern only the question of whether the text should be referred back to the Drafting Committee.

88. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) proposed that a somewhat fruitless debate should be curtailed forthwith and that the plenary should refer draft guidelines 2.6.5 and 2.6.11 back to the Drafting Committee which, with the Special Rapporteur’s assistance, would strive to find common ground. If his proposal was unacceptable, the Commission should, on a strictly exceptional basis, immediately proceed to a vote.

89. Mr. PELLET (Special Rapporteur) said he would be perfectly happy to refer the two draft guidelines back to the Drafting Committee without a vote. In that case, however, it must be on the understanding that the previous compromise was unacceptable. While it would be perfectly reasonable to explain in the commentaries that there had been two positions, there was no way of reconciling those positions. If the plenary was unable to accept his position, he would call for a vote, in the hope that the Drafting Committee would reflect on a wording along the lines he had suggested. However, he was adamantly opposed to simply going back to square one. If that were to happen, he would not participate in the discussions and would attend the Drafting Committee’s deliberations solely as a spectator.

90. Mr. HASSOUNA said that while he strongly supported the proposal by the Chairperson of the Drafting Committee to refer the texts back to the Committee, he did not agree with the Special Rapporteur that some pre-conditions should be set. On the contrary, an earnest effort should be made to come up with a compromise acceptable to all members.

91. Mr. KAMTO said that while he was not opposed to the holding of a vote, the discussions showed that the Commission was increasingly tending to offload its responsibilities with regard to questions of substance and principle onto the Drafting Committee. It was not that body’s task to decide on such matters. The Special Rapporteur was therefore right to query their referral back to the Drafting Committee. The principal body of the Commission was the plenary, which, as a body of experts, must adopt a position on the substance of the topics it was considering, before instructing a smaller look into the formal technicalities. The Commission should debate matters of substance and principle in plenary before coming to an informed decision

on whether to refer the texts back to the Drafting Committee and, in the affirmative, should provide it with clear guidance. The matter merited a decision in plenary, and if there was not enough time to decide on the matter at the current meeting, the Chairperson should arrange for a further plenary debate to be held on the issue. Mechanical referral back to the Drafting Committee was no solution.

92. Mr. McRAE said that as a member of the Drafting Committee he had favoured the Special Rapporteur's approach. If the texts were to be referred back to the Drafting Committee, however, no preconditions should be set. Nor was there any point in referring them back to the same small group of people whose positions were already formed, who understood each other's positions, but who simply disagreed. The real question was which of those views found broader acceptance in the plenary. That could be determined either informally or in a plenary debate, but to refer the text back to the Drafting Committee, unless its membership was expanded, would merely result in a repetition of the present division of opinion.

93. The CHAIRPERSON said that since it had proved impossible to reconcile the two entrenched positions, even after a lengthy debate, he would invite members to vote on draft guideline 2.6.5.

Having been rejected by 14 votes to 5, with 10 abstentions, draft guideline 2.6.5 was referred back to the Drafting Committee.

Draft guidelines 2.6.6 to 2.6.10

Draft guidelines 2.6.6 to 2.6.10 were adopted.

Draft guideline 2.6.11

The adoption of draft guideline 2.6.11 was deferred pending the revision of draft guideline 2.6.5 by the Drafting Committee.

Draft guidelines 2.6.12 [2.6.13], 2.6.13 [2.6.14] and 2.6.14 [2.6.15]

Draft guidelines 2.6.12 [2.6.13], 2.6.13 [2.6.14] and 2.6.14 [2.6.15] were adopted.

2.7 *Withdrawal and modification of objections to reservations*

Draft guidelines 2.7.1 to 2.7.3

Draft guidelines 2.7.1 to 2.7.3 were adopted.

Draft guideline 2.7.4

94. Mr. HASSOUNA asked why the title of the draft guideline was not simply worded "Effect of withdrawal of an objection".

95. Mr. PELLET (Special Rapporteur) said that Mr. Hassouna's comment was justified. There were discrepancies between the wording of the French and English versions of draft guideline 2.7.2. The English version referred to "Form of withdrawal", while the French title read "*Forme du retrait des objections aux réserves*". The opposite was true in draft guideline 2.7.4, where the French made no mention of a reservation but the English version did. The texts should therefore be aligned, so that

the English version of draft guideline 2.7.2 would read "Form of withdrawal of objections to reservations" and the French version of draft guideline 2.7.4 would read "*Effet du retrait d'une objection sur la réserve*".

Draft guideline 2.7.4, as orally amended, was adopted.

Draft guideline 2.7.5

Draft guideline 2.7.5 was adopted.

Draft guideline 2.7.6

96. Mr. CANDIOTI said that the title of the draft guideline bore little relation to its content. That problem should be rectified during the second reading. In the body of the text, in the French text, either the word "*en*" should be inserted before "*a reçu notification*" or the words "*du retrait*" should be added at the end of the sentence for the sake of greater clarity. He also drew attention to some discrepancies between the English and Spanish versions of the text.

Draft guideline 2.7.6, as orally amended, was adopted.

Draft guidelines 2.7.7 and 2.7.8

Draft guidelines 2.7.7 and 2.7.8 were adopted.

Draft guideline 2.7.9

97. Mr. PETRIČ, supported by Mr. PELLET (Special Rapporteur) and Mr. CANDIOTI, said that given the substance of the draft guideline, it would be advisable to omit the words "prohibition against the" from the title.

Draft guideline 2.7.9, as orally amended and with a minor drafting change to the French version, was adopted.

The draft guidelines contained in the report of the Drafting Committee (A/CN.4/L.723 and Corr.1), as a whole, as amended, were adopted, with the exception of draft guidelines 2.6.5 and 2.6.11, which were referred back to the Drafting Committee.

Shared natural resources (continued)* (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

98. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the titles and texts of the preamble and draft articles 1 to 19 on the law of transboundary aquifers adopted, on second reading, by the Drafting Committee, as contained in his report published as document A/CN.4/L.724, which read:

SHARED NATURAL RESOURCES

The law of transboundary aquifers

Conscious of the importance for humankind of life-supporting groundwater resources in all regions of the world,

* Continued from the 2965th meeting.

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Recalling General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources,

Reaffirming the principles and recommendations adopted by the United Nations Conference on Environment and Development of 1992 in the Rio Declaration on Environment and Development and Agenda 21,

Taking into account increasing demands for fresh water and the need to protect groundwater resources,

Mindful of the particular problems posed by vulnerability of aquifers to pollution,

Convinced of the need to ensure the development, utilization, conservation, management and protection of groundwater resources in the context of the promotion of the optimal and sustainable development of water resources for present and future generations,

Affirming the importance of international cooperation and good neighbourliness in this field,

Emphasizing the need to take into account the special situation of developing countries,

Recognizing the necessity to promote international cooperation,

...

PART I

INTRODUCTION

Article 1. Scope

The present draft articles apply to:

- (a) utilization of transboundary aquifers or aquifer systems;
- (b) other activities that have or are likely to have an impact upon such aquifers or aquifer systems; and
- (c) measures for the protection, preservation and management of such aquifers or aquifer systems.

Article 2. Use of terms

For the purposes of the present draft articles:

- (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 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 in whose territory any part of a transboundary aquifer or aquifer system is situated;
- (e) “utilization of transboundary aquifers and aquifer systems” includes extraction of water, heat and minerals, and storage and disposal of any substance;
- (f) “recharging aquifer” means an aquifer that receives a non-negligible amount of contemporary water recharge;
- (g) “recharge zone” means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;
- (h) “discharge zone” means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

PART II

GENERAL PRINCIPLES

Article 3. Sovereignty of aquifer States

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft articles.

Article 4. Equitable and reasonable utilization

Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization, as follows:

- (a) they shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;
- (b) they shall aim at maximizing the long-term benefits derived from the use of water contained therein;
- (c) they shall establish individually or jointly a comprehensive utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and
- (d) they shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Article 5. 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 draft article 4 requires taking into account all relevant factors, including:

- (a) the population dependent on the aquifer or aquifer system in each aquifer State;
- (b) the social, economic and other needs, present and future, of the aquifer States concerned;
- (c) the natural characteristics of the aquifer or aquifer system;
- (d) the contribution to the formation and recharge of the aquifer or aquifer system;
- (e) the existing and potential utilization of the aquifer or aquifer system;
- (f) the actual and potential effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;
- (g) the availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;
- (h) the development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;
- (i) the role of the aquifer or aquifer system in the related ecosystem.

2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different kinds of utilization of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

Article 6. Obligation not to cause significant harm

1. Aquifer States shall, in utilizing transboundary aquifers or aquifer systems in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States or other States in whose territory a discharge zone is located.

2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact upon that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States or other States in whose territory a discharge zone is located.

3. Where significant harm nevertheless is caused to another aquifer State or a State in whose territory a discharge zone is located, the aquifer State whose activities cause such harm shall take, in consultation with the affected State, all appropriate response measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

Article 7. General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

Article 8. Regular exchange of data and information

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifers or aquifer systems, as well as related forecasts.

2. Where knowledge about the nature and extent of a transboundary aquifer or aquifer system is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer system, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.

3. If an aquifer State is requested by another aquifer State to provide data and information relating to an aquifer or aquifer system that are not readily available, it shall employ its best efforts to comply with the request. The requested State 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, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

Article 9 [19]. Bilateral and regional agreements and arrangements

For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements among themselves. Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as an agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

PART III

PROTECTION, PRESERVATION AND MANAGEMENT

Article 10 [9]. Protection and preservation of ecosystems

Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in an aquifer or aquifer system, as well as that released through its discharge zones, are sufficient to protect and preserve such ecosystems.

Article 11 [10]. Recharge and discharge zones

1. Aquifer States shall identify the recharge and discharge zones of transboundary aquifers or aquifer systems that exist within their territory. They shall take appropriate measures to prevent and minimize detrimental impacts on the recharge and discharge processes.

2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system and related ecosystems.

Article 12 [11]. Prevention, reduction and control of pollution

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifers or aquifer systems, including through the recharge process, that may cause significant harm to other aquifer States. Aquifer States shall take a precautionary approach in view of uncertainty about the nature and extent of a transboundary aquifer or aquifer system and of its vulnerability to pollution.

Article 13 [12]. Monitoring

1. Aquifer States shall monitor their transboundary aquifers or aquifer systems. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with competent international organizations. Where monitoring activities cannot be carried out jointly, the aquifer States shall exchange the monitored data among themselves.

2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifers or aquifer systems. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifers or aquifer systems. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifers or aquifer systems.

Article 14 [13]. Management

Aquifer States shall establish and implement plans for the proper management of their transboundary aquifers or aquifer systems. They shall, at the request of any of them, enter into consultations concerning the management of a transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

Article 15 [14]. Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State 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 State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible 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 to make an impartial assessment of the effect of the planned activities.

PART IV

MISCELLANEOUS PROVISIONS

Article 16 [15]. Technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, technical, legal and other

cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, including, *inter alia*:

- (a) strengthening their capacity-building in scientific, technical and legal fields;
- (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) providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting their transboundary aquifer or aquifer system;
- (g) providing advice in the preparation of environmental impact assessments;
- (h) supporting the exchange of technical knowledge and experience among developing States with a view to strengthening cooperation among them in managing the transboundary aquifer or aquifer system.

Article 17 [16]. Emergency situations

1. For the purpose of the present draft article, “emergency” means a situation, resulting suddenly from natural causes or from human conduct, that affects a transboundary aquifer or aquifer system and poses an imminent threat of causing serious harm to aquifer States or other States.

2. The State within whose territory the emergency originates shall:

(a) without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(b) 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 any harmful effect of the emergency.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

4. States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.

Article 18 [17]. 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 19 [18]. Data and information vital to national defence or security

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

99. The plenary, at its 2958th and 2959th meetings, held on 7 and 8 May 2008, respectively, had referred to the Drafting Committee draft articles 1 to 13 and 14 to 20, contained in the fifth report of the Special Rapporteur (A/

CN.4/591). At its 2965th meeting, on 21 May 2008, the plenary had referred to the Drafting Committee the draft preamble prepared by the Special Rapporteur in his note (A/CN.4/L.722). The Drafting Committee had held 10 meetings between 8 and 29 May 2008 and had completed, on second reading, a set of 19 draft articles on the law of transboundary aquifers, together with a preamble, bearing in mind the comments made in plenary, as well as comments and observations of Governments as contained in document A/CN.4/595 and Add.1.

100. He wished to pay tribute to the Special Rapporteur, whose mastery of the subject, perseverance and positive attitude had greatly facilitated the Drafting Committee’s task. He also wished to acknowledge the expertise provided by experts on groundwaters from UNESCO and the support given by the Government of Japan for the Special Rapporteur’s endeavours. Thanks were also due to the Secretariat for its invaluable support.

101. The structure of the draft articles followed the same pattern as that adopted on first reading.¹¹⁴ While the draft articles adopted on first reading had been divided into five parts, the present draft articles were in four parts. “Activities affecting other States”, previously Part IV, containing an article on planned activities, had been deleted, with the Drafting Committee electing to place the sole article contained therein as the last article in Part III on “Protection, preservation and management”.

102. It would be recalled that the draft articles contained obligations that applied to aquifer States *vis-à-vis* other aquifer States; in some instances, there were obligations of aquifer States in relation to other States, and in some other situations certain obligations related to all States. The extent to which the obligations of aquifer States to other aquifer States should be extended to other States, particularly in relation to the obligation not to cause significant harm, had been a subject of further discussion in the Drafting Committee and would be addressed when dealing with the relevant draft article.

103. In addition to the draft articles, a preamble had been formulated to provide a contextual framework for the draft articles. It followed precedents previously elaborated by the Commission, in particular in the draft articles on prevention of transboundary harm from hazardous activities¹¹⁵ and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.¹¹⁶ The first preambular paragraph was overarching in recognizing the importance of groundwater as a life-supporting resource for humankind. The third preambular paragraph recalled General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources, while the fourth preambular paragraph recalled the Rio Declaration¹¹⁷ and

¹¹⁴ *Yearbook ... 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76.

¹¹⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98.

¹¹⁶ *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, para. 66.

¹¹⁷ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, Annex I.

Agenda 21,¹¹⁸ whose chapter 18 espoused the application of integrated approaches to the development, management and use of water resources.

104. The fifth, sixth and seventh preambular paragraphs projected the main purposes of the draft articles, namely utilization and protection of groundwater resources, bearing in mind the increasing demands for fresh water, thus the need to protect groundwater resources, the particular problems posed by the vulnerability of the aquifers, and also the needs of present and future generations. The eighth, ninth and tenth preambular paragraphs accorded particular emphasis to international cooperation and, bearing in mind the principle of common but differentiated responsibilities, took into account the special situation of developing countries.

105. Part I, entitled “Introduction”, consisted of two draft articles. Draft article 1, on the scope, remained substantially the same as adopted on first reading. It addressed three categories of activities, namely (a) utilization; (b) other activities which might have or were likely to have an impact on an aquifer or aquifer system, such as farming or construction, carried out at or below the surface; and (c) measures for the protection, preservation and management of those activities, which were addressed specifically in Part III. Subparagraphs (a) and (c) covered similar ground to article 1 of the 1997 Watercourses Convention. The activities contemplated in subparagraph (b) reflected an additional element specific to the present draft articles. There had been some discussion in the Drafting Committee aimed at refining the subparagraph further, mainly to clarify and thereby limit the seemingly broad scope of the phrase “have or are likely to have an impact”. Suggestions had been made to add a threshold such as “significant” or to simplify the whole text to read: “The present draft articles apply to transboundary aquifers or aquifer systems”. It had been pointed out, however, that a threshold might not be appropriate for an article dealing with the scope. It had also been noted that a simplified text would obscure, from the outset, an essential element that the present subparagraph (b) sought to highlight. In the final analysis, the formulation adopted on first reading had been retained. It was understood that there would be a causal link between the activities under subparagraph (b) and their effects on the aquifer or aquifer system. Moreover, the term “impact” would be the subject of careful clarification in the commentary.

106. The title of draft article 1 had been retained as adopted on first reading.

107. Draft article 2, on the use of terms, defined eight terms employed in the draft articles. As on first reading, technical terms had been used to make the text friendly to its intended users, namely scientific personnel and water management administrators. Seven of those terms, “aquifer”, “aquifer system”, “transboundary aquifer”, “aquifer State”, “recharging aquifer”, “recharge zone” and “discharge zone”, had already been defined in the text adopted on first reading and largely retained their original formulation.

108. Technically, the term “aquifer” in subparagraph (a) was more precise than “groundwaters”. The use of the qualifier “water-bearing” was partly intended to differentiate an aquifer from other geological formations containing, for example, oil and gas. Aquifers were found on the subsurface, and previously “underground” had been used to underscore that self-evident fact. On the recommendation of the Special Rapporteur, the word “underground” had been deleted. It had also been suggested that a specific reference to “freshwater” should be included in the definition of aquifer. However, such an explicit reference had not been retained after discussion. It had been pointed out that the freshness of the water was implied in the definition, and experts would use the Guidelines for Drinking-water Quality produced by the World Health Organization (WHO),¹¹⁹ but at the same time, inclusion of a reference to water freshness would obscure the range of aquifers, such as those containing brackish water, that ought to be included within the scope of the draft articles.

109. The draft articles related to an aquifer or an aquifer system. The latter, defined in subparagraph (b), meant a series of two or more aquifers that were hydraulically connected. Aquifers within a system that was hydraulically connected need not have the same characteristics; there might be aquifers of different geological formations within an aquifer system. The commentary would seek to identify the various aquifers that were covered by the draft articles. It had been acknowledged that the draft articles were not intended to extend to saline aquifers on the continental shelf.

110. The terms “transboundary aquifer” and “aquifer State” were defined in subparagraphs (c) and (d) respectively. The draft articles were intended to apply only to a “transboundary” aquifer or a “transboundary” aquifer system. Thus, a part of an aquifer or an aquifer system should be situated in the territory of another State, in which case each of those States, for the purposes of the draft articles, qualified as an “aquifer State”. The Drafting Committee had held discussions as to whether it was necessary also to include within the scope of subparagraph (d) a situation where an aquifer or an aquifer system was within the “jurisdiction” or “control” of a State. The view had been that such an extension might not necessarily be consistent with the general thrust of draft article 3 concerning sovereignty. It had also been decided to leave the special question of the administration of territories to the commentary.

111. Each aquifer or aquifer system could have a “recharge zone” such as a catchment area which was hydraulically connected to an aquifer or aquifer system, and a “discharge zone” through which water from an aquifer or aquifer system flowed to its outlet, including a watercourse, a lake, an oasis, a wetland or an ocean. Those terms were defined in subparagraphs (g) and (h). The aquifer or aquifer system and its recharge and discharge zones formed a dynamic continuum in the hydrological cycle. While the definition of “aquifer” or “aquifer system” might seem confining, the practical imperatives of ensuring proper protection, preservation and management had

¹¹⁸ *Ibid.*, Annex II.

¹¹⁹ *Guidelines for Drinking-water Quality*, 3rd ed., vol. I, *Recommendations*, WHO, Geneva, 2008 (available at: www.who.int/water_sanitation_health/dwq/fulltext.pdf, accessed 16 November 2012).

influenced the approach taken. Other approaches could have been to include the recharge or discharge zones within an aquifer system. The Drafting Committee's recognition of the need to protect the recharge and discharge zones pointed to the importance it attached to the protection of the overall environment on which the life of an aquifer or aquifer system depended. Those zones were the subject of particular measures and cooperative arrangements under the provisions of the draft articles.

112. An aquifer could be recharging or non-recharging. Both types of aquifer were covered by the draft articles. Specific additional considerations were provided for that were intended to secure the effective functioning of an aquifer or aquifer system as a receptacle of water. Accordingly, subparagraph (f) defined a recharging aquifer. That was an aquifer which received a non-negligible amount of the contemporary water recharge.

113. Thus far he had described terms that had been defined in the text adopted on first reading. The Drafting Committee had also considered it useful, on the recommendation of the Special Rapporteur, to define "utilization" in relation to a transboundary aquifer or aquifer system. The term was defined in a non-exhaustive manner in subparagraph (e) to include extraction of water for domestic and industrial purposes, extraction of heat for thermal energy, extraction of minerals that might be found in an aquifer, as well as storage, as in the case of a recharging aquifer, or disposal, for example of waste. Needless to say, the draft articles focused on the utilization of water contained in an aquifer; storage or disposal were a peripheral possibility and would most likely occur when the water contained in the aquifer had been exhausted. It was anticipated that any rules applicable to the regime of waste and the disposal of hazardous waste would also be applicable in the case of storage or disposal in an aquifer.

114. The title of draft article 2 had been retained as adopted on first reading.

115. Part II, entitled "General Principles", contained draft articles 3 to 9 [19]. Draft article 3, on sovereignty of aquifer States, reiterated the basic principle that States retained sovereignty over an aquifer, or portions of an aquifer, located within their territory, subject to the requirement that the exercise of such sovereignty should be undertaken in accordance with international law and the draft articles. The provision adopted on first reading had attracted very little disagreement in the comments of Governments and the plenary debate.

116. It had been retained largely as formulated on first reading, except for the inclusion of the qualification "in accordance with international law", which had been added to echo the existence of other applicable rules of international law. Although some members had considered such an addition superfluous, it had been added in order to indicate that, while the draft articles reflected present international law, there were other rules of general international law that remained applicable. It would be made clear in the commentary that the draft articles had been elaborated against the background of the continued application of customary international law. As noted earlier, the preamble to the draft articles included a reference

to General Assembly resolution 1803 (XVII). It would be explained in the commentary that the term "sovereignty" was a reference to sovereignty over an aquifer or aquifer system located within the territory of an aquifer State, including the territorial sea, and was to be distinguished from the exercise of sovereign rights, such as those that could be exercised over the continental shelf or in the exclusive economic zone adjacent to the territorial sea. As already noted, aquifers in the continental shelf were excluded from the scope of the draft articles.

117. The title of draft article 3 had been retained as adopted on first reading.

118. Draft articles 4 and 5 were closely related. On first reading, it had been decided to keep them separate, one laying down the general principle and the other setting out the factors relevant to implementation. Draft article 4 treated the interrelated concepts of "equitable" and "reasonable" utilization together, establishing as an overarching principle in the *chapeau* that "[a]quifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization". That principle was further elaborated in subparagraphs (a) to (d). The question of whether the considerations in those subparagraphs were intended to be exhaustive had been raised. While the Drafting Committee had not been in a position to give a definitive answer, it was important to reiterate that draft article 4 laid down the principle of equitable and reasonable utilization in relation to an aquifer or aquifer system. The same minimum standard of equitable and reasonable accrual of benefits aimed at maximizing long-term benefits, taking into account subparagraph (c), applied to both a recharging and a non-recharging aquifer. Subparagraph (d) concerned a recharging aquifer. The principle of equitable and reasonable utilization ought to be implemented bearing in mind the relevant factors set out in draft article 5.

119. There had been some suggestions in the Drafting Committee to break the *chapeau* of draft article 4 into two separate sentences. Ultimately, in order to maintain the balance, no change had been made. In concrete terms, the application of the principle of equitable and reasonable utilization would entail a number of things for aquifer States. In particular, as provided for in subparagraph (a), such States "shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned".

120. There had also been suggestions to replace "equitable and reasonable utilization" with "equitable and sustainable utilization". Similarly, it had been suggested that the phrase "present and future needs" should be replaced by the phrase "the needs of present and future generations". It had been recognized, however, that an aquifer, whether recharging or non-recharging, was more or less non-renewable, unless it was an artificially recharging aquifer. The principle of sustainable utilization thus assumed a connotation different from its connotation in respect of a renewable resource. Effectively, the aim would be to maximize the long-term benefits derived from the use of the water contained in the aquifer or aquifer system. Such maximization could be realized through the

aquifer States concerned establishing, either individually or jointly, concrete utilization plans, taking into account present and future needs, as well as alternative water resources available to them. Subparagraphs (b) and (c) reflected those requirements. In order to acknowledge concerns for sustainability and intergenerational equity, the preamble alluded to those matters.

121. There had been proposals to delete the phrase “individually or jointly” on the grounds that it gave the misleading impression that an overall plan could be unilaterally established for the entire transboundary aquifer or aquifer system by one aquifer State without the involvement of other aquifer States. The phrase “individually or jointly” had been included in the text adopted on first reading to signify first and foremost the importance of having a prior plan. However, it was not necessary that such plan should be a joint endeavour, at least initially, by the aquifer States concerned. To overcome the concerns, while maintaining the actual intention that a plan should be prepared for the utilization of the aquifer taking into account all factors, it had been decided to replace the word “overall” with “comprehensive”.

122. One of the functions of an aquifer was to be a receptacle for water. In the case of a recharging aquifer, whether one receiving a natural or an artificial recharge, it was crucial that it should maintain certain physical qualities and characteristics. Accordingly, subparagraph (d) retained the formulation that the utilization levels should not be such as to prevent continuance of the effective functioning of such aquifer or aquifer system. Moreover, the possible utilization of the aquifer or aquifer system for storage and disposal would have a bearing on subparagraphs (b) and (d). The extent to which those subparagraphs would be affected by use for storage and disposal would be addressed in the commentary.

123. The title of draft article 4 had been retained as adopted on first reading.

124. Draft article 5, on factors relevant to equitable and reasonable utilization, did not contain an exhaustive list of those factors. On first reading, it had been recognized that it was not easy to reorganize the factors so as to separate those that applied to equitable utilization from those that applied to reasonable utilization; indeed in some instances the factors applied to both. Subparagraphs 1 (a) to (i) had nevertheless been rearranged to achieve an internal coherence and logic without establishing any order of priority. However, paragraph 2 noted that “in weighing different kinds of utilization ... special regard shall be given to vital human needs”.

125. The draft article remained largely as adopted on first reading. However, there had been two minor changes. The first change was to qualify further the “effects” of the utilization in subparagraph 1 (f) with the words “actual and potential”. The second was to reformulate the phrase “different utilizations” in paragraph 2 to read “different kinds of utilization”, to make it more felicitous.

126. In further discussions of the factors, it had been questioned whether subparagraph 1 (i) fell perfectly into the category of factors relevant to equitable and

reasonable utilization. Draft article 5 included both “factors” and “circumstances”, and subparagraph 1 (i) was considered important particularly for an aquifer or an aquifer system in an arid zone. The word “role” had been favoured instead of the word “place”, as better signifying the variety of purposive functions that an aquifer or aquifer system had in a related ecosystem and that ought to be taken into account when utilizing the aquifer. The term “ecosystem” embraced both the ecosystem outside the aquifer, for instance one supporting the functioning of an oasis, and that inside the aquifer.

127. The title of the draft article had been retained as adopted on first reading.

128. Draft article 6, entitled “Obligation not to cause significant harm”, addressed questions of significant harm arising from utilization, significant harm from activities other than utilization as contemplated in draft article 1, and questions of mitigation of significant harm occurring despite appropriate measures to prevent such harm. Those matters were respectively addressed in paragraphs 1, 2 and 3. The Drafting Committee had retained the threshold of “significant” harm. In its previous work, the Commission had recognized that the threshold of “significant” was not without ambiguity—so much so that a factual determination had to be made in each specific case. It had understood “significant” as referring to a level that was more than “detectable” but need not be “serious” or “substantial”.

129. A number of other questions had arisen in the discussion of the draft article. The first was whether the “no harm” principle should apply only to relations among aquifer States. Considering that the *sic utere tuo ut alienum non laedas* principle was a principle of international law, also reflected in the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”)¹²⁰ and the Rio Declaration,¹²¹ which were applicable to all States, there was a view that the draft article ought to apply to significant harm caused to all States. Without denying the application of the principle to all States, the other view had pointed to the fact that the focus of the present project was relations between aquifer States. Restricting the focus to harm caused to other aquifer States was not intended to exclude the application of general international law to situations in which States other than aquifer States would be affected. In the final analysis, a compromise had been found in determining that, other than aquifer States, the State in whose territory a discharge zone was located could also be most likely to be affected by the circumstances envisaged in the draft article. Accordingly, the draft article had been extended to other States in whose territory a discharge zone was located.

130. The second question concerned proposals to improve the text to take into account contemporary considerations relevant to the protection of the environment, including response measures and restoration. Thus, a suggestion had been made to amend paragraph 3

¹²⁰ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

¹²¹ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (see footnote 117 above).

to include not only response measures but also measures to restore the environmental status of the aquifer or its water quality. As the paragraph now stood, the “appropriate measures” to be taken included “response measures”. The notion of restoration was implied by the phrase “mitigate such harm, having due regard for the provisions of draft articles 4 and 5” and would be clarified further in the commentary.

131. Thirdly, there had been a suggestion that there should be a specific provision on compensation. It had been recalled that the earlier draft articles proposed by the Special Rapporteur had contained a provision corresponding to article 7, paragraph 2, of the 1997 Watercourses Convention. On first reading, the text had been deleted on the understanding that this was an area that would be governed by other rules of international law such as those relating to State responsibility or to liability for acts not prohibited by international law, and thus did not require specialized treatment in the draft articles. The commentary would reflect that understanding.

132. In view of the extended scope, the title of the draft article now read “Obligation not to cause significant harm”.

133. Owing to time constraints, he would complete his introduction of the remaining draft articles at the Commission’s next plenary meeting.

The meeting rose at 1.05 p.m.

2971st MEETING

Wednesday, 4 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to resume his introduction to the draft articles on the law of transboundary aquifers contained in document A/CN.4/L.724, as adopted on second reading by the Drafting Committee.

2. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that draft article 7 (General obligation to cooperate) was an important provision for shared natural resources arrangements and also served as a backdrop for the application of other provisions on specific forms of cooperation, such as the draft articles on regular exchange of data and information, as well as on protection, preservation and management. Some Governments had proposed that the reference to good faith in paragraph 1 be deleted, but the Drafting Committee had decided not to amend the draft article because the principle of good faith was crucial to the achievement of equitable and reasonable utilization and the appropriate protection of a transboundary aquifer or aquifer system. In paragraph 2, it had also decided to retain the more permissive term “should”, rather than the term “shall” proposed by Governments. Paragraph 2 did not exclude the possibility of using existing mechanisms. The commentary would indicate the type of mechanisms to be envisaged, as well as the types of cooperation, such as management, monitoring and assessment, exchange of information on databases and ensuring their compatibility, coordinated communication, early warning and alarm systems and research and development. The title of the draft article had been retained as adopted on first reading.

3. Draft article 8 (Regular exchange of data and information) dealt with the obligation of aquifer States to exchange information on a regular basis. After having considered a number of proposals for amendments made in the comments by Governments, the Drafting Committee had decided to retain the wording adopted on first reading,¹²² with no change in substance. The commentary would make it clear, as suggested in the comments by Governments, that a collective effort should be made to integrate existing databases of information and make them compatible, whenever possible. It would also indicate that States must be encouraged to establish inventories of aquifers. The title of the draft article adopted on first reading had not been changed.

4. Draft article 9 (Bilateral and regional agreements and arrangements), which had originally been draft article 19, had not been amended as to substance. In view of its programmatic nature, it had been decided to place it in the part relating to general principles. Pursuant to that draft article, aquifer States were encouraged to enter into bilateral or regional agreements or arrangements in respect of activities relating to their transboundary aquifers. However, such arrangements must not adversely affect, to a significant extent, the utilization of water by other aquifer States without their express consent. The commentary would explain that the words “without their express consent” were not intended to signify a veto. The title of the draft article adopted on first reading had not been changed.

5. Part III, entitled “Protection, preservation and management”, consisted of draft articles 10 [9] to 15 [14], which constituted a sequence of obligations. Since their wording had been painstakingly negotiated by the Drafting Committee on first reading, it had considered that any amendments were to be primarily in the nature of refinements. As noted at the preceding meeting, the draft article

¹²² *Yearbook ... 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76.

on planned activities had been included in Part III to harmonize the structure of the draft articles and not have a separate part with only one article.

6. According to draft article 10 (Protection and preservation of ecosystems), which had formerly been draft article 9, aquifer States were required to protect the ecosystem dependent on the aquifer or the aquifer system. The Drafting Committee had considered a proposal to include activities in all States, including those where a recharge zone was located. It had decided not to make that amendment, as it would have shifted the balance achieved in the draft articles, including imposing a more onerous obligation on the State where a recharge zone was located than already provided for in draft article 11 [10], particularly its paragraph 2. It had taken the view that any effort to extend protection to a non-aquifer State could be dealt with in the context of that article. The question of the possible impact of storage and disposal on the protection and preservation of ecosystems would be discussed in the commentary to the draft article. The title of the draft article had not been changed.

7. With regard to draft article 11 (Recharge and discharge zones), which had previously been draft article 10, the Drafting Committee had decided to make the meaning of paragraph 1 clearer by indicating that aquifer States were to take appropriate measures in respect of recharge and discharge zones “that exist within their territory”. That had only been implied in the previous formulation. That amendment helped to distinguish more clearly between the situation dealt with in paragraph 1, relating to the obligations of aquifer States, and that in paragraph 2, relating to the obligations of non-aquifer States in whose territory a recharge or discharge zone was located. Paragraph 1 had been divided into two sentences in order to make a distinction between the scope of the obligations involved. In the first sentence, the obligation of aquifer States related to recharge or discharge zones located in their territory. In the second, it related to impacts on recharge and discharge processes not only in their territory, but also potentially in the territory of other States. The Drafting Committee had also decided to replace the concept of “special” measures by “appropriate” measures in order to ensure the consistency of the text with that of draft article 10 [9]. It had considered other proposals, particularly that of requiring aquifer States, “to the extent possible”, to eliminate detrimental impacts on the recharge and discharge processes, but it had decided against that proposal. It had agreed to add the word “prevent” before the word “minimize” in order to strengthen the obligation of protection of aquifer systems and to bring the text into line with that of draft article 6, paragraph 2. The obligation to “prevent” or “minimize” meant that, in the first place, States had an obligation, whenever possible, to prevent a detrimental impact. In cases where that was not possible, the obligation was to minimize such detrimental impacts.

8. Paragraph 2 dealt with the obligation of all States in whose territory a recharge or discharge zone was located. For example, in the case of a recharge zone located in the territory of a non-aquifer State, that State would have an obligation not to disrupt any such recharge process, as it could have a detrimental effect on the entire

aquifer system. The Drafting Committee had decided not to extend the scope of draft article 10 to include States in whose territory a recharge zone was located and had preferred to refer at the end of paragraph 2 to the obligation of non-aquifer States to cooperate also in the protection of related ecosystems. Accordingly, under draft article 10, aquifer States had an obligation to take appropriate measures to protect and preserve ecosystems dependent on their aquifers or aquifer systems. Under draft article 11, paragraph 2, all States in whose territory a recharge or discharge zone was located also had an obligation to cooperate with aquifer States to protect the related ecosystems. The title of the draft article had not been changed.

9. Draft article 12 (Prevention, reduction and control of pollution), which had formerly been draft article 11, related to a particular type of “harm” and emphasized the management of pollution control of the aquifer, whether the aquifer was actually utilized or not. The Drafting Committee had considered the replacement of the term “precautionary approach” by the term “precautionary principle”, but had decided to retain the former, as adopted on first reading, because, although the two concepts were substantively the same, it was less disputed in terms of the protection, preservation and management of aquifers and it had a more practical orientation to it. The Drafting Committee had also considered a proposal made in the comments by Governments that the words “eliminate, to the extent practicable” should be included, but it had decided not to do so because the existing wording provided for preventive action before any pollution occurred. It had also been necessary to strike a balance between the obligations imposed and lawful activities that would, in practice, allow human access to the water of the aquifer. Accordingly, the draft article and its title had been retained as adopted on first reading.

10. Draft article 13 (Monitoring), which had formerly been draft article 12, applied to aquifer States and served as a precursor to draft article 14 on management. In order to manage an aquifer or an aquifer system properly, it was necessary to ensure monitoring, which could be done jointly, but, if not, it was important for aquifer States to share data on their monitoring activities. Paragraph 1 set out the general obligation to monitor and the sequence of monitoring activities. Two minor amendments had been introduced: in the second sentence, the definite article “the” qualifying “competent international organizations” had been deleted, since no particular international organization was being singled out; and, in the third sentence, the word “however” had been deleted and the words “are not” had been replaced by the words “cannot be”. Paragraph 2 dealt with the modalities and parameters for monitoring. It was important for aquifer States to agree on the standards and methodology to be used for monitoring and on ways of harmonizing different standards and methodologies. It had been suggested that the first sentence should be qualified by adding the words “where possible”, but the Drafting Committee had considered that the wording was already sufficiently flexible. The standards and methodology could be “agreed” or “harmonized”, including through international practices developed by experts in the field. The title of the draft article had been retained as adopted on first reading.

11. Draft article 14 (Management), which had formerly been draft article 13, dealt with the establishment and implementation of plans for the management of aquifers or aquifer systems. Consultations among aquifer States were an essential component of the management process. In the view of groundwater experts, there was great value in the joint management of aquifers or aquifer systems and it should be done wherever appropriate. In practice, however, it might not always be possible to establish such a mechanism. The establishment and implementation of such plans could thus be done individually or jointly. It had been proposed that the establishment and implementation of such plans should be not only “in accordance with the provisions of the present draft articles”, as provided for in the text adopted on first reading, but also in accordance with regional agreements or arrangements. In view of the forward-looking and general nature of the draft articles, however, the Drafting Committee had not been able to reach a clear consensus on whether or not it would be appropriate to make such a reference and had decided, as a compromise, to delete the words “in accordance with the provisions of the present draft articles”, it being understood that the commentary would make it clear that the principles embodied in the draft articles were intended to provide a framework to assist States in formulating plans for the management of the aquifer or aquifer system. The title of the draft article had been retained as adopted on first reading.

12. Draft article 15, which had formerly been draft article 14, related to planned activities. The Drafting Committee had not made any amendment to it. It should be recalled that the 1997 Watercourses Convention contained detailed provisions on planned activities, based on State practice. In contrast, a minimalist approach had been adopted on first reading. The draft article applied to any State that had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby have a significant adverse effect on another State. The threshold of “significant adverse effect” was different from that of “significant harm” and would be fully described in the commentary. The draft article provided for a sequence of measures that might be taken, such as an assessment of possible effects, timely notification of such effects, consultations and, if necessary, negotiations or independent fact-finding with a view to reaching an equitable solution. It would be explained in the commentary that the States concerned had an obligation to refrain, upon request, from implementing or permitting the implementation of the planned activity during the course of the consultations or negotiations. The title of the draft article had not been changed.

13. Part IV, which had previously been Part V, was entitled “Miscellaneous provisions” and contained draft articles 16 to 19. The purpose of draft article 16, formerly draft article 15, was to emphasize “cooperation” rather than “assistance”. The original two sentences of the *chapeau* had been collapsed into one, according to which States were required to promote scientific, educational, technical, legal and other cooperation for the protection and management of transboundary aquifers or aquifer systems, either directly or through competent international organizations. As agreed on first reading, the list of

activities referred to was neither cumulative nor exhaustive. The types of cooperation listed represented some of the various options available to States to fulfil the obligation to promote cooperation. States were not required to engage in each of the types of cooperation listed, and the commentary would explain that they would be allowed to choose their means of cooperation, including the provision of financial assistance. The Drafting Committee had nevertheless made some changes to the list: in subparagraph (a), it had included the concept of strengthening capacity-building, as provided for in Agenda 21,¹²³ to emphasize the need for training, including endogenous training; subparagraph (g) had been restructured for consistency with the preceding subparagraphs; and, with a view to strengthening cooperation among developing States in managing transboundary aquifers or aquifer systems, a new subparagraph (h) had been added to stress the need to provide support for the exchange of technical knowledge and experience. The draft article was now entitled “Technical cooperation with developing States”, partly because its scope had been broadened to include other forms of cooperation.

14. Draft article 17, which had formerly been draft article 16, dealt with emergency situations. The Drafting Committee had made several changes to it. First, the paragraphs had been reorganized. The *chapeau* of paragraph 2 had been deleted in the light of the incorporation of some of its elements into paragraph 1. Consequently, subparagraph (a) had become paragraph 1, while subparagraphs (a) (i) and (a) (ii) had become subparagraphs (a) and (b), respectively. Former subparagraph (b) had become paragraph 4. A number of aspects had been considered as to substance. In paragraph 1, it had been proposed that the words “and to the environment” should be added after the words “serious harm to aquifer States or other States”. Without discounting the importance of environmental protection, it had been considered that the purpose of the draft article was to provide a mechanism to cope with emergency situations and that the focus should therefore be on aquifer States and the other States concerned. The words “other States” referred to States which might be affected by an emergency, in particular those which might have a relation with an aquifer or an aquifer system. It had also been pointed out that there was some inconsistency between paragraphs 1 and 2 as previously worded. While paragraph 1 was broadly worded to define an emergency as posing an imminent threat of serious harm to aquifer or other States, paragraph 2 seemed to focus on an emergency which affected a transboundary aquifer or aquifer system, a link which was missing in paragraph 1. That apparent inconsistency had been overcome by adding the words “affects a transboundary aquifer or aquifer system” after the word “that” in paragraph 1 and deleting the entire *chapeau* of the former paragraph 2.

15. On the basis of comments by Governments, it had been further suggested that the word “suddenly” should be deleted and that the words “imminent threat” should be replaced by the words “imminent risk”. However, it had been considered that the element of “suddenness” was

¹²³ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, Annex II.

crucial for the application of the draft article. As indicated in the commentary to the draft article adopted on first reading, “suddenness” did not exclude situations which could be predicted in a weather forecast and it did cover latent situations, such as those that occurred suddenly, but were a consequence of factors accumulated over a period of time. Thus, the rise in sea levels as a result of global warming could lead to the salination of an aquifer that might lie adjacent to the seacoast or in territorial waters.

16. With regard to the replacement of the words “imminent threat”, it had been recalled that the 1997 Watercourses Convention used similar terminology. It would be explained in the commentary that “imminent threat” had a factual meaning which should not be conflated with notions associated with threats to international peace and security and any attendant consequences that might ensue in accordance with the Charter of the United Nations.

17. Paragraph 2 (*b*) had been the subject of a detailed discussion, which had been decided only by a vote in favour of the initial wording proposed by the Special Rapporteur. Some members of the Drafting Committee had wanted the word “eliminate” to be deleted or possibly attenuated by the words “to the extent possible”, while others would have liked the text to use the words “prevent and limit” or “prevent, mitigate and control”. It had been considered that the word “eliminate” imposed an obligation that was onerous to fulfil and gave rise to an implicit obligation to pay compensation. Other members had argued that the obligation was not to “eliminate harmful effects”, but to “take practicable measures necessitated by the circumstances”, which allowed for a wider margin for action. It was an obligation of conduct rather than an obligation of result. It was also pointed out that that obligation itself did not denote an implied obligation to compensate. As pointed out in the commentary on the draft article adopted on first reading, the paragraph required only that all practicable measures should be taken, meaning those that were “feasible, workable and reasonable”. In addition, only such measures as were “necessitated by the circumstances” needed to be taken, meaning those that were warranted by the factual situation of the emergency and its possible effect on other States. It might also be noted that, to the extent that the draft article was concerned with response measures of notification without delay of, and cooperation with, potentially affected States, it did not deal with questions of compensation, which would remain governed by the relevant rules of general international law. The commentary would indicate that the words “any harmful effects” referred back to “the aquifer or aquifer system or any affected States”. As noted on first reading, the reference to draft articles 4 and 6 in paragraph 3 did not prevent States from invoking circumstances which, in international law, precluded wrongfulness.

18. Paragraph 4, which had originally been paragraph 2 (*b*), made it an obligation for States to provide assistance and dealt with the types of assistance that all other States could provide to the States affected by the emergency situation. The word “trained”, which had been used to describe “emergency response personnel”, had been deleted and the word “equipments” had been replaced by the word “equipment”. The title of the draft article had been retained as adopted on first reading.

19. Draft article 18 (Protection in time of armed conflict), which had formerly been draft article 17, had not been changed as to substance. It reaffirmed that, during times of armed conflict, the principles and rules of international law applicable in international and non-international armed conflict applied to the protection and utilization of transboundary aquifers and related installations. For example, the Hague Convention of 1907 (IV) respecting the Laws and Customs of War on Land and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) provided for the protection of water resources and related works and the utilization of such resources and works during armed conflict. The title of the draft article had been retained as adopted on first reading.

20. Draft article 19 (Protection of data and information vital to national defence or security), which had formerly been draft article 18, created a very narrow exception to the requirement on the provision of information. The 1997 Watercourses Convention contained the same rule, so that the main issue before the Drafting Committee had been whether there was a compelling reason to depart from it. As would be recalled, that had been one of the most contentious provisions during its consideration by the Working Group on shared natural resources and the Drafting Committee on first reading. It had been decided at the time to focus on the confidentiality of data or information by qualifying it as “essential” rather than on whether such information was vital to national defence or security. The majority of the members of the Drafting Committee had taken the view that there was no compelling reason to deviate from the wording of the 1997 Watercourses Convention and had therefore decided to revert to that text. The end of the first sentence had been amended to read “information vital to its national defence or security” and the title had been amended accordingly. Questions concerning the possible protection of industrial secrets and intellectual property would be dealt with in the commentary.

21. In conclusion, he pointed out that the draft articles under consideration did not deal with the relationship between them and existing or future obligations. Those matters depended on the final form the draft articles would take. The commentary would recall that the plenary had referred draft article 20, entitled “Relation to other conventions and international agreements”, as proposed by the Special Rapporteur in his fifth report, to the Drafting Committee. After having considered that draft article, the Drafting Committee had decided to omit it from the current text, on the understanding that the Commission’s report on its work would reflect the discussion that had taken place on it. In the main, it had been considered that issues concerning the relationship with other instruments were linked to questions of the final form the draft articles would take and that it was premature for the Commission to deal with them, particularly as they raised a variety of policy considerations which were best left to negotiating parties to decide.

22. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his introduction and invited the members of the Commission to consider the draft articles article by article with a view to adopting them as a whole.

Preamble and draft article 1

The preamble and draft article 1 were adopted.

Draft article 2

23. Mr. CANDIOTI, drawing attention once again to a mistake in the French text of subparagraph (e), said that the words “*On entend par*” introduced a list or a definition that was supposed to be complete, whereas types of utilization were given by way of example and were not exhaustive.

24. Mr. CAFLISCH said that he agreed with Mr. Candiotti and proposed that the words “*On entend par ‘utilisation d’aquifères et de systèmes aquifères transfrontières’*” should be replaced by the words “*L’utilisation d’aquifères et de systèmes aquifères transfrontières ‘inclut’*” (or “*comprend*”).

25. The CHAIRPERSON requested the Secretariat to make the necessary change in the French text of draft article 2 (e).

Draft article 2 was adopted.

Draft articles 3 to 15

Draft articles 3 to 15 were adopted.

Draft article 16

26. Mr. GALICKI said that there was some inconsistency between the title of draft article 16 and the list of different types of cooperation in the *chapeau*, since the term “technical cooperation” was used twice, but in two different ways, in the broad sense, in the title and in the narrow sense, in the *chapeau*. He therefore proposed that the term “technical” in the title should be deleted.

27. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, without prejudging the Special Rapporteur’s opinion, he would tend to agree with Mr. Galicki’s proposal.

28. Mr. KAMTO, supported by Mr. FOMBA, said that “technical cooperation” was a standard term that made a distinction between the cooperation referred to in draft article 16 and the general obligation of cooperation stated elsewhere. It did encompass the elements contained in the *chapeau* and its deletion would deprive the provision of its specificity. The wording was thus entirely appropriate.

29. Ms. ESCARAMEIA said that, in English, the problem was not the same as in French because the words “technical cooperation” were to be found both in the title and in the *chapeau*, although they did not apply to the same things.

30. Mr. VASCIANNIE said he also thought that the use of the word “technical” to refer to two different things gave rise to a problem. He had assumed that the Special Rapporteur would provide an explanation in the commentary, but perhaps it would be better to amend the text of the

article. He suggested that the word “technical” should be kept in the title and that the *chapeau* should be amended to read: “States shall, directly or through competent international organizations, promote scientific, educational, legal and other forms of technical cooperation with developing States...”. That would clearly show that the forms of cooperation referred to in the *chapeau* were all technical in nature.

31. Ms. XUE said that the adoption of Mr. Vasciannie’s proposal would amend the substance of the text. Since scientific cooperation and technical cooperation were two entirely different things, she proposed that the wording of the *chapeau* should be left as it stood and that the title should be amended to read: “Scientific and technical cooperation...”.

32. Mr. GALICKI proposed that an explanation of the two different meanings of the term “technical cooperation” as used in draft article 16 should be given in draft article 2 (Use of terms).

33. Mr. YAMADA (Special Rapporteur) said that he had originally thought of using the term “technical assistance”, but had then replaced it by the term “technical cooperation” in order to make it clearer that reference was being made not only to a “North–South” relationship, but also to a “South–South” relationship. He agreed with what Mr. Kamto had said and confirmed that the word “technical” should be retained in order to avoid unnecessary complications. He would explain in the commentary that the term had a broader meaning in the title and a narrower one in the rest of the provision.

34. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission adopted draft article 16 as proposed by the Drafting Committee, it being understood that the Special Rapporteur would provide the explanations in question in the commentary to the draft article.

It was so decided.

Draft article 16 was adopted.

Draft article 17

35. Mr. NOLTE said that referring to “affected or potentially affected States” in paragraph 2 (b) would be more in keeping with the provision as a whole.

36. Ms. XUE thanked the Chairperson of the Drafting Committee for having given a faithful account of the Drafting Committee’s discussions on draft article 17. A substantive issue which was all the more important in that it would also arise in connection with the new topic included in the Commission’s agenda, namely, “Protection of persons in the event of disaster”,¹²⁴ had to do with the word “eliminate” in paragraph 2 (b), which gave rise to a problem, particularly in the case of an emergency situation resulting from natural causes, because it would appear to impose an obligation on the State concerned that was practically impossible to fulfil. She hoped the Special Rapporteur would clarify that point in the commentary so that States would have clear guidance.

¹²⁴ See *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257 and Annex III, p. 206.

37. Mr. YAMADA (Special Rapporteur) said that Ms. Xue's statement would probably be reflected in the summary record of the current meeting or in section B of the chapter on shared natural resources in the Commission's annual report. Replying to Mr. Nolte, he said that he had not referred to States already affected in paragraph 2 because the situation to which it referred was that there had not yet been any serious damage in States other than the one where the emergency had taken place. Perhaps that could be explained in the commentary.

38. Ms. ESCARAMEIA said that Ms. Xue's comments could, as the Special Rapporteur had indicated, be reflected in the Commission's report, but not in the commentary, since the stage reached now was the second reading, when the commentary could only reflect a consensus.

39. Ms. XUE, supported by Mr. SABOIA, said that she simply wanted the commentary to explain, as the Special Rapporteur had done in the Drafting Committee, that the obligation provided for in paragraph 2 was an obligation of means, not an obligation of result.

40. Mr. KAMTO said he regretted that the Commission was reopening discussions in plenary on matters that had already been decided on by the Drafting Committee. When a member had taken part in the Drafting Committee's work and a decision had been taken, that member should be in a position to accept the consensus reached so that the Commission could get on with its work. He himself had expressed concerns similar to Ms. Xue's and had proposed that the Drafting Committee should add the words "and, if possible," before the word "eliminate", but, following the discussions, he had seen that it was not necessary.

41. Mr. YAMADA (Special Rapporteur) said that, in the commentary to the draft articles adopted on first reading, he had already explained that what was involved was an obligation of means, not one of result. He therefore did not see how the current wording could be a problem. To prevent any confusion, however, he could state in the commentary that what was important was that the State concerned should try "in good faith" to eliminate any harmful effect of the emergency.

42. Ms. XUE said that, in that case, she had no further objection.

43. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission adopted draft article 17 as proposed by the Drafting Committee, it being understood that the Special Rapporteur would include the explanations he had referred to in the commentary.

It was so decided.

Draft article 17 was adopted.

Draft articles 18 and 19

Draft articles 18 and 19 were adopted.

The preamble and the draft articles reproduced in document A/CN.4/L.724, as a whole, as amended, were adopted on second reading.

Responsibility of international organizations (continued)* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

44. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the text of the draft articles on responsibility of international organizations as provisionally adopted by the Drafting Committee (A/CN.4/L.725 and Add.1).

45. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the eight draft articles (46 to 53) before the Commission dealt with the invocation of the international responsibility of an international organization and were intended to form a chapter of Part Three on the implementation of the international responsibility of an international organization, based on the model of the draft articles on responsibility of States for internationally wrongful acts.¹²⁵ Part Three ended with draft article 53, which contained a "without prejudice" clause and would be further reviewed in the light of the Working Group's conclusions. The Drafting Committee had not dealt with the question of the invocation of the international responsibility of a State by an international organization because it had considered that the question went beyond its terms of reference and would have required the amendment of other draft articles, including those on State responsibility.

46. Draft article 46 (Invocation of responsibility by an injured State or international organization) corresponded to article 42 of the draft articles on State responsibility. At the request of some members of the Commission, the case of an international organization being authorized to act on behalf of the international community as a whole had been dealt with in draft article 52 [51], paragraph 3.¹²⁶ The words "party" or "parties", which could give the impression of referring only to the parties to a treaty, had been replaced by the words "State(s) or international organization(s)" throughout the text of the draft articles. It would be explained in the commentary that the "group of States or international organizations" referred to in subparagraph (b) of draft article 46 could be composed of States or international organizations or a combination thereof.

47. Draft article 47 (Notice of claim by an injured State or international organization) corresponded to article 43 on State responsibility. The text proposed by the Special Rapporteur had been favourably received and the Drafting Committee had simply merged paragraphs 1 and 2, as had been suggested. The draft article thus consisted of two paragraphs, one on the requirement that notice of the claim should be given by the injured State or international organization and the other, on the content of such notice.

* Resumed from the 2968th meeting.

¹²⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., para. 76.

¹²⁶ The number between square brackets refers to the corresponding article in the sixth report of the Special Rapporteur, *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597.

48. Draft article 48 (Admissibility of claims), which was based on article 44 of the draft articles on State responsibility, had been added on the recommendation of the Working Group to respond to the request of several members who had considered it necessary. It consisted of two paragraphs, each stating a condition for admissibility under international law. The first was the requirement of nationality and applied only to claims made by a State. The second was the requirement of the exhaustion of local remedies, which applied to claims both by States and by international organizations.

49. The rule of the exhaustion of local remedies had given rise to a lengthy discussion. The proposal that it should be dealt with in two separate paragraphs depending on whether it applied to claims by States or claims by international organizations had not been retained, but questions had been raised as to its existence, scope and content in connection with a responsible international organization. Some members had hesitated to transpose a requirement that was applicable to diplomatic protection in the context of inter-State relations to claims against international organizations, while others had raised doubts as to the existence within an international organization of local remedies that would have to be exhausted. The wording adopted clearly limited that provision to claims that were subject under international law to the requirement of the exhaustion of local remedies. The commentary would emphasize that the provision did not aim to expand the scope of the requirement to claims for which such a requirement did not already exist. In international law, that requirement applied to certain claims brought on behalf of an individual. In the context of the draft articles under consideration, it would also apply to claims brought against an international organization by a State which exercised diplomatic protection on behalf of one of its nationals, for example, when he or she had been injured by an international organization administering a territory. It might also apply to claims brought by another international organization for personal injuries inflicted on one of its agents (or one of his or her family members), a situation that could be regarded as similar to the exercise of diplomatic protection. Lastly, the requirement of the exhaustion of local remedies would apply in respect of certain claims alleging human rights violations by an international organization. In contrast, it would not apply to claims for direct injuries to a State or another international organization inflicted by an international organization.

50. It would be made clear in the commentary that paragraph 2 did not apply to the case where the members of an international organization were bound by the rules of the organization to resort to certain internal procedures or mechanisms when invoking the responsibility of their organization. The commentary would also indicate that the words “remedy provided by that organization” referred primarily to those remedies that might be available to the individual concerned within the responsible organization, while, however, not excluding the possible existence of other effective remedies outside the organization, which might, for example, have accepted the jurisdiction of domestic courts in respect of certain categories of claims brought by an individual, such as employment-related claims. The commentary would explain that the

term “local remedies”, which might be ambiguous in the case of international organizations, had nevertheless been retained in order to indicate the kinds of situations where the requirement of the exhaustion of such remedies was likely to apply.

51. Draft article 49 [48] (Loss of the right to invoke responsibility), which corresponded to article 45 of the draft articles on State responsibility, had been adopted without change, but some discussions had taken place in the Drafting Committee on the relationship between subparagraphs (a) and (b), the wording of subparagraph (b) and the nature and modalities of a waiver or acquiescence in the lapse of a claim. Some members had been of the opinion that, given the nature and structure of international organizations, they should not be easily considered as having waived a claim or acquiesced in its lapse. The point had also been made that a waiver must be valid. In particular, it must not have taken place under coercion and, in the case of an international organization, it must have been made by a competent organ in accordance with the internal rules of the organization. The commentary would provide some indications on the specificities of a waiver by an international organization, emphasizing, for example, that such a waiver must not be easily assumed. In the light of draft article 50 [49], the commentary would also make it clear that a waiver could only be made individually, without prejudice to the rights of other injured States or international organizations.

52. Draft article 50 [49] (Plurality of injured States or international organizations) was the equivalent of article 46 of the draft articles on State responsibility. Since the text of the draft article had been favourably received in plenary, the Drafting Committee had merely made a few drafting amendments. The words “entity” or “entities” in the title and in the text had been replaced by the words “State(s) or international organization(s)”. The words “the responsibility of the international organization which has committed the internationally wrongful act” were to be replaced by the words “the responsibility of the international organization for the internationally wrongful act”, as suggested by the Special Rapporteur, in order to cover situations such as those dealt with in draft articles 12 to 15, in which an international organization might incur responsibility for an internationally wrongful act committed by a State or another international organization. Such a situation could arise, for example, in the event of an international organization aiding or assisting in, exercising direction and control over, or coercing a State or another international organization in the commission of an internationally wrongful act; or in the case of decisions, recommendations and authorizations addressed by an international organization to member States or international organizations. After a discussion, it had finally been decided that the word “separately” should be retained, but it would be explained in the commentary that that did not rule out the possibility that some or all of the injured States or international organizations might jointly invoke responsibility. The commentary would also emphasize that a waiver or acquiescence in the lapse of a claim by one of the injured States or international organizations in accordance with draft article 49 [48] did not affect the rights of the other injured States or international organizations. Lastly, the commentary would indicate that, in the

situation where an international organization and one of its members were injured by an internationally wrongful act of another international organization, the internal rules of the injured international organization could determine which entity was entitled to make the claim, without prejudice to the legal position of third parties.

53. Draft article 51 [50] (Plurality of responsible States or international organizations) was the equivalent of article 47 of the draft articles on State responsibility, and also dealt with subsidiary responsibility, which had been discussed at length in the Drafting Committee. It would be recalled that some members of the Commission had proposed in plenary that paragraph 1 should include a specific reference to draft article 29. Others had expressed the concern that the paragraph could be interpreted as precluding the simultaneous invocation of the primary responsibility of the organization and only the subsidiary responsibility of a member of the organization. In that regard, some members of the Drafting Committee had raised the possibility of the conditional invocation of subsidiary responsibility pending the outcome of the claim against the organization bearing primary responsibility. All those points were covered in paragraph 2 on subsidiary responsibility, which replaced the second sentence of paragraph 1 dealing with that question. The words “only to the extent that” had been replaced by the words “insofar as” in order to introduce greater flexibility as to the timing of subsidiary responsibility. Paragraph 3 was the former paragraph 2 as proposed by the Special Rapporteur, who had explained, for the sake of clarity in relation to the corresponding article on State responsibility, that subparagraph (b) referred to the State or international organization “providing reparation”.

54. Draft article 52 [51] (Invocation of responsibility by a State other than an injured State or by an international organization other than an injured international organization) was based on article 48 on State responsibility. With regard to paragraph 1, the Drafting Committee had held a lengthy discussion on the concept of the “collective interest of the group”, whose interpretation might, in the opinion of some members of the Commission, give rise to problems. It had also discussed whether a distinction should be made between the members of a responsible international organization and non-members as far as their right to invoke the responsibility of the organization was concerned. It had decided to retain the wording proposed by the Special Rapporteur, with some minor drafting changes. It had explained that paragraph 1 did not deal with the obligations owed to the international community as a whole, which were addressed in paragraphs 2 and 3. Paragraph 1 referred primarily to certain categories of multilateral treaties to which an international organization could be a party and which established obligations that could not be split as between the parties. Thus, it did not cover all cases in which an obligation arising from a multilateral treaty had been breached or all situations in which the members of a group of States or international organizations shared a collective interest. It referred to very specific cases in which the obligation breached was owed to the parties “as a group” and each member of the group was entitled to claim compliance as a guardian of the collective interest.

55. Although some elements of vagueness would remain as to the precise scope of paragraph 1, an attempt would be made in the commentary to offer some examples of the situations that were covered, thus providing further clarification of the notions of an obligation “owed to a group of States or international organizations” and an obligation “established for the protection of the collective interest of the group”. It would also be made clear that paragraph 1 did not cover every breach by an international organization of its obligations *vis-à-vis* its members: the source and content of the obligation would determine whether the obligation was due to the members “as a group”.

56. Some members of the Drafting Committee had expressed concern about conferring on the members of an international organization the right to invoke the responsibility of the organization under the general regime on international responsibility. Others had pointed out that the question was not specific to draft article 52 [51], but also related to draft article 46. In that regard, it must be emphasized that those two draft articles dealt only with the invocation of responsibility and not with the issue of possible remedies; they must therefore not be interpreted as allowing the members of an international organization to act towards that organization in a manner inconsistent with its internal rules. Furthermore, special rules applying between an international organization and its members could be dealt with in a general provision on *lex specialis*.

57. Paragraph 2 of draft article 52 [51] had not given rise to comments in plenary and had been adopted as proposed by the Special Rapporteur, with only a minor drafting change. Paragraph 3 dealt with the right of an international organization to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole. Based on comments by States and international organizations, the Special Rapporteur had proposed that this right should be limited to international organizations which had been given the function of “safeguarding the interest of the international community underlying the obligation”. In plenary, some members of the Commission had considered that wording too broad, while others had found it too restrictive. Following a lengthy discussion, the Drafting Committee had agreed to limit the entitlement in question to those situations in which safeguarding the interest of the international community underlying the obligation breached “is included among the functions” of the international organization invoking responsibility. The commentary would indicate whether that criterion had to be assessed by reference to the rules of the organization, including its character and purposes. The word “protecting” had been replaced by the word “safeguarding” in order to avoid any confusion with the recent principle of the “responsibility to protect”. The commentary would also reflect the concerns that had been expressed about the possibility that a regional organization might act in defence of the interests of the international community as a whole.

58. Paragraph 4 of draft article 52 [51] had not given rise to comments by the Commission and had been left as it stood, except that the words “any State or international organization” had been replaced by the words “a State or an international organization”. Paragraph 5 had also been adopted as proposed by the Special Rapporteur,

with the addition of a reference to paragraph 2 of draft article 48 [47 *bis*]. Paragraph 1 of that draft article had not been mentioned, since the condition of nationality of claims did not apply to the invocation of international responsibility under draft article 52 [51]. The commentary would emphasize that point, while also indicating that the solution was in conformity with the correct interpretation to be given to article 48, paragraph 3, of the draft articles on State responsibility, despite the ambiguity that the provision contained.

59. Draft article 53 (Scope of this Part) contained a “without prejudice” clause relating to the invocation of the responsibility of an international organization by a person or entity other than a State or an international organization. That additional draft article had been proposed by the Special Rapporteur in response to the concerns of some members of the Commission, and the Drafting Committee had considered that it should be included for the sake of clarity, even though Part Two of the draft articles on the content of the international responsibility of an international organization already contained a similar provision and Part Three of the articles on State responsibility did not. The purpose of the wording retained was to preserve those situations where a person or entity other than a State or an international organization would have a legal entitlement to invoke the international responsibility of an international organization. That “without prejudice” clause should therefore not be read as conveying any presumption in favour of the existence of such an entitlement. If it was decided to include provisions on countermeasures in the draft articles, some changes might have to be made in the title of draft article 53 and in the references to “this Part” and “the present Part”.

60. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his introduction and invited the members of the Commission to consider draft articles 46 to 53 on responsibility of international organizations article by article with a view to adopting them as a whole.

Draft articles 46 to 51

Draft articles 46 to 51 were adopted.

Draft article 52

61. Mr. KAMTO, noting that the Drafting Committee had chosen to replace the word “protecting” by the word “safeguarding” in paragraph 3, said that he would like the distinction between those two words to be more clearly explained in the commentary because it was not obvious.

62. Mr. HASSOUNA said that, since the title was too long, he wished to know whether it could be simplified to read: “Invocation of responsibility by a non-injured State or international organization” or whether the words “other than” had to be retained.

63. Mr. GAJA (Special Rapporteur) suggested that the first sentence of paragraph 1 could be used for that purpose. The title would thus be slightly shorter and would read: “Invocation of responsibility by a State or international organization other than an injured State or international organization”.

Draft article 52, as amended, was adopted.

Draft article 53

Draft article 53 was adopted.

The draft articles contained in document A/CN.4/L.725, as a whole, as amended, were adopted.

Organization of the work of the session (continued)*

[Agenda item 1]

64. Mr. KOLODKIN (Chairperson of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia (*ex officio*), Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

The meeting rose at 11.50 a.m.

2972nd MEETING

Thursday, 5 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (continued) (A/CN.4/588, sect. C, A/CN.4/594)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NIEHAUS congratulated the Special Rapporteur on his fourth report, which addressed two questions: the non-expulsion by a State of its nationals when it related to persons having two or more nationalities, and deprivation of nationality, which was sometimes used as a preliminary to expulsion. The first question, dealt with in chapter I of the report, harked back to a time-honoured and undisputed legal concept, namely that it was for a State to determine under its own law who were its nationals. Alongside the interest of the State and its right to make that determination, however, the legitimate interests and

* Resumed from the 2968th meeting.

** Resumed from the 2969th meeting.

rights of individuals in the matter were also, quite correctly, mentioned by the Special Rapporteur. Such rights were enshrined in numerous human rights instruments, beginning with the Universal Declaration of Human Rights,¹²⁷ and States were obliged to respect them in exercising their sovereign right to regulation in that area.

2. The practice of dual or multiple nationality was in reality not as recent a trend as the Special Rapporteur seemed to indicate in his report. In the distant past, the ancient Greeks had recognized that an individual could be a citizen of more than one city-State. In more recent times, such well-known figures as Garibaldi had had three or four nationalities. In 1913, the German Imperial and State Citizenship law (Delbrück law)¹²⁸ had expressly permitted dual nationality in Germany. While it was true that dual nationality had been fairly rare in the past, it had grown more prevalent in recent years and seemed set to become even more widespread in the future, probably owing to modern lifestyles, increasingly close relations among States and globalization in general. Each State had the right to permit or prohibit dual nationality. In his own country, Costa Rica, for example, only a few years previously, taking a second nationality would have resulted in the loss of Costa Rican nationality. Now, however, following constitutional reforms, Costa Rican nationality was inalienable, and dual or multiple nationality was perfectly acceptable under Costa Rican legislation.

3. As to the question, raised by the Special Rapporteur in paragraphs 7 to 13 of his report, of whether dual or multiple nationals were aliens, the existing literature and legislation seemed to answer very clearly in the negative, notwithstanding the Special Rapporteur's arguments. Quite apart from the fact that nationality could be acquired by birth (whether through *jus sanguinis* or *jus soli*) or naturalization, once it was acquired, the sources cited and simple legal logic could hardly be said to argue for the existence of first-, second- and third-category nationality. Although certain political rights, such as the right to be elected Head of State, might be constitutionally restricted to nationals born in the country, any further distinctions among nationals on grounds such as their holding of dual or multiple nationality would be discriminatory and in breach of fundamental principles of international law. The examples given in the report should be understood as relating to consular, migration or tax matters in the context of the movement of migrants or transients across borders, not as agreements that fundamentally affected the civil or political rights of individuals lawfully established in a country and that would enable a State to consider a national that held the nationality of another State as an alien.

4. An appropriate conception of the modern phenomenon of dual nationality was to be found in the treaties that Spain had concluded with the majority of Latin American States, which shared its traditions, culture and language. Their purpose was to ensure that nationals of one of the States parties did not feel like foreigners in the other State, were treated with respect and enjoyed the

same rights as that country's nationals. In other words, a Costa Rican resident in Spain was to be treated like a Spaniard, and vice versa. Under no circumstances could dual nationality be seen as affecting a person's nationality of origin, still less as rendering the person an alien in his or her own country.

5. With regard to the second question, on the legality of expelling a person with more than one nationality if that person had not first been denationalized, he believed that the expelling State was under an obligation to denationalize a dual or multiple national, as in the case of a person with only one nationality, before carrying out the expulsion, if it wished to avoid serious violations of the principles of human rights. The fact that such expulsions occurred in practice neither justified nor authorized them from the standpoint of international law. He found it difficult to comprehend the Special Rapporteur's retreat from the position that the expelling State had an obligation to denationalize, on the grounds that, were the expelled person to return to the expelling State, for example as a result of a change of government, that action would be complicated by the denationalization, since the person would be treated as an alien requesting admission to a foreign State, or else the expelling State would have to restore its nationality to the person in order to enable the latter to exercise the right of return (paragraph 11 of the report). That would be tantamount to recommending that a national with dual or multiple nationality should be treated as an alien. Such, as he understood it, was the tenor of paragraph 12 (a), pursuant to which "[t]he principle of the non-expulsion of nationals does not apply to persons with dual or multiple nationality unless the expulsion can lead to statelessness". The correct legal approach would, in his view, be to require that for persons with dual or multiple nationality to be expelled, they must first be denationalized, and that their denationalization must be neither arbitrary nor discriminatory. That was the condition attached by the Special Rapporteur to the denationalization of persons with a single nationality in paragraph 35 (a) of his report.

6. As to the question discussed in paragraphs 14 to 24 of the report, namely whether the expelling State was the State of dominant or effective nationality of the person being expelled, he agreed with the Special Rapporteur on the need to refrain from raising the question as far as was possible, since the topic that should concern the Commission was the expulsion of aliens, not the legal regime of nationality. Nonetheless, when discussing dual nationality in the context of expulsion of aliens, it would be hard to ignore certain basic principles and elements relating to nationality. The concepts of dominant or effective nationality seemed more relevant to conflicts of nationality or of rules under private international law, and were not a good basis for the Commission's work on expulsion of aliens.

7. Regarding the second major question, namely loss of nationality, denationalization and expulsion, covered in chapter II of the report, it was clear, first of all, that a large number of States prevented their nationals from holding another nationality, so that the acquisition of another nationality automatically led to a loss of the person's original nationality. The State had full sovereignty and rights in such matters. On the other hand, many States, like his own, allowed dual or multiple nationality:

¹²⁷ General Assembly resolution 217 A (III) of 10 December 1948.

¹²⁸ German Imperial and State Citizenship Law, 22 July 1913, *American Journal of International Law*, vol. 8, No. 3, Supplement: Official Documents (July 1914), pp. 217–227.

that trend was well suited to the modern world. The State could establish, through legal (usually constitutional) measures, conditions or circumstances that led to the loss of nationality.

8. Unlike loss of nationality, which, as the Special Rapporteur rightly pointed out, was the consequence of an individual's voluntary act, denationalization was a State decision that deprived a class of people or one or more individuals of the nationality of that State. Denationalization had not only been a means of defending the interests of the State, it had also frequently been used to abuse and improperly appropriate property, to usurp and violate the rights of individuals and to dispossess them of their property prior to expulsion. That type of denationalization generally took place in particular circumstances such as State succession or war. During the Commission's discussion of the third report on expulsion of aliens at its previous session,¹²⁹ he had alluded to the little-known yet grave abuses committed during the Second World War in many countries of Latin America and elsewhere. Denationalization of persons of German or Japanese origin born in States at war with Germany and Japan had served as a means of unjustly and arbitrarily confiscating their belongings and expelling them. Grave acts had been committed that violated basic human rights and might easily be repeated at a regional level in other circumstances. Hence his difficulty in understanding why the Special Rapporteur, in paragraph 35 of his report, said that he was not convinced of the necessity or even the practical utility of proposing one or more draft articles on the issues dealt with in the fourth report, particularly as he went on to say that it was within the sovereign jurisdiction of each State to establish in its domestic legislation conditions for the loss of its nationality and for the denationalization of its nationals, provided that it did not result in statelessness and the denationalization was not arbitrary or discriminatory. What would happen if there were no prior conditions for denationalization? Was it not precisely to cover such cases that the Commission should identify minimum rules or parameters that must be observed in accordance with fundamental principles of human rights and international law?

9. In the cases that had occurred during the Second World War, denationalization had often been declared not by a competent court but by the Executive itself, and, to compound the legal absurdity, those nationals, once arbitrarily stripped of their nationality and rendered stateless, had been declared to be German or Japanese nationals, thereby allegedly providing all the more justification for confiscating their property and expelling them.

10. For those reasons, unlike the Special Rapporteur, he thought that there were sufficient reasons for elaborating draft rules both on non-expulsion by a State of its nationals having two or more nationalities and on deprivation of nationality as a preliminary to expulsion, with a view to regulating such situations and preventing the arbitrary acts and abuses to which he had referred.

11. Ms. ESCARAMEIA said that the Special Rapporteur's fourth report seemed to be based on four main assumptions, all of which caused her difficulties.

12. The first was that once an individual had a nationality, a second nationality did not deserve full protection: the problem of statelessness could not arise and even in the event of expulsion, another State could always receive the individual. A second assumption was that denationalization could be used by the State as a sort of precautionary measure to circumvent a general prohibition on the expulsion of nationals. The third assumption was that denationalization was permissible, as long as it was not discriminatory or arbitrary. While the meaning of "discriminatory" was easy to grasp, the meaning attached to the term "arbitrary" seemed to be heavily influenced by paragraph 60 of one of the arbitral awards by the Eritrea-Ethiopia Claims Commission (*Ethiopia/Eritrea*), according to which denationalization was not arbitrary if it had a basis in law, it avoided statelessness and there were legitimate reasons for it, considering the circumstances of the case. The fourth assumption was that the actions of States were a basis for the formation of rules of international law, thus almost ruling out the possibility that such rules had already existed and that States were breaching them. She had been surprised to see the emphasis placed on those assumptions, especially because in paragraph 5 of the report the Special Rapporteur had invoked many universally accepted documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Nationality.

13. Her reaction to the report had been fairly personal, as she had been born in a country that had been subjected to almost 50 years of dictatorship, during which expulsion and denationalization had been systematically used to remove political enemies and as a punitive measure. After the restoration of democracy in Portugal, the Constitution and legislation had adopted a completely new approach to nationality, viewing it as a right. In its article 33, the Constitution of Portugal forbade, in absolute terms, the expulsion of any Portuguese citizen, irrespective of how many nationalities he or she had, and prohibited the loss of nationality by any means except the will of the dual citizen involved. Denationalization, as an act of State, was totally forbidden in Portugal.

14. Legislation on nationality and expulsion that severely restricted the expulsion even of aliens had been adopted in 2007.¹³⁰ It required that the relevant decision be made by a judicial authority and restricted it to a very limited number of cases. Administrative expulsion was always subject to appeal before a judicial organ and was restricted exclusively to cases in which an alien had entered and remained in the country illegally. Thus, nationality was seen as a right of the individual, not as a benefit or concession granted by the State and which could be withdrawn whenever the State so wished, with the sole proviso that the individual must not become stateless.

15. A similar position had been taken by the Inter-American Commission on Human Rights in 1977. In considering several important cases from the Pinochet era in Chile, it had indicated that since nationality was generally considered to be a natural right and not a gift or favour bestowed through the generosity or benevolence

¹²⁹ Yearbook ... 2007, vol. II (Part One), document A/CN.4/581.

¹³⁰ Act 23/2007 of 4 July 2007 (available at: www.sef.pt/).

of the State, the State could neither impose it by force nor withdraw it as punishment or reprisal.¹³¹ That position was strongly supported by many international instruments that did not differentiate among citizens on the basis of whether they had single, dual or multiple nationality and never assumed that the status of a nationality was diluted by the acquisition of another nationality. Such provisions included articles 5, 7 and 17, paragraph 1, of the European Convention on Nationality; article 15, paragraph 2, of the Universal Declaration of Human Rights; article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights; article 22, paragraph 5, of the American Convention on Human Rights: "Pact of San José, Costa Rica"; article 12, paragraph 4, of the African Charter on Human and Peoples' Rights; article 12, paragraph 4, of the International Covenant on Civil and Political Rights; General Comment No. 27 of the Human Rights Committee;¹³² and the Declaration of Principles of International Law on Mass Expulsion adopted by the International Law Association.¹³³

16. While the Special Rapporteur had of course referred to many of those documents, he seemed not to have drawn the correct inferences. He seemed to have been unduly concerned with the practice of certain States, some of which was dated or did not constitute real expulsions, as was pointed out by the International Organization for Migration. Other practice, such as the material in paragraph 33 of the report, related to the fight against terrorism. The examples of State practice were thus not a good basis for establishing general rules; they were either exceptions or not pertinent.

17. She had already referred to the Special Rapporteur's strong interest in one of the arbitral awards by the Eritrea-Ethiopia Claims Commission (*Ethiopia/Eritrea*). This partial award had been quite controversial and had addressed a very special situation of dual nationality. The Claims Commission itself had referred frequently to the unique nature of the situation, for example, in paragraphs 6, 50 and 58 of the award. It had concerned dual nationals in a country that had been a political unit from 1952 to 1993, and related to a situation of armed conflict. Rather than as dual nationals, the individuals had been seen as nationals of an enemy State who posed a threat to the security of the expelling State. It was thus a very particular case, and a general rule could hardly be inferred from it.

18. The expulsion of dual nationals or denationalization could not be limited solely by the requirement of avoiding statelessness or the absence of discriminatory State policies or procedures. Nationality had to be seen not as an instrument of State policy but as a right of the individual. The number of additional nationalities that the individual had was totally irrelevant. Ms. Escameia would like to

see a draft article included stating that citizens with dual nationality had exactly the same rights as those with only one nationality, and another prohibiting denationalization for the purposes of avoiding the question of nationality. However, as it was unlikely that such articles would gain the support of the Special Rapporteur and the majority of members of the Commission, she was therefore prepared to endorse the Special Rapporteur's proposal not to include draft articles on those matters.

19. Mr. PETRIČ said he endorsed the Special Rapporteur's approach and had no quarrel with the conclusions set out in paragraph 35 of the fourth report. His criticism concerned the Special Rapporteur's selection of material. By and large, until the Second World War issues of nationality had been dealt with from the standpoint of States' interests, the general feeling having been that nationals should not be deprived of their nationality, because to do so might harm the interests of other States. In the modern world, however, practice from the age of monarchies was no longer relevant. Any consideration of practice should bear in mind the fact that since 1945 the focus had been on human rights and the protection of the individual, as evidenced by the many human rights instruments adopted in recent decades, a number of which set forth the right not to be deprived of one's nationality, in particular for the purpose of a later expulsion. He therefore suggested that in his future work the Special Rapporteur focus more closely on materials of relevance to problems that had arisen in the contemporary context, in which expulsion was an everyday issue.

20. While he agreed with the Special Rapporteur's interpretation of the *Ethiopia/Eritrea* case, that case had dealt with a unique, *sui generis* situation. The cases referred to by the Special Rapporteur in paragraph 8 of the report were also special in that States had concluded arrangements with other States for a particular purpose, relating to the fact that many immigrants who had left Eastern European countries after 1945 had started to return to them on visits, even though the question of their nationality had not been resolved. Having become United States or Canadian nationals, they had visited Poland or Yugoslavia, where they had been at risk of arrest, because they had still been regarded as Polish or Yugoslav nationals. Although the problem had been addressed by a number of conventions to which the report referred, it was not of relevance to the topic under consideration.

21. He had reservations with regard to the question of dual nationality. Current practice was not uniform: some States accepted dual nationality, while others, such as those listed in paragraph 27 of the report, automatically denationalized persons who had acquired another nationality. It should be borne in mind, however, that such individuals voluntarily chose to do so and should be aware that they risked losing the other nationality; indeed, loss of nationality in such instances was very common, as the list in paragraph 27 showed. In practice, however, the process was not automatic, and dual nationality was often tolerated, despite the country's official policy. On the other hand, many countries did not object to dual nationality. For example, the Federal Law on Citizenship of the Russian Federation specified that the prohibition on the expulsion of Russian nationals extended to citizens who also

¹³¹ Inter-American Commission on Human Rights, Third report on the situation of human rights in Chile (OEA/Ser.L/V/II.40 doc. 10), 11 February 1977, chapter IX, paras. 10–11 (www.cidh.oas.org/countryrep/Chile77/eng/index.htm, accessed 19 November 2012).

¹³² Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40, (A/55/40)*, vol. I, sect. A, p. 128.

¹³³ International Law Association, *Report of the Sixty-second Conference held at Seoul, August 24th to August 30th, 1986*, London, 1987, p. 13.

possessed the nationality of another State.¹³⁴ Some countries had even introduced certain privileges for citizens who had emigrated and had taken dual nationality, setting aside seats for them in parliament and allowing them to enjoy certain rights in their country of origin. Thus, the problem of dual nationality was very complex, and State practice was varied and sometimes even contradictory.

22. On the other hand, he was firmly opposed to the concept of a dominant nationality, which was unclear, and was tantamount to introducing a grading system for nationality. He was opposed to the Special Rapporteur's tendency to establish different categories of nationality. A person who had dual nationality was simply a national of both States; that was the position taken by many States.

23. Accordingly, he had difficulty accepting the Special Rapporteur's conclusions in paragraph 22 of the report. The Special Rapporteur himself conceded that his conclusions were an intellectual exercise based neither on State practice nor on any sort of jurisprudence and could at best lead to the progressive development of international law. Yet for the Commission to set out to categorize different kinds of nationality would be very progressive development indeed; such an approach would be unacceptable.

24. With regard to paragraph 28, he noted in passing that the Special Rapporteur, in his list of countries in which denationalization had taken place before the Second World War, had mistakenly included an established democracy of that period, namely Czechoslovakia, which had not denationalized any citizens in those years, whereas it had certainly done so on a large scale after the Second World War. He agreed with the Special Rapporteur's conclusions on denationalization in paragraph 29: nationality could not be lost legally unless a person had voluntarily adopted another nationality; in other words, it was an act of free will. The points made in paragraph 29 were the key concepts to be borne in mind in dealing with the question.

25. He agreed with the Special Rapporteur's suggestion that he should confine his study to the expulsion of aliens and not address the issue of the legal regime of nationality, which would lead the Commission into turbulent waters. However, he agreed with Ms. Escameia that the Special Rapporteur should elaborate, at least tentatively at the initial phase, a draft article specifying that States could not use denationalization or deprivation of nationality as a step towards expulsion.

26. Mr. GALICKI said that, like it or not, the phenomenon of dominant nationality did indeed sometimes occur in practice. For instance, the Constitution of Poland specified that Polish citizens could not be deprived of their nationality without their consent (art. 34, para. 2) or expelled (art. 52, para. 4), and no distinction was made between single and dual nationality. Fairly recently, however, Polish nationals who had travelled to Poland on United States passports had been refused permission to leave the country on those passports, on the grounds that they were Polish citizens. There had also been cases in which persons had tried to enter the country holding a

Polish passport and to leave it on a United States passport. While, in practice, the Polish authorities now permitted Polish nationals who also had United States citizenship to enter and leave Poland on United States passports, Polish law nevertheless theoretically provided that a person who had a second nationality was to be treated exclusively as a Polish national. Thus, the situation was not always clear-cut, and in practice one nationality might sometimes be treated as dominant. That was a problem which the Commission should address.

27. Mr. PELLET said that dominant nationality was not an invention of the Special Rapporteur. The Commission itself had endorsed the concept, in article 7 of the draft articles on diplomatic protection,¹³⁵ which provided that "[a] State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim". The Commission's commentary to article 7, citing abundant and well-founded case law, had stressed that the words "predominant" and "dominant" had the same meaning.

28. Mr. PETRIČ said he had never claimed that the concept of dominant nationality was an invention of the Special Rapporteur. In any event, it was still not clear what exactly was meant by "dominant nationality" and what criteria would be used in deciding which of the two nationalities was dominant. As to the remarks by Mr. Galicki, Polish practice was very inconsistent and was of no help in deciding which nationality was dominant.

29. Mr. SABOIA said that the report sought to clarify a number of aspects of dual or multiple nationality and loss or deprivation of nationality that might be of relevance to draft article 4, on non-expulsion by a State of its nationals, as proposed in the Special Rapporteur's third report.¹³⁶ On the whole, he endorsed the thrust of the fourth report and the Special Rapporteur's conclusion that it was preferable not to include a specific draft article or articles dealing with those questions. Nevertheless, such a decision should be based on a thorough discussion of the issues involved, and the debate must be duly reflected in the report of the Commission.

30. With regard to the chapter of the report on expulsion in cases of dual or multiple nationality (paras. 4–24), it was true that nationality was essentially governed by internal law, albeit within the limits set by international law. The question was how international law established the legal framework within which the State acted. In matters of nationality, as the Special Rapporteur rightly observed in paragraph 5, the legitimate interests both of States and of individuals must be duly taken into account. In that context, it was appropriate to refer to the right of everyone to a nationality as well as to the right not to be arbitrarily deprived of his or her nationality—rights enshrined in international instruments on human rights, to some of which the Special Rapporteur had alluded.

¹³⁴ Federal law of No. 62-FZ of 31 May 2002 on Russian Federation citizenship, 2002.

¹³⁵ *Yearbook ... 2006*, vol. II (Part Two), chap. IV, pp. 34–35, para. 50.

¹³⁶ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 121, para. 57.

31. It was also true that States could regulate the admissibility of dual or multiple nationality, and even deny their nationals the possibility of acquiring or maintaining another nationality. However, as a result of globalization and the increased mobility of individuals and families, there was a trend towards more widespread acceptance of dual or multiple nationality. Such broader acceptance could pose difficulties, particularly when the exercise of rights and the fulfilment of obligations normally related to nationality created conflicts between two different sets of legal systems. States had the right to protect their legitimate interests against the improper or fraudulent utilization of dual or multiple nationality, but there was no compelling reason to adopt a negative approach to dual nationality as such.

32. The report posed the question whether dual or multiple nationals could be considered to be aliens for the purpose of expulsion. With the exception of cases which could lead to statelessness, the Special Rapporteur replied to that undoubtedly complex question in the affirmative, citing State practice and legal precedents in paragraphs 7 to 11. The report also invoked the argument that to establish a rule requiring deprivation of nationality as a precondition for the expulsion of a dual national would work to the detriment of the interests of the person to be expelled, whose right of return would be compromised.

33. However, the examples of State practice presented by the Special Rapporteur to substantiate his assertion were not entirely convincing. The agreements referred to in paragraph 8 between Australia and Hungary, the United States of America and Poland, and Canada and Hungary in respect of the consular treatment of dual nationals must be seen in the context of the limitations established at the time by the regimes in Poland and Hungary, which had restricted the freedom of travel of their own nationals. Thus, the aim had been to protect individuals against restrictions on returning to their country of residence rather than to determine that they were to be treated as aliens for other purposes, and in particular regarding expulsion. Moreover, such differentiated treatment would apply only if the person concerned chose to enter the territory by presenting the passport of his or her other nationality.

34. The decision of the High Court of Australia referred to a footnote to paragraph 8, the effect of which had been to preclude a dual national from being elected to the Federal Parliament, appeared to be a limitation of a restricted nature aimed at preserving certain interests of the State relating to the exercise of political rights, and did not necessarily imply that a dual national would be treated in Australia as an alien for the purpose of expulsion or for other purposes. It remained to be seen whether the distinction between two categories of citizens, as established in that judicial decision, was in conformity with the provisions of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination and with the interpretation given to those instruments by the treaty monitoring bodies.

35. Finding reasons to substantiate exceptions to the rule of non-expulsion of nationals in situations of extradition

or enforcement of criminal sentences might also be misleading. In paragraph 51 of his third report, the Special Rapporteur had referred in the footnote to cases in which what had apparently been in dispute was not the right of expulsion, but rather an appeal against measures related to extradition or enforcement of decisions in criminal proceedings.

36. He therefore considered that the Special Rapporteur's conclusions in paragraph 12 should be reviewed, and in any case should not give the impression that they were the Commission's own conclusions. As he saw it, the rule of non-expulsion of nationals should be regarded as the general rule, subject only to limited qualifications, which must pass the test of legitimacy of the interest of the State and proportionality. Adopting a different standard for the case of dual or multiple nationals would seriously weaken that general principle. It would also be difficult to treat those cases under the heading of "exceptional reasons", as in draft article 4, paragraph 2, a provision which must still be clarified and about which he had reservations.

37. The question whether denationalization should be seen as a step preliminary to expulsion would also have to be reconsidered. In addition to the same caveat against stating an exception to the general rule, a point on which he agreed with the Special Rapporteur, attention should also be given to the need to guarantee individual rights. Depriving someone of nationality for the purpose of expulsion should require the fulfilment of guarantees that the act was not arbitrary or discriminatory and that it complied with due process and other human rights standards.

38. As the Special Rapporteur rightly indicated, the issue of whether the expelling State was the State of dominant or effective nationality of the person being expelled was relevant for the purposes of the current study regarding dual and multiple nationality. It also seemed correct to assert, as was done in paragraph 17, that if the expelling State was the State of dominant nationality of the person in question, it could not expel that person, by virtue of the rule of non-expulsion of nationals. The complexity of questions regarding the relationship of an individual with two or more States in respect of which that individual might be considered as having a dominant nationality substantiated the point made by the Special Rapporteur in paragraph 24 of the report that, instead of dealing with scenarios involving conflicts of nationalities at the current stage, it might be preferable to address the issue in the framework of a study on protection of the property rights of expelled persons. Similarly, the protection of other rights that might be negatively affected by expulsion should also be dealt with at that later stage.

39. The chapter of the report on loss of nationality, denationalization and expulsion (paras. 25–35) contained a useful analysis of the practice of States in those areas. It rightly distinguished between loss of nationality, which derived from an act of the individual, and denationalization, which was an act of the State.

40. With regard to denationalization, the examples of collective withdrawal of nationality through the enactment of restrictive nationality laws referred to in

paragraph 28 (a) belonged to the unfortunate history of flagrant violations of the most basic provisions of international law concerning non-discriminatory treatment. Withdrawing the nationality of large numbers of persons on ethnic, linguistic, religious or other grounds had frequently resulted in statelessness and had been, and might still be in many cases, the prelude to the perpetration of genocide and crimes against humanity.

41. Denaturalization, as described in paragraph 28 (b) of the report, and deprivation of nationality as referred to in paragraph 28 (c), were lawful procedures, but in order to conform to international standards, the respective processes they entailed must respect rules regarding the prohibition of discriminatory or arbitrary measures, must be conducted in such a way as to safeguard the rights of defence and judicial review, and, as indicated in paragraph 29, should not lead to statelessness.

42. With regard to paragraphs 30 to 35 of the report, while it was perhaps true that customary international law did not provide a clear rule regarding dual nationality, there was at least a strong presumption in international law regarding the prohibition of the expulsion of nationals, which must apply to dual nationals as well, except perhaps in very special circumstances.

43. The arbitral awards of the Eritrea–Ethiopia Claims Commission should be treated with circumspection. The reports of the Claims Commission had strongly emphasized the unique nature of the circumstances that had prevailed between Ethiopia and Eritrea at the time and the challenges it had faced in determining whether or how several potentially relevant bodies of international law might apply in dealing with it. Among the obstacles had been issues relating to the succession of States, disagreement over the facts and differing perceptions as to the applicability of nationality laws and the ways of expressing a will to acquire a different nationality. Added to those was the outbreak of war, which had enabled Ethiopia to take measures invoking the law of armed conflict. In considering the claims, the Claims Commission had arrived at varying conclusions that depended on the particular circumstances of the persons who had been deprived of nationality and, in several cases, had found that Ethiopia had acted in ways that were unlawful and contrary to international law.

44. In view of the great complexity, both legal and factual, of the *Ethiopia/Eritrea* case, one had to be very cautious in drawing general conclusions regarding the deprivation of nationality of relevance to the current study. The Eritrea–Ethiopia Claims Commission itself had noted in paragraph 71 of the partial award of 17 December 2004 that “[d]eprivation of nationality is a serious matter with important and lasting consequences for those affected. In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review.”

45. As he had indicated at the beginning of his statement, he agreed with the Special Rapporteur’s conclusion that it was preferable not to prepare draft articles on the issue dealt with in the fourth report. Nevertheless, the

Commission’s discussion of that important issue must be duly reflected in its report in order to allow for analysis of the views expressed during the debate. Those views might have implications for the further consideration of draft article 4 regarding the non-expulsion of nationals.

46. Mr. BROWNLIE said that, despite the obvious relevance of the arbitral decisions and awards of the Eritrea–Ethiopia Claims Commission, which had been emphasized by Ms. Escameia and other members, the Commission should, as had already been indicated, be cautious in drawing inferences from those sources. In the first place, the decisions and awards in question did not, contrary to appearances, have the authority of the Permanent Court of Arbitration, since the latter served merely as registry to the Claims Commission. The Claims Commission, for its part, had been the product of a bilateral agreement negotiated by Ethiopia and Eritrea at the end of the war. Furthermore, the Special Rapporteur should check the way in which the applicable law in the *Ethiopia/Eritrea* case had been defined. The issues before the Claims Commission had been somewhat unusual and pertained to a situation in which no one had been prosecuted for any offence, thus reflecting some degree of waiver of liability in the resulting peace settlement. The Commission should accordingly exercise caution with regard to those sources.

47. Mr. GAJA said that, while he acknowledged the quality of the fourth report on the expulsion of aliens, he was not entirely persuaded by some of the Special Rapporteur’s arguments. In the first place, the rule prohibiting the expulsion of nationals could not be interpreted to mean that a State was free to expel an individual on condition that the individual had previously been denationalized. That would be tantamount to prescribing a two-step procedure in which a State first denationalized an individual and then proceeded to expel him or her. Acceptance of the rule prohibiting the expulsion of nationals necessarily implied that a State could not circumvent it by denationalizing individuals with a view to expelling them. A statement to that effect could be included, possibly in the commentary, while there would be no need to specify the circumstances in which denationalization would be lawful and in which the State would be entitled to take the subsequent step of expulsion.

48. His second point concerned the expulsion of dual nationals. Like other speakers, he was opposed to leaving aside that issue, regardless of whether a rule prohibiting the expulsion of nationals was to be included in the draft articles. Even if no such provision was included, the question whether a State of nationality could expel one of its nationals who was a dual national would have to be addressed, either in a provision or in the commentary.

49. Practice with regard to the expulsion of dual nationals appeared to vary. Like Mr. Brownlie, Ms. Escameia, Mr. Petrić and Mr. Saboia, he found it difficult to give much weight to the conclusions of the Eritrea–Ethiopia Claims Commission, which had upheld, in the context of an armed conflict, the lawfulness of the expulsion of dual nationals following the acquisition of their second nationality. The Claims Commission had considered that certain persons, for security reasons, had been

lawfully deprived of Ethiopian nationality and subsequently expelled “as nationals of an enemy belligerent”. That solution should not be taken by the Commission as the basis for a general rule. The practice of several States pointed in a different direction. Mr. Galicki had referred to practice in Poland, and, in its recent comments, the Russian Federation had indicated that the prohibition on the expulsion of Russian nationals also applied to dual nationals. Several other examples could be found along the same lines. If the Commission followed the latter approach and made no distinction between dual nationals and persons having a single nationality, there would be no exception to the rule prohibiting the expulsion of nationals in the case of dual nationals.

50. While it was true that, in the event of expulsion, dual nationals could find refuge in the other State of nationality, that hardly constituted an adequate remedy against the pernicious effects of their expulsion. The fact that there was another State of nationality might actually make it easier for the expelling State to proceed with the expulsion, thus emphasizing the need for protection of the persons concerned.

51. Various paragraphs in the fourth report, including paragraphs 17 to 23 and 32 to 34, considered the issue of the State of destination. The existence of a State willing to accept an expelled individual—whether a State of dual nationality or another State—no doubt affected the possibility of expulsion, but should not be a decisive element in determining its lawfulness. The issue of the State of destination raised a number of questions—one of which was whether the person to be expelled had any say in the matter. He hoped that those questions would be addressed by the Special Rapporteur in future reports.

52. Mr. McRAE thanked the Special Rapporteur for his ready response to the request by members at the previous session to consider the question of dual nationals under the topic of the expulsion of aliens. He agreed with the Special Rapporteur that delving too deeply into the issue of nationality risked diverting attention from the true focus of the topic. The basic question appeared to be to what extent the Commission should use the draft articles on expulsion of aliens as a vehicle for strengthening protection in relation to the law of nationality, and particularly, with regard to dual nationals. The Special Rapporteur’s position seemed to be that the Commission should not go down that road—a view apparently shared by Ms. Escameia, though perhaps for the opposite reason, namely that anything the Commission might formulate along those lines risked undermining the law of nationality. While he could understand the Special Rapporteur’s reluctance to include draft articles on dual nationals, he was not entirely convinced that the Commission could afford to take that course.

53. The problem stemmed in part from the inclusion of a provision on the non-expulsion of nationals. At the previous session, he had questioned the rationale for including, in a set of draft articles on expulsion of aliens, a provision on the non-expulsion of nationals. That was not because he objected to its content but rather because he doubted the need for such a provision. One of the consequences of including it was that it raised the question of dual

nationals, since it was not possible to include a rule on the non-expulsion of nationals without specifying whether it also applied to dual nationals. The Special Rapporteur’s response seemed to be that, on the basis of certain practice and doctrine, States could denationalize nationals so long as that did not render them stateless. The implication of that proposition was that it was possible to expel dual nationals so long as they were denationalized first. Since they would still have a nationality, they were not stateless, and would, as aliens, potentially be subject to expulsion.

54. Although the Commission could perhaps avoid that problem if, as Mr. Gaja had suggested, it did not include a draft article on the non-expulsion of nationals, he was not sure that the matter could be resolved that easily. As aliens were defined by reference to non-nationals, the question inevitably arose whether the right to expel an alien included the right to expel someone who had become an alien through denationalization or denaturalization. Hence, regardless of whether the draft articles included a provision on the non-expulsion of nationals, the Commission still had to address the limits on the power to denationalize, which was the basic issue in respect of dual nationals. Moreover, given the Special Rapporteur’s objective, as set out in his second report, of providing the Commission with as exhaustive a regime as possible on the expulsion of aliens,¹³⁷ it was not really an option to leave the question of dual nationals aside.

55. The question, then, was how far the Commission should go into the issues of dual and multiple nationality for the purposes of establishing such a regime. In his view, it had to go at least far enough to provide certain minimum protections, but without prejudice to the law relating to nationality. Ms. Escameia seemed to be suggesting that the Commission should take up the law relating to nationality as a separate topic.

56. In his view, the answers to that question were already set out in the Special Rapporteur’s fourth report. In order to provide a coherent treatment of rules on the non-expulsion of aliens in relation to dual or multiple nationals, two minimum principles had to be established. First, if the Commission included in the draft articles on expulsion of aliens a rule on the non-expulsion of nationals, then it had to supplement it with a rule prohibiting denationalization if such action led to statelessness. Although that provided a basic minimum level of protection, it also clearly implied that States could, in fact, denationalize. Difficult though it might be for some members to accept, there was no denying that denationalization occurred in practice. One could even consider the denial of nationality or the loss of nationality upon acquiring another nationality to be a form of denationalization since, even though it resulted from the individual’s own initiative, it still remained an act that took away his or her nationality.

57. While setting limits on denationalization might provide some degree of protection for sole nationals, a rule that prohibited denationalization only when it resulted in statelessness did not protect dual nationals; in fact, to some extent, it licensed denationalization.

¹³⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, p. 222, para. 9.

Accordingly, that rule needed to be supplemented by the second principle found in the Special Rapporteur's report, or at least by a variation of it, whereby a State could not denationalize an individual for the sole purpose of expulsion. The denationalization and expulsion of individuals considered to be a security threat might, in fact, violate that principle, but if the denationalization and subsequent expulsion of an individual resulted from his or her violation of the domestic law of the expelling State, then there seemed to be very little difference between denationalization as a result of committing a grave criminal offence and denationalization as a result of committing a security-related offence.

58. That was a variation on the Special Rapporteur's suggestion, based on the *Ethiopia/Eritrea* case, that denationalization should not be arbitrary or discriminatory. On balance, it therefore seemed better to include in the draft articles one principle prohibiting denationalization that led to statelessness and a second principle prohibiting denationalization for the sole purpose of expulsion. That suggestion did not, however, preclude the possibility of seeking to formulate better rules on the protection of dual nationals in the different context of a study of the law of nationality. All he was suggesting was that those were the minimum requirements to be included in the rules on expulsion of aliens in order to make the draft articles as exhaustive as possible. If no draft article on the non-expulsion of nationals was included, then all that would be needed was the rule prohibiting denationalization for the sole purpose of expulsion. Yet, so long as there was a draft article on non-expulsion of nationals, the other two principles, which were found in the Special Rapporteur's report, were necessary. It would not be sufficient merely to refer to them in the commentary.

59. Mr. KOLODKIN said that in paragraph 27 of his fourth report, the Special Rapporteur referred to cases involving the loss of nationality as "the consequence of an individual's voluntary act", whereas denationalization was "a State decision of a collective or individual nature". Paragraph 27 also contained a long list of States, including the Russian Federation, whose legislation allegedly contained rules prescribing the loss of nationality for individuals who acquired a foreign nationality. He wished to point out that there had never been a rule or a provision in the domestic law of the Russian Federation pursuant to which a Russian national lost his or her Russian nationality on acquiring another nationality. No such provision existed in the former law on citizenship of the Russian Federation of 1991,¹³⁸ to which the Special Rapporteur referred, nor in the 2002 law,¹³⁹ which was currently in force. Indeed, the current law contained a diametrically opposite provision, pursuant to which Russian citizens did not lose Russian nationality upon acquisition of another nationality. The information concerning former Russian legislation contained in the compendium published in the United States,¹⁴⁰ to which the Special Rapporteur referred in his report, appeared to be more or less correct;

however, it provided no grounds whatsoever for including the Russian Federation in the list of States contained in paragraph 27.

60. Like Mr. McRae, he had some doubts regarding the Special Rapporteur's hypothesis that the loss of nationality referred to in paragraph 27 differed in principle from denationalization. It was true that the acquisition of another nationality was, in many cases, a voluntary act; however, if the legislation of the State of which the person acquiring a foreign nationality was a national provided, in such cases, for the automatic denationalization of the individual or loss of the first nationality, then there appeared to be no clear distinction between loss of nationality and deprivation of nationality. In his view, that situation might be referred to as the "automatic deprivation of nationality".

The meeting rose at 11.40 a.m.

2973rd MEETING

Friday, 6 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candioti, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. NOLTE thanked the Special Rapporteur for his stimulating report. He agreed with certain parts of his analysis and, in particular, the concerns expressed in paragraphs 20 and 33 on the expulsion of persons to countries where their lives would be in danger.

2. The question whether a dual or multiple national was an alien in cases of dual or multiple nationality, as posed in chapter I, section A of the Special Rapporteur's fourth report (paras. 7–13), would take the Commission in a problematic direction. Nationals were not aliens, and that was not merely empty formalism. One purpose of establishing a clear distinction was to prevent States from creating different classes of nationals or citizens, as Mr. Petrič had pointed out. If States sometimes treated some of their nationals, for certain purposes, as if they were aliens, they either had a special justification or they were violating international law. Such exceptions could be justified only exceptionally, for example, if they were

¹³⁸ Law of the Russian Federation No. 1948-I of 28 November 1991 on the Citizenship of the Russian Federation.

¹³⁹ See footnote 134 above.

¹⁴⁰ United States Office of Personnel Management, Investigations Service, "Citizenship laws of the world", document No. IS-1 (March 2001), p. 184.

for the benefit of a class of persons, as when an individual was given the possibility of consular protection by the State of his or her dominant nationality against the State of his or her less dominant nationality. States could also limit the right of certain dual nationals to be elected to certain positions. There was, however, no State practice that could legitimize the treatment of dual nationals as aliens for the purpose of expulsion. The distinction between a dominant and a non-dominant nationality had its place in the law of diplomatic protection where it did not serve to determine the legal relationship between the individual and his or her State, but only the consequences of that legal relationship between two States which apparently had the same entitlement as protector.

3. The award of 17 December 2004 in the *Ethiopia/Eritrea* arbitration was not an example to the contrary. In that case, Ethiopia had applied a law according to which an Ethiopian national lost his or her Ethiopian nationality if he or she voluntarily acquired the nationality of another State. That rule existed in many countries and was legitimate under international law: a person could automatically lose his or her nationality and become an alien and thus be subject to expulsion. Admittedly, the example of the *Ethiopia/Eritrea* arbitration was somewhat misleading as the Ethiopian law in question had apparently not had the effect of *ipso jure* terminating the citizenship of the persons who had acquired Eritrean citizenship by registering to vote in the referendum. It had therefore been necessary to publish an implementing act, which had then had to be monitored to determine whether it was arbitrary. Moreover, as some members of the Commission had stressed, that case was exceptional in nature.

4. In any event, the mere fact that dual nationals had been expelled without first having been denationalized by the expelling State, as indicated in paragraph 10 of the report, did not prove that such a practice was legal. Its legality could not be established by the fact that the expellees might possibly return more easily to the country from which they had been expelled if they had not been stripped of their nationality. That rather hypothetical advantage was contrary to the very real protection offered by the requirement that a State must not arbitrarily deprive a person of his or her nationality before expelling him or her.

5. He could not agree with the two conclusions the Special Rapporteur had reached in paragraph 12 of his report because they were too broad, even if the Special Rapporteur's interpretation of the material he had collected was correct. Taken at face value, principle (a), according to which "[t]he principle of the non-expulsion of nationals does not apply to persons with dual or multiple nationality unless the expulsion can lead to statelessness", would mean that States could freely expel their nationals who just happened to be dual nationals. Dual nationals would thus be second-class citizens who would be more liable to expulsion. Principle (b), according to which "[t]he practice of some States and the interests of expelled persons themselves do not support the enactment of a rule prescribing denationalization of a person with dual or multiple nationality prior to expulsion", was not based on a sufficiently comprehensive assessment of the legitimacy of the practice of States and the interests of the persons concerned.

6. He was also not persuaded by chapter I, section B of the report (paras. 14–24) for the simple reason that it was based on the reasoning and conclusions of section A. Even if he were persuaded by section A, however, he would have doubts about section B because he could not accept the statement in paragraph 18 of the report that dual or multiple nationals could be more freely expelled by or between the States of their nationalities, regardless of the nature of their attachment to each of those States.

7. Chapter II of the report dealt with the circumstances under which a person lost or was deprived of his or her nationality and then became an alien. That question must be considered on the basis of the fundamental right provided for in article 15 of the Universal Declaration of Human Rights,¹⁴¹ which stated that no one could be arbitrarily deprived of his or her nationality and which had been applied by the Ethiopia–Eritrea Claims Commission. Contrary to what was suggested in paragraph 30 of the report, that Commission had not considered "expulsion on the ground of dual nationality" permissible, but had, rather, assumed that such expulsion would have been admissible if the expelled persons had lost their nationality in a non-arbitrary way. It had never considered the expulsion of nationals to be permissible, even in the case of dual or multiple nationality.

8. It was perhaps worthwhile to recall the context in which the right to a nationality and the right not to be deprived of a nationality had been recognized in article 15 of the Universal Declaration of Human Rights. The recognition of those guarantees at the international level had been much influenced by the fact that Nazi Germany had stripped its Jewish citizens of their nationality. In his view, that experience did not show only that persons should not be deprived of their nationality if that made them stateless. It would have been equally powerful if the German Jews had all had another nationality because it also showed that the deprivation of nationality could take place only in generally recognized or clearly reasonable exceptional circumstances. The Commission's work should not suggest otherwise.

9. Despite those reservations, he agreed with the Special Rapporteur's conclusion that there was no need for an additional draft article because the general prohibition of the expulsion of nationals would be enough. That prohibition applied equally to dual and multiple nationals. In order to avoid any misunderstanding, however, nothing would prevent the Commission from including a provision expressly indicating that denationalization could not take place for the purpose of expulsion.

10. Ms. JACOBSSON said that, like Mr. Niehaus, she was convinced that the Commission had to establish minimum parameters and regulations and, unlike the Special Rapporteur and some members of the Commission, that the question of dual nationals and deprivation of nationality as a prelude to expulsion must be dealt with in at least one draft article, for two main reasons. The first had to do with structural consistency. Draft article 4 on non-expulsion by a State of its nationals, as proposed in the third

¹⁴¹ General Assembly resolution 217 A (III) of 10 December 1948.

report on the expulsion of aliens,¹⁴² provided for exceptions to that general rule, and that “right of exception” was clearly spelled out in draft article 4, paragraph 2. That article, and that paragraph, in particular, had given rise to a major debate during which some members had expressed the view that the prohibition of the expulsion by a State of its own nationals was—and should be—absolute. Although the Commission had not taken a position on whether that prohibition was absolute, there was a clear link between the inclusion of that article, especially given the exceptions proposed by the Special Rapporteur, and the issue of dual or multiple nationality. If the question of the expulsion of dual or multiple nationals was not expressly dealt with, the result would be unbalanced and legal uncertainty even greater, not to mention the fact that it might give rise to an “unreflected” practice of States that would upset the balance between the right of a State to expel aliens and the interest and legal protection of the individual. The Special Rapporteur admitted that there was limited modern State practice, i.e. State practice which had taken place in parallel with growing acceptance of dual and multiple nationality, which took account of the increasing importance of human rights law and which reflected the *opinio juris* of States. There was a great risk that dual nationality situations might be seen as yet another legitimate derogation from the prohibition of expulsion by a State of its nationals and that would create two categories of citizens: those who had only one nationality and could not be expelled and those who had two or more nationalities and could be expelled from one of their “mother countries”. That was not an acceptable legal consequence.

11. The Special Rapporteur correctly pointed out that recognition of dual or multiple nationality was a relatively recent trend. It was a trend that would continue and could not be reversed, not only on account of globalization, but also because of underlying factors that had made globalization possible, such as modern technology and, primarily, the development of human rights, democracy, freedom of movement and freedom of trade. In that context, it was particularly important to analyse the situation of women who, for one reason or another, had more than one nationality, since more than half the world’s adult population might be particularly vulnerable if there was no clear-cut prohibition of dual and multiple nationals. For such women, it was of the utmost importance that each nationality should offer the same protection as the others. There must be no grading of nationalities.

12. If the Commission did not address that issue at all, there was a great risk that it would be criticized for working in an ivory tower and for not having grasped the effects of the increasingly accepted trend towards dual or multiple nationality. From a legal point of view, it was unsatisfactory not to address the legal implications of this trend and not to draw conclusions from its relationship with the law of human rights. As stated by Mr. Gaja, the issue should not be buried.

13. In conclusion, she stressed that there were two elements that must be made clear in the Commission’s work

on the expulsion of aliens: first, the rights of dual or multiple nationals were no different from those of individuals who had only one nationality; and, second, denationalization for the purpose of facilitating expulsion was and should be prohibited. She believed that this had been the essence of the statement by Ms. Escameia and a number of other members of the Commission. If that was the Commission’s sentiment, she did not see why it should not be included in a draft article.

14. Mr. PERERA recalled that, at the fifty-ninth session, he had said that the question of dual nationality should be discussed in the context of the topic under consideration, particularly the non-expulsion of nationals,¹⁴³ and he welcomed the fact that the report submitted by the Special Rapporteur had given rise to a very full debate. Like Mr. McRae and other members, he thought that the Commission should establish a fundamental rule offering a minimum degree of protection to dual nationals in the form of a prohibition of denationalization for the sole purpose of expulsion. As Ms. Jacobsson had said, it was better to discuss that question than to set it aside.

15. Mr. FOMBA said that the Special Rapporteur had made an excellent analysis of the main legal problems under consideration by basing his arguments on the need to strike a balance between the interests of the State and those of the individual, the distinction between nationals and aliens, the concern to understand the legal consequences of that distinction, the well-established rule of the non-expulsion of nationals and the cases where that rule would, might or should logically apply, if only with a view to the possible progressive development of international law. He therefore fully agreed with the Special Rapporteur’s approach and the arguments underlying it, as well as with the conclusions he had reached. Some members had said that they were somewhat perplexed about the notion of “dominant nationality”, even though it was well established in law, as had been recalled, or that it came within the field of private international law, an argument that was all the more irrelevant in that article 1, paragraph 2, of the Commission’s Statute did not preclude it from entering that field. While some members thought that no distinction should be made between nationals, whether they had one or more nationalities, and that the same rule should be applied to them, he had some doubts in that regard and was of the opinion that what were involved were situations that were not legally and factually the same. Other members had said that an obligation of denationalization should not be imposed as a prelude to expulsion. Even if that idea was logically conceivable, it would be contrary to the rule of non-expulsion and might go against the interests of the individual from the viewpoint of his protection. With regard to the criticism of the documentation and sources used by the Special Rapporteur and, in particular, the special nature of the *Ethiopia/Eritrea* case, it must not be forgotten that the Special Rapporteur had to make do with the means available to him.

16. In conclusion, he said that he had initially been in favour of the formulation of draft articles and had been convinced by the Special Rapporteur’s sound arguments, but he proposed that the Commission should think about

¹⁴² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 121.

¹⁴³ *Yearbook ... 2007*, vol. I, 2942nd meeting, p. 178, para. 21.

other possible solutions, such as draft guidelines or recommendations to be included in an annex, the question being whether they would serve a practical purpose.

17. Mr. VÁZQUEZ-BERMÚDEZ said that, in its articles on the nationality of natural persons in relation to the succession of States, the Commission had reaffirmed that “nationality is essentially governed by internal law within the limits set by international law” and that the development of human rights standards after the Second World War had imposed new international obligations on States in respect of nationality.¹⁴⁴ In that context, it was not possible, either directly or indirectly, to compromise fundamental principles such as the right of individuals to a nationality, the prohibition of the expulsion of nationals and the prohibition of arbitrary deprivation of nationality, which were embodied in international human rights instruments of a universal and regional nature, including article 15 of the Universal Declaration of Human Rights, articles 20 and 22 of the American Convention on Human Rights: “Pact of San José, Costa Rica” and article 3 of Protocol No. 4 to the European Convention on Human Rights.

18. Deprivation of nationality for the purpose of circumventing the prohibition on expelling nationals was clearly contrary to international law, and a State could not just make it a simple procedural matter. The prohibition on expelling nationals did not depend on the number of nationalities or on whether a nationality was dominant. The concept of dominant nationality was, moreover, nothing new, as Mr. Pellet had pointed out, since it was recognized in the set of articles on diplomatic protection. However, it must be specified that its purpose was to enable a State to act on behalf of its national in order to guarantee his protection from another State of which he or she was also a national; it could in no case be extrapolated to another context and used against a dual or multiple national to facilitate his or her denationalization with a view to his or her expulsion on the grounds that his or her dominant nationality was the other nationality.

19. With regard to the countries listed in paragraph 27 under the heading of “Loss of nationality”, the inclusion of Ecuador might give rise to confusion as far as the provisions of the Constitution were concerned, because paragraph 26 implied that Ecuador prevented its nationals from holding another nationality or that they lost their Ecuadorian nationality if they acquired another nationality, while the related footnote implied that Spain was the only exception. However, since the 1995 constitutional reform, Ecuadorians kept their nationality if they acquired a new nationality, just as the nationals of another State did if they acquired Ecuadorian nationality.

20. The CHAIRPERSON said that the discussion had been extremely interesting and productive, like the report the Special Rapporteur had submitted. All members of the Commission seemed to agree with at least some of its conclusions. The majority considered that it was neither necessary nor relevant to formulate a draft

rule concerning the expulsion of holders of dual or multiple nationality. At the very most, as Mr. McRae had proposed, an explicit rule could be drafted prohibiting denationalization for the purpose of expelling someone. Although he agreed with many of the Special Rapporteur’s opinions, he did have doubts about the conclusion reached in paragraph 12 (a) of his report, since the principle of non-expulsion of nationals was provided for in international law, regardless of the origin of the nationality. As to the considerations relating to the dominant nationality, although that concept existed in international law and applied mainly in the area of diplomatic protection, it was not relevant in the case of the expulsion of nationals, as Mr. Vázquez-Bermúdez had pointed out, because it had been designed to protect persons in time of conflict and certainly not for other purposes. There was no rule making it possible to invoke the dominant nationality in a situation contrary to international law. As Ms. Escameia and Mr. Nolte had rightly noted, the practice of some oppressive regimes of expelling dissident nationals was contrary to law and, in that regard, the Commission must reaffirm the right to a nationality provided for in the Universal Declaration of Human Rights. In the case of dual nationals, it could not be considered that deprivation of nationality was a prelude to expulsion: such deprivation could only be exceptional and reserved for very grave situations, as in the event of armed conflict and doubts about a person’s loyalty to his or her country. Nationality was a fundamental human right deriving from the Universal Declaration of Human Rights and provided for in other international instruments. As Earl Warren, former Chief Justice of the United States Supreme Court, had said in *Perez v. Brownell*, having a nationality was having “the right to have rights”, and that fundamental principle must be preserved.

21. Mr. KAMTO (Special Rapporteur), summing up the discussion, thanked the members who had taken part in the debate on the fourth report, which dealt with a very specific question that he had agreed to look into in greater depth, namely, the expulsion of persons with two or more nationalities. In that connection, he pointed out that criticism was always welcome, but, in order to be helpful, it must be levelled in legal, not subjective, terms, and have a basis in law. He also apologized to Ecuador and the Russian Federation for the incorrect information on their practice in respect of dual nationality, which had been taken from an official United States document entitled “*Citizenship laws of the world*”.¹⁴⁵

22. It appeared from the discussion that several members generally agreed with his conclusions, while others would prefer to have one or two draft articles on the question or at least deal with it in the commentary. He was not sure that his approach had been clearly understood: it was that the principle of the prohibition of the expulsion of dual nationals did not exist as an explicit rule of international law. The question was thus whether the rule applicable to persons who had one nationality could be extended to those who had two or more nationalities. In other words, for the purpose of expulsion, was there a difference between such persons?

¹⁴⁴ *Yearbook ... 1999*, vol. II (Part Two), chap. IV, sect. E, para. 48, p. 23 (Preamble of the draft articles) and p. 24 (para. (4) of the commentary thereto).

¹⁴⁵ See footnote 140 above.

23. If there was no difference, the study of the question was unnecessary, since the rule of the non-expulsion of nationals could simply be stated without any need to go into detail concerning dual, multiple and dominant nationality; that would be splitting hairs. If the applicable rule was the non-expulsion of nationals regardless of the number of nationalities they held, draft article 4, paragraph 2, could be deleted. However, if, as Mr. McRae had said, the Commission could not state that rule without referring to persons with more than one nationality, it could go even further and delete draft article 4 as a whole and deal with the question of expulsion in relation to aliens only without any reference to nationals, dual nationals or multiple nationals. The rule of the non-expulsion of nationals was so well established in international law that he had considered it useful to refer to it in the draft articles. The purpose of the paragraph 2 he was proposing was to leave a door open to the few exceptions to that rule that existed in State practice. It was now up to the Commission to decide whether it wanted to take account of those exceptions or establish an absolute rule from which there could be no derogations.

24. He stressed that the award by the Eritrea–Ethiopia Claims Commission had been based primarily on the common law and on English law, in particular. In any event, that award could be criticized, but not underestimated. The International Law Commission could not presume to assess the decisions of international courts. The concept of effective or dominant nationality was well established in nationality law. As far back as 1954, the Special Rapporteur on the elimination or reduction of statelessness,¹⁴⁶ Roberto Córdova, had proposed a draft article on that question and, as Mr. Pellet had recalled at the preceding meeting, the Commission itself had discussed it in connection with diplomatic protection. In Córdova's view, persons with two or more nationalities should be deprived of those nationalities and keep only their effective nationality: "If, by application of the nationality laws of the Parties, a person has two or more nationalities, such person shall be deprived of all but the effective nationality that he possesses, as hereinafter defined, and his allegiance to all other States shall be deemed to have been severed."¹⁴⁷ With regard to deprivation of nationality, he had written:

Deprivation of nationality by unilateral action of the State has been considered as a violation of an accepted principle of international law, since such deprivations, especially if applied on a large scale, will or may entail mass emigrations and, consequently, they may not only impose undue hardship on human beings, but also inundate foreign States with aliens. However, the principle is not respected by most modern legislation and it cannot be considered as an accepted tenet of international law.¹⁴⁸

As to multiple nationality, he had concluded, citing Frédéric-Henri Hool, that "from the point of view of 'international order', it is desirable that each person should possess a nationality, but only one, and that dual nationality is an anomaly and the source of numerous conflicts and difficulties".¹⁴⁹

25. A draft article providing that a State could not denationalize one of its nationals if it thus made him stateless would not add anything to contemporary law, since that rule already existed in the Convention on the reduction of statelessness. Mr. McRae had proposed that it should be stated more specifically that a State could not denationalize its nationals for the sole purpose of expulsion, but admitted that there were exceptional cases and that a distinction should therefore be made in event of expulsion for a crime or an offence, for example. He personally thought that there would be no basis for such a rule in international practice. The fact of the matter was that, at present, many States, particularly European States, denationalized in order to expel. Moreover, a single draft article on the question would not be sufficient, or it would have to be very long, because, as some members had suggested, the criteria for denationalization would have to be listed. One solution might be the proposal by Mr. Gaja that it should be mentioned in the commentary to draft article 4 that States must not, in so far as possible, denationalize for the purpose of expulsion and that, when they did so anyway, certain criteria should be respected, such as those of their internal law and others defined by the Commission.

26. In conclusion, he said that he was prepared to follow any guidelines the Commission might wish to give him, but he was still not convinced of the need for or the advisability of a draft article on the question. He did not see on what basis an explicit rule prohibiting the denationalization of persons with two or more nationalities could be established and was of the opinion that the Commission would be deviating from the topic if it dealt with nationalities in a draft article on the expulsion of aliens. It should either say as little as possible and content itself with draft article 4, possibly without paragraph 2, thereby ignoring practice, or recall in the commentary—and that it could certainly do—that States violated international law if they expelled nationals.

27. The CHAIRPERSON asked whether the Commission wished to entrust the Drafting Committee with the task of preparing one or more draft articles or follow the recommendation of the Special Rapporteur, who was not in favour of that idea.

28. Ms. ESCARAMEIA said that she was not sure whether the Commission could entrust such a task to the Drafting Committee if it did not even have an outline of a draft article. She thought it would be better to set up a working group. If time permitted, it would also be helpful to consult States.

29. Mr. WISNUMURTI said that he agreed with the Special Rapporteur's proposal that the prohibition of the expulsion of aliens should be dealt with in the commentary to draft article 4.

30. Ms. JACOBSSON said that too many points had been raised to deal with in the commentary. If the Commission's procedure allowed the question to be referred to the Drafting Committee for the preparation of a draft article even without a prior basis, that would be the best solution. Otherwise, a working group should be set up.

¹⁴⁶ *Yearbook ... 1954*, vol. II, document A/CN.4/81.

¹⁴⁷ *Ibid.*, document A/CN.4/83, p. 49 (Basis 2).

¹⁴⁸ *Ibid.*, document A/CN.4/84, p. 61, para. 38.

¹⁴⁹ *Ibid.*, p. 111, para. 383.

31. Mr. NOLTE said that he agreed with Ms. Jacobsson. Mr. McRae's proposal, with which several members agreed, should be taken into consideration, either by the Drafting Committee or else by a working group. If the idea of a draft article on the prohibition of the expulsion of nationals was adopted, that prohibition would have to be explained and it would have to be specified whether it applied to dual nationals.

32. Mr. KAMTO (Special Rapporteur) said that he did not see why draft article 4 was not clear enough. The rule it embodied—the prohibition of the expulsion by a State of its own nationals—was an established one, both by international instruments and by practice, whereas the prohibition of denationalization for the purpose of expulsion had no basis in treaty or customary law, and State practice even went in the opposite direction. The United Kingdom, for example, was considering a bill making it possible to deprive of their nationality, for the purpose of expulsion, persons who had preached radical sermons in mosques and, in France, there had been at least two cases where Franco-Algerian dual nationals had been expelled for the same reasons. That was why the Commission should refrain from establishing an explicit rule—unless it wished to engage in the progressive development of international law.

33. He was not opposed to the idea of establishing a working group, but he did wish to make it clear that, as Special Rapporteur, he did not intend to deal with questions of nationality because that was not the topic that had been entrusted to him or the topic that had been agreed on by States in the Sixth Committee.

34. Mr. McRAE said that the Commission could adopt innovative methods, even if there was no precedent in its practice, provided that it was expedient. He was not sure that he had understood what the Special Rapporteur had meant in the commentary to draft article 4. He wondered, for example, whether there were plans to include minimum criteria for the expulsion of a national. It would be helpful to have some explanations on the Special Rapporteur's position before possibly abandoning the idea of having a draft article on the question.

35. Mr. GAJA said that he supported Ms. Escameia's proposal that a working group should be set up. The Commission not only did not have a draft article to refer to the Drafting Committee, but there was also no consensus on the content of any such draft article. Solving those problems in a working group would help allay the Special Rapporteur's concerns.

36. Mr. PETRIČ said that, at the current stage, it might be useful to prepare a draft article along the lines of the one Mr. McRae had proposed. The Commission could then decide either to keep it or to explain its content in the commentary. He was therefore in favour of the establishment of a working group.

37. Mr. SABOIA said that he was in favour of the establishment of a working group, which could discuss the question without prejudging the existence of a future draft article.

38. Mr. VASCIANNIE said that the two questions of the expulsion of dual nationals and the denationalization by a State of its nationals for the purpose of expulsion were closely linked to the question of the expulsion of aliens. He was therefore in favour of the establishment of a working group to consider them.

39. The CHAIRPERSON said that, following informal consultations, a consensus had been reached on the idea of establishing a working group which would be chaired by Mr. McRae and whose composition and mandate would be decided at the Commission's next session. If he heard no objection, he would take it that the Commission so agreed.

It was so decided.

Effects of armed conflicts on treaties (continued)*
(A/CN.4/588, sect. D, A/CN.4/589 and Corr.1, A/CN.4/592 and Add.1, A/CN.4/L.721, A/CN.4/L.726, A/CN.4/L.727/Rev.1 and Add.1)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

40. The CHAIRPERSON invited Mr. Caflisch to speak on behalf of Mr. Comissário Afonso, the Chairperson of the Drafting Committee, to introduce the text of the draft articles on the effects of armed conflicts on treaties, as provisionally adopted on first reading by the Drafting Committee on 4 June 2008 (A/CN.4/L.727¹⁵⁰).

41. Mr. CAFLISCH said that, at the preceding session, the Commission had referred draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report,¹⁵¹ to the Drafting Committee, together with draft article 4, as proposed by the Working Group on the effects of armed conflicts on treaties.¹⁵² At the current session (see 2968th meeting above, para. 10), it had referred draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14, as proposed by the Working Group, as well as draft articles 12 and 13, as proposed by the Special Rapporteur, to the Drafting Committee. The Drafting Committee had also had before it a set of policy guidelines prepared by the Working Group at the preceding session and at the current session.

42. The Drafting Committee had held four meetings on 29 May, 2, 3 and 4 June 2008 and had completed the first reading of 18 draft articles on the effects of armed conflicts on treaties. With regard to draft article 5, the Special Rapporteur would prepare during the intersession an annex containing a list of categories of treaties to which draft article 5 would apply that would be submitted to the Commission when it resumed its work in July 2008. The adoption of the draft articles by the Commission at the present stage would allow the Special Rapporteur sufficient time to prepare the commentaries.

* Resumed from the 2968th meeting.

¹⁵⁰ The wording of the draft articles in this document was subsequently revised and published on 31 July 2008 in document A/CN.4/L.727/Rev.1.

¹⁵¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578.

¹⁵² *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324.

43. Before turning to the substance of the draft articles, he recalled that, in its report (A/CN.4/L.726), the Working Group had noted that the Drafting Committee should consider not only the suspension or termination of a treaty, but also the possibility that a party might withdraw from certain types of treaties (see 2968th meeting above, para. 5) as a consequence of the outbreak of armed conflict. The Drafting Committee had considered that possibility in relation to a number of draft articles, while recognizing that withdrawal had not been a major element of practice and doctrine, considerations relevant to withdrawal were not necessarily the same as for termination or suspension and withdrawal therefore had to be mentioned only where appropriate.

44. Structurally, the draft articles could be divided into several clusters: draft articles 1 and 2 were introductory in nature and dealt with scope and use of terms. Draft articles 3, 4 and 5 were the core provisions of the text and reflected the underlying foundation of the draft articles of favouring legal stability and continuity. Draft articles 6 and 7 extrapolated a number of basic legal guidelines from the basic principles embodied in draft articles 3 to 5. Draft articles 8 to 12 dealt with various ancillary aspects of termination, withdrawal and suspension. Draft articles 13 to 18 related to a number of miscellaneous issues and included some saving clauses.

45. Draft article 1 (Scope) showed that the point of departure for the formulation of the draft articles was article 73 of the 1969 Vienna Convention, which stated that the provisions of the Convention did not prejudice any question that might arise in regard to a treaty, *inter alia*, from the outbreak of hostilities between States. The draft articles under consideration thus applied to the effects of an armed conflict on treaties between States. That wording was based on article 1 of the 1969 Vienna Convention.

46. Bearing in mind the proposal by the Working Group, the Drafting Committee had amended the draft article by adding the following words at the end of the sentence: “where at least one of the States is a party to the armed conflict”. The Working Group had recommended that addition in order to indicate that the draft articles were also to cover the position of third States parties to a treaty in relation to a State involved in an armed conflict. The draft articles thus dealt with three scenarios: (a) the treaty relations between two States engaged in an armed conflict; (b) the treaty relations between a State engaged in an armed conflict and a third State not party to that conflict; and (c) the effect of an internal armed conflict on the treaty relations of the State in question with third States.

47. The Drafting Committee had decided, on the Working Group’s suggestion, that the question of the effect on treaties involving international organizations should not be considered in the draft articles at the present stage.

48. Draft article 2 (Use of terms) defined two key terms used in the draft articles. Subparagraph (a) defined the term “treaty” and reproduced the wording of article 2, paragraph 1 (a), of the 1969 Vienna Convention. Subparagraph (b) of the draft article, which defined the term “armed conflict”, was based on the version initially proposed by the Special Rapporteur, with some refinements,

in turn based on the resolution on that topic adopted in 1985 by the Institute of International Law.¹⁵³ There had been no intention of providing a definition of armed conflict for international law generally because that would have been difficult and beyond the scope of the topic. Instead, the proposed definition was intended as a working definition which applied to treaty relations between States parties to an armed conflict or between one of those States and a third State. The wording adopted, particularly the reference to “between a State party to the armed conflict and a third State”, was intended to cover the effects of an armed conflict which might vary according to circumstances. It thus also covered the situation where the armed conflict affected the operation of a treaty only with regard to one of the parties to that treaty, and it recognized that an armed conflict could affect the obligations of the parties to the treaty in different ways. It also served to include the possible effects of an internal armed conflict on a treaty with a third State within the scope of the draft articles.

49. Some members of the Drafting Committee had been of the opinion that the definition of armed conflict had an element of circularity to it in the sense that it sought to define armed conflicts by reference to conflicts “likely to affect” treaties, when such likelihood was established by the draft articles. The Drafting Committee had dealt with that issue by making it clear that the effect on the “application” of the treaty was the subject matter of the draft articles.

50. With regard to the requirement of intensity implied in the words “which by their nature or extent”, an element of flexibility had been introduced in the draft articles to take account of the wide variety of historical situations. Thus, in some cases, it could be said that the level of intensity was less of a factor, for example, in relation to low-level conflict in a border region which, despite the low level of intensity, drastically affected the application of bilateral treaties regulating the control of border traffic. The Drafting Committee had recognized that there were historical situations where the nature and extent of the armed conflict did have a bearing on the application of treaties.

51. The Drafting Committee had considered a proposal to make the inclusion of internal armed conflict more explicit, but had decided against doing so in order not to refer to specific factual scenarios in the draft articles and, accordingly, run the risk of a *contrario* interpretations excluding other scenarios. The commentaries would provide examples of a wide range of possibilities, including the situation where an entirely internal armed conflict had an effect on a treaty with a third State, the specific case of blockades and the situation of occupation during an armed conflict.

52. Draft article 3 (Non-automatic termination or suspension), the title of which remained unchanged, was of overriding significance. It established the basic principle of legal stability and continuity. It incorporated the key developments in the resolution of the Institute of International Law of 28 August 1985, which had shifted the legal position in favour of a regime establishing a presumption that the outbreak of armed conflict did not as such cause

¹⁵³ Institute of International Law, *Yearbook*, vol. 61, part II (session of Helsinki 1985), Paris, Pedone, 1986, pp. 278–282.

the suspension or termination of a treaty. At the same time, the Drafting Committee had recognized that it was not easy to reconcile the principle of stability, as stated in draft article 3, with the fact that, in practice, the outbreak of armed conflict did have the result of terminating or suspending treaty obligations.

53. The Drafting Committee had considered whether the word “necessarily” should be replaced by the word “automatically”, but had decided against that idea, since the word “necessarily” was closer to the term “*ipso facto*”, which the Special Rapporteur had used in his initial proposal,¹⁵⁴ on the basis of article 5 of the resolution of the Institute of International Law. It had refined the text to make it more consistent with that of draft article 2 by clarifying in subparagraph (a) that what was being referred to was “States parties” to the armed conflict and in subparagraph (b) that what was covered was the operation of treaties between a “State party” to an armed conflict and a third State.

54. The Drafting Committee had decided not to include the possibility of withdrawal from a treaty in draft article 3, since withdrawal involved a conscious decision by a State, whereas draft article 3 dealt with the automatic application of the law.

55. Draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties) followed from the content of draft article 3. The outbreak of armed conflict did not necessarily put an end to or suspend the operation of a treaty. It was another key provision of the draft articles, based on the reformulation prepared by the Working Group, which had replaced the initial reference to the “intention of the parties” by a number of specific indicia to be taken into account when considering the susceptibility of treaties to suspension or termination. The only change to the *chapeau* had been the addition of the withdrawal of a party as one of the possibilities open to States parties to an armed conflict. The question of withdrawal in draft article 4 provided an appropriate context for its inclusion in subsequent ancillary draft articles.

56. With regard to the indicia listed in subparagraphs (a) and (b), the Drafting Committee had considered proposals to replace the word “indicia”, but had decided to retain it in order to avoid any implication that they were established requirements. They were to be viewed as mere indications of susceptibility which would be relevant for particular cases depending on the circumstances. The Drafting Committee had also considered that the indicia listed in subparagraph (b) were not to be seen as exhaustive. It should be recalled that articles 31 and 32 of the 1969 Vienna Convention, as referred to in subparagraph (a), themselves contained a number of indicia to be taken into account.

57. The Drafting Committee had considered a proposal that the legality of the use of force was also one of the factors to be taken into consideration in draft article 4, but

it had decided to resolve that matter in the context of draft articles 13 to 15. It had also considered that it could not be assumed that the effect of armed conflict between parties to the same treaty would be the same as that on treaties between a party to an armed conflict and a third State. It had decided that this aspect would be dealt with in the commentary. It had discussed a number of formulations for the title, but had settled on the version initially proposed by the Special Rapporteur with the inclusion of a reference to withdrawal and the deletion of the words “in case of armed conflict”, which were superfluous.

58. Draft article 5 (Operation of treaties on the basis of implication from their subject matter) was a new provision, but it had its origins in former draft article 7, as proposed by the Special Rapporteur. The reference to “necessary” implication, as contained in the original text, had been deleted in order to avoid any possible contradiction with draft article 4. In addition, the initial reference to “object and purpose” had been replaced by “subject matter”, on the recommendation of the Working Group. At the end of the English text of the draft article, the word “inhibit” had been replaced by the word “affect”, which was more in line with the language used in the draft articles. The original draft article 7¹⁵⁵ had included a list of categories of treaties whose subject matter had involved the necessary implication that they would continue to be applicable during an armed conflict. The Working Group had recommended that the list should be appended to the draft articles. The Drafting Committee had decided that the content of former draft article 7, paragraph 1, should be adjusted and placed after draft article 4 as new draft article 5. A proposal to include it as an additional paragraph in draft article 4 had not been adopted, as it would have affected the balance of that draft article. In addition, the Drafting Committee had agreed to include an annex containing a list of categories of treaties whose subject matter involved the implication that they continued to apply in time of armed conflict, based on the list contained in the Special Rapporteur’s initial proposal for former draft article 7, paragraph 2. However, the consideration of those categories of treaties, including an exposition of State practice, would be reflected in the commentary to draft article 5. It had been understood that, in the preparation of the annex, account would be taken of the preferences expressed by States in the debate in the Sixth Committee and by members of the Commission in plenary. The Drafting Committee had, however, not had an opportunity to discuss the categories to be included in the annex. As indicated earlier, the Special Rapporteur would prepare a proposal for that annex that would be submitted to the Drafting Committee at the second part of the Commission’s current session. He drew the Commission’s attention to the footnote at the end of draft article 5, which referred to the annex.

59. Draft article 6 [5 *bis*]¹⁵⁶ (Conclusion of treaties during armed conflict) and draft article 7 [5] (Express provisions on the operation of treaties) should be read in

¹⁵⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, p. 216, paras. 24–28. Regarding the use of the terms “*ipso facto*” or “necessarily”, see also *Yearbook ... 2005*, vol. II (Part Two), pp. 30–31, paras. 142–148 and *Yearbook ... 2007*, vol. II (Part Two), pp. 72–73, paras. 289–291.

¹⁵⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, pp. 220–228, paras. 62–118.

¹⁵⁶ The number between square brackets refers to the corresponding article in the third report of the Special Rapporteur (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578) and in the report of the Working Group (A/CN.4/L.726).

sequence. They had been included to preserve the principle *pacta sunt servanda*, and they were in line with the basic policy of the draft articles, which was to ensure the legal security and continuity of treaties. Those two draft articles reflected the fact that, in time of armed conflict, States could have dealings with one another.

60. Draft article 6 contained two paragraphs. Paragraph 1 reflected the basic principle that an armed conflict did not affect the capacity of a State party to that conflict to enter into treaties. That provision had initially been draft article 5 *bis*, after what had now become draft article 7. The Drafting Committee had nevertheless decided to reverse the order of the two draft articles, since draft article 6, paragraph 1, dealt with a potential treaty, while draft article 7 referred to an existing treaty.

61. It had been proposed that it should be specified that what was meant was the “legal” capacity of States. The Drafting Committee had considered that, even if, technically speaking, the provision dealt with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect of a conflict on the treaty itself, it would be useful to retain the paragraph in the draft articles. The text had been further refined to refer to the capacity of “a State party to that conflict” in order to indicate that there might be only one State party to the armed conflict, as in situations of internal armed conflict. The Drafting Committee had also considered, but had not accepted, a proposal that the draft article should be deleted and reflected in the commentary.

62. Paragraph 2 had its origin in the Special Rapporteur’s initial proposal for draft article 5, which the Drafting Committee had divided into two provisions: one had been included in draft article 6 and the other had remained in draft article 7. It dealt with the practice of States parties to an armed conflict which expressly agreed during the armed conflict to suspend or to terminate a treaty which was operative between them.

63. Draft article 7 [5] (Express provisions on the operation of treaties) stated the general rule that, where a treaty expressly so provided, it continued to operate in situations of armed conflict. It had been noted that the draft article was based on a substantial amount of doctrine and practice which recognized the possibility of concluding lawful agreements even in time of armed conflict.

64. The Drafting Committee had considered that draft article on the basis of a proposal by the Special Rapporteur which contained two ideas: (a) the continued operation in time of armed conflict of a treaty in accordance with its own express terms; and (b) the possibility that the States parties to the treaty might subsequently agree, during the armed conflict, to suspend or to terminate the treaty. The Drafting Committee had finally decided to separate the two concepts, keeping the first as the subject of draft article 7 and the second as paragraph 2 of draft article 6.

65. With regard to the wording of draft article 7 [5], the Drafting Committee had proceeded on the basis of a proposal focusing on the fact that the “operativeness” of the treaties under consideration was not affected by a conflict. That proposal had been further refined to become the text

now before the Commission. Initially, the provision had referred to the continuation “in force” of the treaty. The Drafting Committee had decided to use the term “operate”, since the emphasis should be placed not on whether the treaty remained in force or was potentially applicable, but on whether it was actually operational in the context of armed conflict.

66. The Drafting Committee had also considered whether it should retain the reference to the treaty “expressly” providing for continuation during an armed conflict. One member had been of the opinion that such a qualifier was unnecessarily limiting, since there were treaties which, although not expressly so providing, continued in operation by implication. However, the Drafting Committee had decided that, on balance, a stricter formulation which clearly covered only treaties containing such an express provision should be retained and that draft articles 4 and 5 should be left to cover treaties which, by necessary implication, continued in operation. Other proposals had called for the deletion of that provision, as it was purely expository in nature, or its inclusion as an additional subparagraph of draft article 4.

67. Draft article 8 (Notification of termination, withdrawal or suspension) established a basic duty of notification of the withdrawal of a party or the termination or suspension of a treaty. The text adopted was substantially the same as the one worked out by the Working Group on the basis of article 65 of the 1969 Vienna Convention, as adapted to the context of armed conflict. The intention behind draft article 8 was to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, but not to go further. In other words, in such situations, there would be a dispute that would remain unresolved, at least until the end of the conflict. The Drafting Committee had thought that it was not feasible to maintain a fuller equivalent of article 65, as it was illusory to want to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.

68. In paragraph 1, the Drafting Committee had aligned the text with the 1969 Vienna Convention, replacing the word “wishing” by the word “intending” and adding the words “of that intention” at the end in order to specify what the object of the notification was. It had also considered the possibility of using the words “of its claim”, as in the Convention, but had decided not to do so in order to distinguish that procedure more clearly from the one provided for in article 65 of the Convention. It had considered a proposal to replace the words “or its depositary” by the words “and its depositary” or to delete the words “other States”. However, it had finally retained the text as originally proposed, since it was the function of the depositary to notify the parties. It was aware, of course, that there were treaties that did not have depositaries. The possibility of notifying either the States parties or the depositary therefore had to be provided for in paragraph 1. However, with regard to the taking of effect of the notification, what was important was the moment at which the other State party or parties received the notification, and not the moment at which the depositary received the notification. Hence, no reference to the depositary was made in paragraph 2.

69. As to the wording of paragraph 2, the Drafting Committee had considered a proposal to specify that it was the “termination, suspension or withdrawal” which took effect upon receipt of the notification. It had, however, decided to retain the reference only to the “notification” taking effect, since the adoption of the proposed amendment would have had the effect of indicating that the termination, suspension or withdrawal of a party would take effect immediately upon receipt, whereas paragraph 3 provided that a party to the treaty retained the right to object to termination.

70. The initial proposal relating to paragraph 3 had referred to objection to “such” termination, withdrawal or suspension, thereby suggesting that the termination, withdrawal or suspension had already taken place by virtue of the notification, contrary to what was intended in paragraph 2. The intention of the paragraph was to preserve the right that might exist under a treaty or general international law to object to termination, suspension or withdrawal. Hence, the objection was to the intention to terminate, suspend or withdraw, as communicated by the notification provided for in paragraph 1. Proposals for refinement had included referring to “intention”, “claim”, “any attempt” and “purported termination, withdrawal or suspension”. The solution the Drafting Committee had settled on was simply to remove the word “such” to indicate that the objection was to the proposed termination, withdrawal or suspension, but without suggesting that the termination, withdrawal or suspension had already occurred. Those issues would be discussed more fully in the commentary.

71. Draft articles 9 to 11 sought to establish a modified regime modelled on articles 43 to 45 of the 1969 Vienna Convention. Draft article 9 [8 *bis*] (Obligations imposed by international law independently of a treaty), based on a proposal by the Working Group, derived from article 43 of the Convention. Its purpose was to preserve the requirement of the fulfilment of an obligation under general international law where that obligation appeared in a treaty which had been terminated or suspended or from which the State party had withdrawn as a consequence of an armed conflict. The latter point, i.e. the linkage to the armed conflict, had been added by the Drafting Committee in order to put the provision into its proper context for the Commission’s purposes. The words “as a result of the application of the present draft articles or of the provisions of the treaty”, which had been included in the earlier version on the basis of the text of article 43 of the 1969 Vienna Convention, had been considered unnecessary and had been deleted. The Drafting Committee had considered proposals that the words “independently of that treaty” should be deleted or replaced by the words “general international law”, but had finally decided that it was better to retain that aspect of the wording of the Convention.

72. Draft article 10 [8 *ter*] (Separability of treaty provisions) had been prepared by the Working Group during the current year on the basis of article 44 of the 1969 Vienna Convention.

73. The Drafting Committee had first considered the concern that the initial version of the *chapeau*, which was based on its counterpart in article 44 of the 1969 Vienna Convention, gave the impression that the ancillary rule

was that the entire treaty was either terminated or suspended. It had been noted that the issue of the effect of armed conflict was different from that envisaged in the Convention, since there was practice whereby the effect of an armed conflict on some treaties was only partial. To have it otherwise would suggest that the effect was always on the treaty as a whole. Suggestions on how to solve that problem had included deleting the draft article and adding a paragraph to draft article 4 indicating that, in some cases, the effect of an armed conflict on a treaty could be partial or referring in the *chapeau* of draft article 4 to “a treaty or provisions of a treaty”. The Drafting Committee had nevertheless decided to retain draft article 10 as it stood, but to deal with the matter by means of a reformulation of the *chapeau*, which no longer emphasized the pre-existence in the treaty of a right to terminate, withdraw from or suspend. It had seen no need to amend subparagraphs (a) to (c), which reproduced the exact wording of the corresponding subparagraphs of article 44 of the 1969 Vienna Convention.

74. Draft article 11 [8 *quater*] (Loss of the right to terminate, withdraw from or suspend the operation of a treaty) was also based on the equivalent provision of the 1969 Vienna Convention, namely, article 45. An express reference to the context of an armed conflict had been added to the *chapeau*, but the draft article had not given rise to any controversy.

75. Draft article 12 [9] (Resumption of suspended treaties) had been considered on the basis of wording proposed by the Working Group which had replaced an earlier reference to the criterion of the intention of the parties by a simple cross reference to the indicia in draft article 4. The Drafting Committee had considered a proposal to include the element of immediate resumption, but had decided against it in order to allow the question of when a treaty was resumed to be resolved on a case-by-case basis. Having chosen to use the term “indicia” in the title of draft article 4, it had decided to replace the words “the criteria in draft article 4” by the words “the indicia referred to in draft article 4”.

76. Draft article 13 [10] (Effect of the exercise of the right to individual or collective self-defence on a treaty) was the first of three articles which the Drafting Committee had, following the Working Group’s recommendation, based on the resolution of the Institute of International Law adopted at the Helsinki session in 1985.¹⁵⁷ It covered the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. That State was entitled to suspend, in whole or in part, the operation of treaty incompatible with the exercise of that right, subject to the limitation that the Security Council could subsequently determine that such an act of self-defence was in reality an act of aggression. The last element was dealt with in draft articles 14 and 15. Draft article 13, which was based on the text of article 7 of the above-mentioned resolution, had not been amended as to substance.

77. Draft article 14 [11] (Decisions of the Security Council) was designed to preserve the legal effects of decisions of the Security Council under Chapter VII of

¹⁵⁷ See footnote 153 above.

the Charter of the United Nations. It had the same function as article 8 of the 1985 resolution of the Institute of International Law. The Drafting Committee had preferred the Special Rapporteur's approach of presenting the provision in the form of a "without prejudice" clause instead of adopting the wording used by the Institute in order to avoid dealing directly with the powers of the Security Council in the draft articles. The Drafting Committee had also thought that the text proposed by the Special Rapporteur was more precise, since it included a reference to decisions taken under Chapter VII of the Charter of the United Nations. In that connection, it had been suggested that the words "in accordance with the provisions of Chapter VII" should be deleted in order to reflect the possibility that the Council could take decisions under other Chapters of the Charter of the United Nations, but the Drafting Committee had decided to retain the reference to Chapter VII because the context of the draft articles was that of armed conflict.

78. Draft article 15 (Prohibition of benefit to an aggressor State) was a new provision. Following the recommendation by the Working Group that the resolution of the Institute of International Law should be considered, the Drafting Committee had decided to include a draft article to cover the content of article 9 of that resolution. The new provision prohibited an aggressor State from benefiting from the possibility of termination of, withdrawal from or suspension of a treaty as a consequence of the armed conflict it had provoked. The wording of the provision was based on the text of article 9 of the Institute's resolution, with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that what were involved were treaties that were terminated, withdrawn from or suspended as a consequence of the armed conflict in question.

79. The Drafting Committee had considered proposals for refining the words "within the meaning of" in the first line, such as replacing them by the words "contrary to", but had decided to retain the text of the resolution of the Institute of International Law. The title emphasized that the provision dealt less with the question of the commission of aggression and more with the possible benefit, in terms of the termination of, withdrawal from or suspension of a treaty, that the aggressor State might derive from the armed conflict in question.

80. Draft article 16 [12] (Rights and duties arising from the laws of neutrality) was another "without prejudice" clause designed to preserve the rights and duties of States arising from the laws of neutrality. It was presented as a new formulation: the version which had been referred to the Drafting Committee by the Special Rapporteur had referred more specifically to the "status of third States as neutrals", but the Drafting Committee had considered that the term "neutrals" was imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The use of the words "laws of neutrality" was not a substantive change from the proposal made by the Special Rapporteur. The reformulation turned the provision into more of a saving clause.

81. Draft article 17 [13] (Other cases of termination, withdrawal or suspension) preserved the possibility of

termination or suspension of treaties arising out of the application of other rules of international law in the case of the four examples listed in subparagraphs (a) to (d) by the application of the 1969 Vienna Convention. The provision was uncontroversial and had been adopted in the form originally proposed by the Special Rapporteur, with two changes suggested by the Working Group, namely, adding "Other" to the title, to indicate that those grounds were additional to those provided for in the draft articles, and adding "*inter alia*" at the end of the *chapeau* to make it clear that what followed was an indicative list. The Drafting Committee had subsequently added withdrawal to the possible effects listed in the *chapeau*, whence the title of the draft article, "Other cases of termination, withdrawal or suspension".

82. Draft article 18 [14] (Revival of treaty relations subsequent to an armed conflict) covered the situation where the States parties to an armed conflict had, subsequent to that conflict, entered into specific agreements regulating the revival of treaties which might have been terminated or suspended as a consequence of the conflict. It provided that the draft articles did not prejudice the right of States to enter into such agreements. The Drafting Committee had worked on the basis of a revised text which had been agreed on in the Working Group and had been accepted by the Drafting Committee with some changes. The initial version had referred to the "competence" of the parties, which had been changed to the "right", as the concept of competence had a specific meaning in the 1969 Vienna Convention. The text had been further clarified to indicate that reference was being made to the right of "States" parties to the conflict.

83. In conclusion, the Drafting Committee recommended that the Commission should adopt, on first reading, the set of 18 draft articles on the effects of armed conflicts on treaties. At the second part of the session, the plenary would also have an opportunity to consider the Drafting Committee's proposal for an annex to the draft articles.

84. The CHAIRPERSON thanked Mr. Caflisch and the members of the Drafting Committee and proposed that the Commission should adopt draft articles 1 to 18 on the effects of armed conflicts on treaties, as provisionally adopted on first reading by the Drafting Committee.

Draft articles 1 to 4

Draft articles 1 to 4 were adopted.

Draft article 5

85. Mr. McRAE pointed out that the Drafting Committee had decided that the footnote on page 3 would read: "the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict". The words "in whole or in part" had been omitted.

86. Mr. CAFLISCH said that this was indeed an error and that the sentence must be completed.

Draft article 5, as corrected, was adopted.

Draft articles 6 to 12

Draft articles 6 to 12 were adopted.

Draft article 13

87. Mr. VALENCIA-OSPINA said that he had a problem with the last part of the sentence, which read: "subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor" because he did not see how the exercise of the right to self-defence in accordance with the Charter of the United Nations might be regarded, even *a posteriori*, as an act of aggression. Such self-defence would usually be exercised as a result of armed aggression, unless the provision was intended to refer to the preventive exercise of the right to self-defence. In any event, the situation would be covered by draft article 14.

88. Mr. BROWNLIE (Special Rapporteur) said that a sharp difference of opinion between himself and some members of the Drafting Committee, who had considered that the original wording did not take sufficient account of the question of illegality, had led to the adoption of wording that might be somewhat too closely based on that of article 7 of the resolution of the Institute of International Law. In order to meet Mr. Valencia-Ospina's concern, he proposed that the words "in accordance with the Charter of the United Nations" should be replaced by the words "by invoking the Charter of the United Nations".

89. Mr. VALENCIA-OSPINA, thanking the Special Rapporteur for his proposal, said that the amendment would not meet his concern. He proposed that the words: "A State intending to exercise its right to self-defence..." should be used instead and that any reference to the Charter of the United Nations should be deleted.

90. Mr. BROWNLIE (Special Rapporteur) said that he was prepared to agree to that amendment.

91. Mr. NOLTE said that he wondered what would happen in the situation where a State intended to exercise its

right to self-defence without justification and without the Security Council later designating it as the aggressor.

92. Mr. KOLODKIN said that he too had some concerns about that draft article, but, since there was little time available, the Commission should be careful not to adopt substantive amendments too hurriedly.

93. After a discussion in which Ms. ESCARAMEIA, Mr. KAMTO, Mr. YAMADA and Mr. BROWNLIE (Special Rapporteur) took part, Mr. McRAE suggested that, since Mr. Valencia-Ospina's proposal was more drastic than it looked and the Drafting Committee was to meet during the second part of the Commission's session to consider the question of the annex, draft article 13 should be referred to it so that there would be time to think about it more calmly.

94. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft article 13 to the Drafting Committee.

It was so decided.

Draft articles 14 to 17

Draft articles 14 to 17 were adopted.

Draft article 18

95. Mr. CANDIOTI said that, for the sake of clarity, the words "on the basis of an agreement" should be added after the words "subsequent to the conflict".

Draft article 18, as amended by Mr. Candioti, was adopted.

Draft articles 1 to 18 on the effects of armed conflicts on treaties (A/CN.4/L.727/Rev.1), as a whole, were adopted on first reading, with the exception of draft article 13 [10], which was referred to the Drafting Committee.

The meeting rose at 1 p.m.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTIETH SESSION

Held at Geneva from 7 July to 8 August 2008

2974th MEETING

Monday, 7 July 2008, at 3.05 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

1. The CHAIRPERSON declared open the second part of the sixtieth session of the International Law Commission and invited members to resume their consideration of the topic “Reservations to treaties”. The Commission would first hear the report of the Drafting Committee on the topic (A/CN.4/L.739 and Corr.1). Thereafter it would turn to the consideration of the thirteenth report of the Special Rapporteur (A/CN.4/600).

REPORT OF THE DRAFTING COMMITTEE (*continued*)*

2. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the text of draft guidelines 2.6.5, 2.6.11, 2.6.12 and 2.8 provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.739 and Corr.1, which read:

2.6.5 Author

An objection to a reservation may be formulated by:

a) any contracting State and any contracting international organization; and

* Continued from the 2970th meeting.

b) any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

2.6.12 Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty, does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

2.8 Form of acceptances of reservations

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

3. With those texts, he was presenting the fifth report of the Drafting Committee and its second on the topic of reservations to treaties. After his presentation of the Drafting Committee’s first report on that topic on 3 June 2008, at its 2970th meeting, the Commission in plenary had decided to refer back to the Committee for its reconsideration draft guidelines 2.6.5 (Author) and 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation). The Drafting Committee, meeting on 5 June 2008 under the chairpersonship of Mr. Candioti, had been able provisionally to adopt the two draft guidelines referred back to it for reconsideration, and also draft guidelines 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) and 2.8 (Form of acceptances of reservations).

4. Draft guideline 2.6.12 had become superfluous following the Drafting Committee’s adoption of the first version of draft guidelines 2.6.5 and 2.6.11 and had been deleted, but following the reconsideration and reformulation of the latter texts, it had had to be revisited. Draft guideline 2.8, however, was new.

5. For its consideration of draft guideline 2.6.5, the Drafting Committee had had before it the original version of the draft guideline and a new version prepared by the Special Rapporteur after the debate in plenary, in which he had addressed the concerns of those members who had been of the view that States or international organizations that were not parties to a treaty were not entitled to make objections, properly speaking, but that they could make declarations that became objections once they became parties to the treaty. The Special Rapporteur's new proposal contained two subparagraphs, the first on contracting States and contracting international organizations, and the second on States and international organizations entitled to become parties to a treaty. At the end of the second subparagraph, the Special Rapporteur had added the phrase "in which case the objection produces its legal effects only at the time the State or the international organization expresses its consent to be bound by the treaty". The Drafting Committee had wondered whether that phrase, addressing the question of effects, which would be covered in another section of the Guide to Practice, had its place in that draft guideline. It had been acknowledged that, although that was the general rule, in the present case, exceptionally, the mention of effects was justified in order to bridge the divergent positions prevailing in the Committee. It had been pointed out that, in that additional phrase, the word "objection" should be replaced by the more neutral word "declaration", since it did not yet constitute an objection, according to the adherents of the "contracting parties only" theory. The Committee had also considered using the term "becomes operative" or "becomes effective", as it had done in draft guideline 2.7.7. It had been pointed out, however, that the term "does not produce any legal effect" was much clearer; in addition, it had been used in the past in several draft guidelines.

6. The Committee had finally decided to keep most of the wording originally proposed by the Special Rapporteur but to make some changes to the additional phrase. It had replaced the word "objection" by the neutral word "declaration" and had changed the positive mode of the phrase ("produces its legal effects") into a negative one ("does not produce any legal effect"), which confirmed more categorically the absence of legal effects of such declarations. The commentary would explain the complicated history of the draft guideline, whose title, "Author", remained unchanged.

7. Following the Drafting Committee's adoption of draft guideline 2.6.5 in its modified form, it had been led to reconsider draft guideline 2.6.11. After a very short debate, it had decided that the original version proposed by the Special Rapporteur was the most appropriate. The title, "Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation", remained the same, but the draft guideline was now much shorter and simpler, stating that an objection made prior to confirmation of the reservation in accordance with draft guideline 2.2.1 did not itself require confirmation. It basically repeated article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. With regard to the use of the word "made" instead of the more accurate "formulate", it had been pointed out that the word "made" was used in the Vienna Conventions and therefore should not be changed. The commentary would also address that issue.

8. After the adoption of the new versions of draft guidelines 2.6.5 and 2.6.11, the Committee had felt that draft guideline 2.6.12 should be reconsidered. It had still been entitled "Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty", and the new version proposed by the Special Rapporteur had consisted of two options, one more detailed and the other more concise and simpler. The Committee had focused on the simpler one. The guideline stated that, if an objection was formulated prior to consent to be bound by the treaty by a signatory State or international organization, it did not need to be reconfirmed when that State or organization expressed its consent to be bound by the treaty. However, it needed to be reconfirmed if the State or organization had not signed the treaty when making the objection. The Committee had had a useful debate on the guideline and had been informed of the current depositary practice, especially that of the Secretary-General of the United Nations, which, however, had not been conclusive. The Committee had been of the view that if a State or organization had formulated an objection before even signing a treaty and expressed its consent to be bound by it after a long period of time, the security and certainty of treaty relations required that such an objection be reconfirmed at the time of expression of the consent to be bound. If, however, the State or organization had already signed the treaty when formulating the objection, such confirmation was not necessary. The title of the draft guideline had been changed to reflect that distinction. It now read "Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty".

9. Draft guideline 2.8 constituted the first in a series of guidelines dealing with the acceptance of reservations. The original draft as proposed by the Special Rapporteur had stated that the acceptance of a reservation arose from the absence of objections, which itself could arise either from a unilateral statement (express acceptance) or from the silence kept by a contracting State or organization (tacit acceptance). Such tacit acceptance should, however, be distinguished from implicit acceptance, which constituted a presumption of acceptance and could be reversed. During the debate, the Drafting Committee had been of the view that the first paragraph in the original version of the guideline was redundant, since the second paragraph repeated practically the same principle. It had decided, however, that some elements of the first paragraph could be usefully inserted into the second paragraph, in which case the two paragraphs could be merged into one.

10. The Drafting Committee had also thought that the bracketed terms "(express acceptance)" and "(tacit acceptance)" should be deleted. The final wording was much more concise and clear. The title of the guideline now read "Form of acceptances of reservations", since it had been felt that the express and tacit methods of acceptance pertained to the form of such an action rather than to its formulation.

11. If time allowed, the Drafting Committee would meet again during the second part of the session in order to complete its examination of the draft guidelines included in section 2.8 of the Guide to Practice.

12. With those remarks, he recommended to the plenary the adoption of the four draft guidelines.

13. The CHAIRPERSON invited the Commission to adopt the texts of draft guidelines 2.6.5, 2.6.11, 2.6.12 and 2.8.

Draft guideline 2.6.5

14. Mr. VASCIANNIE pointed out an inconsistency in the verbs used in connection with objections to reservations: in the *chapeau* of draft guideline 2.6.5, the verb was “formulated”, while in the titles of draft guidelines 2.6.11 and 2.6.12, *inter alia*, it was “made”. It had been explained that the latter was the term used in the 1969 Vienna Convention. For the sake of consistency, perhaps the verb “made” should also be used in the *chapeau* of draft guideline 2.6.5.

15. Mr. PELLET (Special Rapporteur) said that while he personally would welcome such a change, he feared vociferous opposition from a minority of members who construed subparagraph (b) of the draft guideline to mean that an objection was considered “made” only once a State or international organization had expressed its consent to be bound by the treaty.

Draft guideline 2.6.5 was adopted.

Draft guideline 2.6.11

16. Mr. HASSOUNA suggested the replacement of the first word in the French text of the title, “*Inutilité*”, by “*Non-exigence*”, which corresponded more closely to the English term (“Non-requirement”) and was more consistent with the French term used in draft guideline 2.6.12 (“*Exigence*”).

17. Mr. PELLET (Special Rapporteur) said the point was a valid one, particularly as the expression “*non-exigence*” had been used earlier, in draft guideline 2.4.4, for example.

18. Mr. CAFLISCH said he would prefer the wording “*Absence d’exigence*”.

19. Mr. PELLET (Special Rapporteur) said that while formulation proposed by Mr. Caflisch was certainly more elegant, the primary consideration was consistency. Since the term “*non-exigence*” had already been used elsewhere in the text, he would prefer the formulation proposed by Mr. Hassouna.

With that editorial amendment to the French text, draft guideline 2.6.11 was adopted.

Draft guideline 2.6.12

20. The CHAIRPERSON drew attention to a corrigendum reproduced in document A/CN.4/L.739/Corr.1, issued in French and English only, which read:

Draft guideline 2.6.12

First line:

Replace the word formulated with made.”

21. Mr. PELLET (Special Rapporteur) said that the corrigendum must be the result of a misunderstanding, because it seemed to him that the converse should apply. Given the correlation between draft guideline 2.6.12 and draft guideline 2.6.5 (b), and also as a concession to his intellectual adversaries, it would be more logical to speak of an objection “formulated” prior to the expression of consent to be bound by a treaty, rather than of one “made”, both in the body of the text and also in the title. The title should be amended accordingly.

22. The CHAIRPERSON said that the text contained in the corrigendum had apparently been proposed by the Drafting Committee.

23. Ms. ESCARAMEIA, speaking as a member of the Drafting Committee, said she had no recollection of the Drafting Committee having proposed a corrigendum changing the word “formulated” to “made”. She suggested that the corrigendum should be disregarded and the wording contained in document A/CN.4/L.739 retained.

It was so decided.

24. Mr. VASCIANNIE and Mr. VÁZQUEZ-BERMÚDEZ supported Mr. Pellet’s proposed amendment to the title.

Draft guideline 2.6.12, as amended, was adopted.

Draft guideline 2.8

25. Mr. McRAE said that, in the title, the plural form “acceptances” should be replaced by the singular form “acceptance”.

26. Mr. CANDIOTI said that, in the Spanish version, the plural form “*las reservas*” should be replaced with the singular “*la reserva*”.

27. Mr. McRAE said that, in that case, in the English version, the word “reservations” should be replaced with the singular “a reservation”.

28. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, since draft guideline 2.8 was a guideline introducing a series of others, more than one form of acceptance was to be taken into account. It might therefore be more appropriate, in the title, to replace the singular “form” by the plural “forms”. The title would then read: “Forms of acceptance of a reservation”.

29. Mr. PELLET (Special Rapporteur) said he supported the idea of replacing the word “form” by “forms” in the title. However, he was unsure whether the words “acceptance” and “reservation” should also be pluralized, and doubted that the matter was of any consequence.

30. The CHAIRPERSON suggested that an appropriate formulation for the title might be “Forms of acceptance of reservations”.

Draft guideline 2.8, as amended, was adopted.

The draft guidelines contained in document A/CN.4/L.739, as a whole, as amended, were adopted.

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR

31. The CHAIRPERSON invited the Special Rapporteur to present his thirteenth report on reservations to treaties, contained in document A/CN.4/600.

32. Mr. PELLET (Special Rapporteur) said that, although the Commission had already discussed the topic of reservations to treaties at considerable length during the current session, it had still not managed to eliminate the accumulated backlog of work on the topic. The slowness of his working methods, for which he had often been criticized, was a deliberate choice based on the very form of the Guide to Practice as endorsed by the Commission. In his view, it was better to have a carefully pondered and extensively debated draft than one that was rushed through and consequently botched, as regrettably had sometimes been the case in the recent past. He wished to point out that, despite his admittedly slow pace, the Commission was nevertheless having difficulty in keeping up with him. At the current session, more than 40 draft guidelines had been languishing, if not on death row, at least in the Drafting Committee, which, furthermore, sometimes condemned his draft guidelines to death, thereby going well beyond what its subordinate status permitted. Although an effort had been made during the first part of the session, some 10 draft guidelines that had already been referred to the Drafting Committee had still to be given their final form. He hoped that the time that had been generously allocated to discussion of the topic in plenary would be put to good use and that any unused time would be set aside in order to enable the Drafting Committee at least to complete its consideration of the series of draft guidelines comprising section 2.8 of the Guide to Practice. It was now his turn to be eager for the Commission to complete its work regarding the procedure for formulation of reservations, and with it the second part of the Guide to Practice, although it was perhaps too much to hope that the Commission could also find the time to consider the draft guidelines he was about to introduce concerning reactions to interpretative declarations by the end of the present session.

33. The draft guidelines in question would thus be missing from the part of the Guide to Practice dealing with the formulation of reservations and interpretative declarations, but if those could at least be referred to the Drafting Committee at the end of the discussion on the topic, as he hoped would be the case, the Commission would finally be able, at its next session, to conclude its consideration of all the problems relating to formulation. It was for that reason that, even though he realized that the Commission would not be able to examine all 10 draft guidelines proposed in document A/CN.4/600, he had resigned himself to submitting his so-called thirteenth report, which, as was indicated in the first footnote to the cover page, was merely the follow-up to the twelfth report (A/CN.4/584),¹⁵⁸ that dealt with the formulation of reactions to reservations, in other words, objections and comments made following reservations and interpretative declarations. That was why the numbering of the paragraphs and footnotes did not begin afresh but followed on from the previous year's report.¹⁵⁹

34. Any line of reasoning concerning interpretative declarations stemmed from two observations: the first was that the 1969 and 1986 Vienna Conventions were totally silent on the question of interpretative declarations, which had been mentioned only rarely during the *travaux préparatoires*; the second was that interpretative declarations served a different function from that of reservations. In that connection, he referred members to draft guidelines 1.2 and 1.2.1 on the definition of interpretative declarations and on conditional interpretative declarations, respectively.¹⁶⁰ Since the function of interpretative declarations differed from that of reservations, one could not simply transpose the rules applicable to reservations to cover cases of interpretative declarations, even though there was nothing to prevent one from drawing inspiration from them. Indeed, it was essential to do so, for, in addition to the lack of any reference to them in the legal texts, there was also a dearth of practice relating to them. As the Commission had prepared a fairly complete set of guidelines on reactions to reservations, the most logical approach would be to take those reactions as a starting point, while bearing in mind the different functions served by reservations and interpretative declarations.

35. As was indicated in paragraph 7 [282]¹⁶¹ of the report, four possible attitudes could be adopted towards an interpretative declaration: agreement, disagreement, silence and reclassification, the latter being the observation or claim that what the author was presenting as an interpretative declaration was in fact a reservation.

36. A few isolated examples of explicit approval were mentioned in paragraphs 8 [283] and 9 [284] of the report and did not raise any particular problems. The declaration/approval pairing could be linked with article 31, paragraph 3, of the 1969 and 1986 Vienna Conventions, which provided that any agreement between the parties regarding the interpretation of a treaty was an element that must be taken into account for its interpretation. The fact remained that analogies with the acceptance of a reservation could not be pressed too far, for, while acceptance of a reservation might alter the effects of the treaty itself as between the reserving State and the accepting State, and acceptance could even result in the applicability of the treaty to the reserving State or its entry into force, agreement with an interpretative declaration constituted agreement with the interpretation of the treaty, but had no effect on the nexus of treaty relations. That was the reasoning behind the very cautious wording of draft guideline 2.9.1, to be found in paragraph 12 [287] of the report, which read:

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

37. There was, however, another very important difference between the pairing interpretative declarations/reactions to them, on the one hand, and the system of acceptance of reservations, on the other. One of the key

¹⁵⁸ Yearbook ... 2007, vol. II (Part One), document A/CN.4/584.

¹⁵⁹ The paragraphs were renumbered when the report was published in Yearbook ... 2008, vol. II (Part One).

¹⁶⁰ Yearbook ... 1999, vol. II (Part Two), pp. 97–106.

¹⁶¹ The number between square brackets refers to the corresponding article in the thirteenth report of the Special Rapporteur (A/CN.4/600).

elements of the Vienna regime was the presumption of acceptance resulting from the silence on the part of the other States concerned. In the case of interpretative declarations, it seemed wholly inconceivable to apply the dictum whereby silence constituted consent. That was true only if the State or international organization that failed to respond did so because it was legally bound to respond but instead chose to remain silent. Yet no practice or *opinio juris* established such an obligation in respect of interpretative declarations. States were entitled to respond but were certainly not required to do so.

38. That was the rationale behind draft guideline 2.9.8, to be found in paragraph 41 [316], which read:

2.9.8 *Non-presumption of approval or opposition*

Neither approval of nor opposition to an interpretative declaration shall be presumed.

39. That absence of presumption did not mean that approval of the interpretative declaration could not result from the silence of the other States or international organizations concerned when circumstances so permitted—in other words, if the circumstances in a particular case were such that a State could legitimately be expected to express its opposition to the interpretation put forward in the declaration.

40. That was the basis for draft guideline 2.9.9, also to be found in paragraph 41 [316], which read:

2.9.9 *Silence in response to an interpretative declaration*

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

41. While he was aware that the wording he proposed was not very specific, he did not think the Commission could reasonably go much further. If it wanted to do so, it would have to include in the Guide to Practice the entire set of rules concerning acquiescence in international law, something which was scarcely feasible. Moreover, given the extent of the problems that had arisen in relation to the topic of unilateral acts of States,¹⁶² he feared that the Commission might find itself dealing with the matter for decades to come. As a result, draft guideline 2.9.9 was more of a signal to users of the Guide than a rule that was directly and individually applicable. While he did not think the Commission could go any further than that, it would be wise to point out to States and international organizations that they should be vigilant in weighing the risks of reacting or not reacting to an interpretative declaration.

42. Negative reactions whereby a State or an international organization expressed disagreement with an interpretative declaration were more frequent than expressions

of approval, just as objections to reservations were more frequent than cases of express acceptance. A number of examples had been provided in paragraphs 13 [288] to 16 [291] of the report; they concerned outright opposition to an interpretative declaration and corresponded to the first part of the definition of opposition to an interpretative declaration set out in draft guideline 2.9.2, which read:

2.9.2 *Opposition to an interpretative declaration*

“Opposition” to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

43. That was quite clear, but it left the reader hungry for more. According to the first part of the draft guideline, a State could reject a declaration, which was therefore not opposable to it—if he might be allowed to stray a little into the question of effects, even though that question was not on the Commission’s agenda—but that was all; it could not propose any counter-interpretation. Thus, although it was clear which interpretation it did not accept, there was no way of knowing what interpretation it considered to be the correct one. Yet it could, and often did, happen that a State went so far as to interpret the provision on which the initial interpretative declaration was based, by providing an interpretation that diverged in whole or in part from that interpretative declaration and that seemed to it to be the only one in line with the letter and spirit of the treaty in question. Paragraphs 17 [292] to 20 [295] of the report provided examples of reactions which he had tried to reflect at the end of draft guideline 2.9.2 by explaining that “opposition” to an interpretative declaration could also mean a unilateral statement whereby a State or international organization proposed an interpretation other than that contained in the declaration with a view to excluding or limiting its effect. In any event, whether the reactions in question amounted to a counter-interpretation or simply constituted opposition to an interpretation, their effects obviously differed from those produced by an objection to a reservation, if only because negative reactions to an interpretation could not have any consequences for the entry into force of the treaty, or for the nexus of treaty relations between the declaring and the reacting State or international organization. As he explained in paragraphs 11 [286] and 23 [298], it would be unwise to use identical terminology to denote reactions to interpretative declarations and reactions to reservations. Instead of “acceptance” and “objection”, the terms he had employed with reference to reservations, he had preferred “approval” and “opposition” in respect of interpretative declarations, in order to avoid confusion.

44. There was, however, one type of reaction to interpretative declarations, namely reclassification, which had no equivalent in the context of reservations. He had defined that reaction in draft guideline 2.9.3, which read:

2.9.3 *Reclassification of an interpretative declaration*

“Reclassification” means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or

¹⁶² For the text of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations with the commentaries thereto adopted by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 161–166, para. 177.

organization purports to regard the declaration as a reservation and to treat it as such.

[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

45. States and treaty-monitoring bodies in fact frequently engaged in that practice. Paragraph 26 [301] supplied numerous examples of inter-State reactions of that kind.

46. Such counter-declarations, often accompanied by a very detailed statement of reasons, were generally based on the usual criteria for distinguishing between reservations and interpretative declarations, which had been summarized in draft guidelines 1.3 to 1.3.3,¹⁶³ to be found in footnote 52 [509] of the thirteenth report, which, incidentally, had been co-authored by Daniel Müller, whom he wished to thank publicly.

47. The second paragraph of draft guideline 2.9.3 tried to encapsulate that frequent practice by making an express reference to the draft guidelines he had just mentioned. While he realized that the paragraph was neither in line with the general logic of the Guide to Practice nor indispensable, it was nonetheless useful so that the Drafting Committee would have to decide whether to say that, when States or international organizations reclassified an interpretative declaration, they must apply the guidelines in section 1.3 of the Guide to Practice, or that they must simply take them into account. Even if that was a problem which the Drafting Committee could resolve, it would be useful if speakers in the debate were to indicate their preference in order to provide guidance to the Drafting Committee on a point on which he was neutral.

48. Although reactions to interpretative declarations could not be treated in the same way as acceptances of or objections to reservations, they were nonetheless intended to produce legal effects. As the International Court of Justice had found in its advisory opinion of 11 July 1950 on the *International Status of South-West Africa*, “[i]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument” [pp. 135–136].

49. It was therefore important that other States or international organizations that were, or might become, parties to the treaty were aware of those interpretations, and it was therefore wise to make an interpretative declaration in writing and to communicate it to other States or international organizations that were entitled to become parties to the treaty. But, as the Commission had already accepted, that was not a legal obligation. It was therefore hard to see why reactions to interpretative declarations should be made subject to stricter formal and procedural requirements than interpretative declarations themselves.

50. However, as he had indicated in paragraph 45 [320], if the author of an opposition, approval or reclassification of an interpretative declaration seriously intended its reaction to be taken into account and to have legal effects in

the event of problems arising, it was in its interests to state the reasons for its reaction, and certainly to formulate it in writing so that it might be communicated in accordance with the formal requirements applicable to all unilateral declarations relating to the treaty, thereby ensuring that its position was known to all the States which had, or might have, something to say about it.

51. Two problems arose in that connection. The first, though not very serious, difficulty was that any provisions the Commission might decide to include on the formulation of and statement of reasons for interpretative declarations could be only in the nature of recommendations, since it was not possible to require that reactions to interpretative declarations be formulated in writing, when the interpretative declarations to which they related did not themselves necessarily have to be made in writing. The recommendatory form of those forthcoming draft guidelines was not a major problem because the Commission was not in the process of drafting a treaty, but was drawing up a guide to practice which, by definition, would never be binding. Moreover, it would not be the first time that the Commission had made recommendations. That was the method it had chosen in the first part of the session in adopting draft guidelines 2.1.9 and 2.6.10 on statement of reasons for reservations and objections (see the 2970th meeting above, paragraphs 66 and 93, respectively). It was quite reasonable to urge States to observe certain formalities if they wanted their reactions to interpretative declarations to have any chance of producing an effect.

52. The second, more complicated question was whether it was necessary to devote some draft guidelines to the form of, reasons for, and communication of, reactions to interpretative declarations when, at least for the moment, no equivalent provisions existed with regard to interpretative declarations themselves. There were three solutions to that dilemma. The first and simplest solution would be to say something in the commentaries about the form in which reactions to interpretative declarations should be communicated, rather than adopting draft guidelines on the matter. The second solution, which he favoured, would be to include the relevant provisions in the Guide to Practice so as to make it more “user-friendly”. If that were done, it would be necessary to correct the dissymmetry between interpretative declarations and the reactions thereto during the second reading. The third solution would be to instruct the Special Rapporteur to present, either by the end of the current session or at the beginning of the next session, equivalent provisions on interpretative declarations themselves.

53. The three draft guidelines he was tentatively proposing read as follows:

2.9.5 Written form of approval, opposition and reclassification

An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and reclassification

Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

¹⁶³ *Yearbook ... 1999*, vol. II (Part Two), pp. 107–112.

2.9.7 Formulation and communication of an approval, opposition or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

54. Once again, the guidelines could be no more than recommendations. He very much hoped that speakers in the debate would express an opinion on the desirability of referring them to the Drafting Committee—the step he advocated—and on the advisability or otherwise of incorporating equivalent provisions on interpretative declarations themselves in the Guide to Practice. That was a question of principle on which the Commission should state its position in plenary; it was not for the Drafting Committee to take the decision.

55. Draft guideline 2.9.4 read as follows:

2.9.4 Freedom to formulate an approval, protest or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

56. It was imperative to refer that text to the Drafting Committee, as something must be said in the Guide to Practice about the time at which it was possible to react to an interpretative declaration, and who could react to it. As to the first of those questions, the draft guideline stated that approval, opposition or reclassification could be formulated at any time. He had not adopted that position merely out of a concern for symmetry with interpretative declarations themselves, which could be formulated at any time, as specified in draft guideline 2.4.3, but also because, as there was no obligation to formulate interpretative declarations in writing or to communicate them to the other States, depositaries or international organizations concerned, those other States or international organizations might learn of the interpretative declaration by chance and only after some considerable time had elapsed. They must therefore be able to respond at any time once they had become aware of the interpretative declaration.

57. He sincerely hoped that the Commission would not spend as much time discussing the issue of who could react to an interpretative declaration as it had in discussing the question of who could formulate an objection to a reservation. For the same reasons as those he had adduced on that question, which the majority of members had ultimately accepted, that possibility must be open to any State which was entitled to become a party. Admittedly, as far as objections were concerned, draft guideline 2.6.5, in the form in which it had just been adopted (paras. 13–15 above), established that objections from a State or an international organization that was not a party to the treaty did not produce their effects until that State or international organization had expressed its consent to be bound thereby. He was uncertain whether it was necessary to transpose that restriction to the case of reactions to interpretative declarations. Whereas an objection had effects on the treaty relations between the author of the reservation and the author of the objection and the objection might even lead to the entry into force of the treaty

or prevent it, the same was not true of interpretative declarations or of reactions to them. A simple interpretative declaration never had any effect on treaty relations themselves. Consequently, it could not be contended that the principle contained in the second subparagraph of draft guideline 2.6.5 likewise applied to interpretative declarations. Since interpretative declarations and reactions to them were no more than indications for interpreters, he saw no point in specifying that it was necessary to wait until a State had become a party before its reaction, or counter-interpretation, could produce effects. The interpreter, for example, a court, might or might not be inclined to accept the interpretation of a State or an international organization that was not a party, but it could hardly disregard that view as a matter of principle. What a State had to say about the interpretation of a treaty was always interesting. That was a second problem on which the plenary Commission, which had the authority to decide, must give clear instructions to the Drafting Committee, which had no authority to adopt a position on issues of principle, since its mandate was simply to give shape to decisions taken by the Commission in plenary.

58. He was proposing only one draft guideline on conditional interpretative declarations, namely draft guideline 2.9.10, which was worded:

2.9.10 Reactions to conditional interpretative declarations

Guidelines 2.6 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.

59. The draft guidelines in sections 2.6, 2.7 and 2.8 of the Guide to Practice, which had not yet been adopted but all of which had been referred to the Drafting Committee, concerned reactions, in the form of acceptances or objections, to reservations. The wording he was proposing for draft guideline 2.9.10 was in line with what had consistently been found with respect to conditional interpretative declarations: they were certainly interpretative declarations as far as their purpose was concerned but, unlike simple interpretative declarations, they might produce effects, and were intended to produce effects, on treaty relations between the State making the interpretative declaration and any State that might oppose it. For that reason, once a contracting State or international organization opposed the interpretation proposed by the author of the conditional interpretative declaration, the negative reaction of another contracting State should prevent the application of the treaty, in part or in its entirety, in relations between the author of the conditional interpretative declaration and the author of the negative reaction, which was more like an objection to a reservation than an opposition to an interpretative declaration. He set out his terminological scruples in paragraph 54 [329] of the report.

60. Accordingly, the wording of draft guideline 2.9.10 had the merit of not taking a position on that terminological nicety, which was after all of secondary importance. It spoke of “reactions of States and international organizations”, rather than “objections”, “opposition”, “acceptance” or “approval”. In any event, draft guideline 2.9.10, like all those concerning conditional interpretative declarations, was being presented only as an interim solution,

since the Commission had agreed provisionally that it would adopt a set of guidelines on conditional interpretative declarations, but that no final decision would be taken on the advisability of retaining those draft guidelines until it was absolutely sure that conditional interpretative declarations behaved like reservations and had the same effects. There was a widely held conviction, which he shared, that this was the case.

61. He would be grateful if, at the end of the debate, the Commission were to refer to the Drafting Committee draft guidelines 2.9.1, 2.9.2, 2.9.3, 2.9.4, 2.9.8, 2.9.9 and 2.9.10, and also possibly draft guidelines 2.9.5, 2.9.6 and 2.9.7. It was, however, important that the plenary Commission and not the Drafting Committee decide on the advisability of including similar provisions on interpretative declarations themselves. Likewise, the plenary must give firm and clear instructions to the Drafting Committee as to whether States and international organizations that were not parties to a treaty could react to interpretative declarations, as he firmly believed they could and, if so, in what circumstances.

The meeting rose at 4.35 p.m.

2975th MEETING

Tuesday, 8 July 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

THIRTEENTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. Mr. GAJA said he regretted that he had been unable to be present when Mr. Pellet had introduced his report, which was very detailed and contained a wealth of analysis and information based on practice. He was not entirely convinced that the question of reactions to interpretative declarations had to be dealt with in a guide to reservations, but, even if the Commission had little choice in the matter, it would be a shame if it did not follow up on the Special Rapporteur's proposals. In reply to the Special Rapporteur's question at the preceding meeting whether draft guidelines 2.9.5 to 2.9.7 should be maintained, he himself did not think that they were necessary,

and perhaps other texts were unnecessary as well. Most of the comments and proposals contained in the report were nonetheless generally convincing.

2. The impression should not be given that it was for a State other than the State making a declaration to determine the nature of the reclassification of a declaration, a phenomenon of which the report provided relevant examples. The State reclassifying a declaration gave its interpretation, which might be wrong, of the nature of that declaration. It would not be consistent if, after stating that a declaration was, in its view, a reservation, it did not treat it as such. However, if the declaration was in fact an interpretative declaration—in which case, the State was wrong—the regime applicable to reactions to that declaration continued to be the regime governing reactions to interpretative declarations. Even if the proposed draft guidelines did not necessarily arrive at another conclusion, the commentary seemed to indicate that the reclassifying State occupied a more important position than the declaring State. Obviously, if the question was put to an arbitrator or a court, they would provide their interpretation, but, to the extent that a practice of States was being considered, the declaring State must be given precedence.

3. He continued to have problems with the category of conditional interpretative declarations. If a State declared that it accepted a text only if it was interpreted in a certain way, its purpose was to modify the legal effect of a provision by agreeing to only one of the possible interpretations and subjecting its acceptance of the treaty thereto; the treaty was thus modified to some extent even if the interpretation of it was correct. Since the Special Rapporteur had promised in the past that he would reconsider the existence of the category of conditional interpretative declarations that had appeared in the draft 10 years previously, he hoped that the Special Rapporteur would in future agree to include such declarations in the category of reservations by amending accordingly the wording of certain draft guidelines, which, as he had said, were perhaps not suited to conditional interpretative declarations.

4. In paragraph 18 [293], the Special Rapporteur referred to a declaration by Egypt designed “to broaden the scope of the [International Convention for the Suppression of Terrorist Bombings]” and noted that this “exclude[d] assigning the status of ‘reservation’”, which seemed to be too restrictive an interpretation of a reservation. For example, when the Union of Soviet Socialist Republics and other socialist countries had formulated a reservation to the 1958 Convention on the High Seas to extend the immunity of Government ships to all ships belonging to the State, they had made declarations which they had called reservations and which had been treated as such by the other contracting States.¹⁶⁴ When a reservation was designed to modify the legal effect of some provisions of the treaty, its purpose was not necessarily to restrict the scope of those provisions. Reservations that modified the scope and therefore added obligations for the reserving State and for the other States had the particular characteristic that they could produce their effects for the

¹⁶⁴ *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006*, vol. II (United Nations publication, Sales No. E.07.V.3), p. 321 (chap. XXI.2) (available at <http://treaties.un.org/pages/ParticipationStatus.aspx>).

other contracting parties only to the extent that those parties accepted the reservations. An objection by them, even if it did not prevent the entry into force of the treaty with the reserving State, did not signify acceptance: on the contrary, it would go beyond consent because the State formulating an objection or remaining silent would otherwise be bound to do something to which it had not consented. If that analysis was correct, there would have to be a special regime for reactions to that particular type of reservation, which was designed to modify the legal effect of some provisions by giving rise to additional obligations for the States parties to the treaty. As far as such reservations were concerned, acceptance by the other contracting States should be regarded as necessary for the reservation to produce its effects in the relations with those States.

5. Ms. ESCARAMEIA said that, since the 1969 and 1986 Vienna Conventions did not refer to interpretative declarations and there was little practice on which to rely, the Special Rapporteur had been right to proceed by analogy or by opposition in relation to reactions to reservations and to make a distinction between conditional interpretative declarations and “general” interpretative declarations. She nevertheless regretted the fact that he had not stuck closely to that methodological approach and that the distinction in question did not always appear clearly in the report. Since guidelines 1.2 (Definition of interpretative declarations) and 1.2.1 (Conditional interpretative declarations) clearly distinguished between those two types of declarations—even if she was not convinced by that approach and it seemed premature to establish such different regimes for those two types of declarations—and since the effects which the Special Rapporteur attributed to them were rightly very different, the structure of the report would have gained by being systematically based on that dichotomy.

6. With regard to interpretative declarations under the general regime, the analysis of the four possible reactions and the terms used (approval, opposition, reclassification and silence) to distinguish them from reactions to reservations were very relevant because the effect of such declarations was only to clarify the interpretation given by tribunals, treaty bodies, national courts, etc., and it had no impact on relations between the parties or on the entry into force of the treaty. The second subparagraph of paragraph 7 [282] was nevertheless confusing because it seemed to associate a negative reaction and the classification of a declaration as an “interpretative declaration”, whereas such a reaction was referred to in the last sentence of the paragraph as a possible fourth type of reaction. Perhaps the term “classification” should be avoided and reference should be made to a “proposal for another interpretation”. The distinction between reactions to reservations and to interpretative declarations was also not always very clear.

7. She endorsed draft guideline 2.9.1 (Approval of an interpretative declaration), which did not call for any comments, and draft guideline 2.9.2 (Opposition to an interpretative declaration), except for the words “with a view to excluding or limiting its effect”, which should be deleted because they were not clear and equated a reaction to an interpretative declaration and a reaction to a reservation, whereas they should continue to be clearly

distinguished. The example given in paragraph 17 [292] should also be corrected because, as the text now stood, Poland had made its consent subject to its own interpretative declaration, and that was probably a mistake. Draft guideline 2.9.3 (Reclassification of an interpretative declaration) also did not call for any particular comments, except that the words in square brackets did not serve much purpose; if they were retained, she would prefer the words “take into account” rather than the word “apply” in order to emphasize that the guideline was a recommendation. In paragraphs 29 [304] to 31 [306], which dealt with the time periods applicable to reactions to interpretative declarations, the Special Rapporteur indicated that such declarations could be “disguised” reservations and that the time period for objections to reservations should therefore apply, not the time period for reactions to interpretative declarations. In her view, that would have the result of treating such reclassifications as objections to reservations, something which might create additional problems, especially when a treaty did not allow reservations or allowed only certain reservations, even if such disguised reservations were given another name.

8. Although she agreed that silence could have various meanings and that there could be no presumption, she endorsed draft guideline 2.9.8 (Non-presumption of approval or opposition), but she would like draft guideline 2.9.9 (Silence in response to an interpretative declaration) to be deleted because it was very vague and did not state the specific circumstances in which a State or an international organization could be considered as having acquiesced to an interpretative declaration. Since such circumstances could not be listed in the draft guideline, it might be more disconcerting than enlightening. As the Special Rapporteur had said that his aim was primarily to indicate a possibility rather than to establish a practical rule, it could be considered that the indication was already given by draft guideline 2.9.8.

9. In the title of draft guideline 2.9.4 (Freedom to formulate an approval, protest or reclassification), the word “protest” should be replaced by the word “opposition”. She had no objection to the inclusion of any State or any international organization entitled to become a party to the treaty since what was involved was a unilateral declaration that had no legal effect on relations between the parties or the entry into force of the treaty. She was therefore in favour of referring draft guideline 2.9.4 and draft guidelines 2.9.5 (Written form of approval, opposition and reclassification) and 2.9.6 (Statement of reasons for approval, opposition and reclassification) to the Drafting Committee because, in reply to the question the Special Rapporteur had asked at the preceding meeting, they were entirely appropriate and provided a great deal of clarity and certainty.

10. Draft guideline 2.9.7 (Formulation and communication of an approval, opposition or reclassification) referred to several other draft guidelines, particularly draft guideline 2.1.6, which dealt with the time period for formulating an objection. In the case of an opposition, however, there should not be any time period because a time period would apply only in the case of a conditional interpretative declaration. It would therefore be better not to refer to that draft guideline in the present context.

11. With regard to draft guideline 2.9.10 (Reactions to conditional interpretative declarations), she endorsed the comments made by Mr. Gaja and agreed in principle that reactions to such declarations were similar to reactions to reservations; the text nevertheless referred to such a large number of guidelines that she had not yet been able to consider all their implications and thought that it would be useful to look more closely at the nature of conditional interpretative declarations. In conclusion, she was in favour of referring all the draft guidelines to the Drafting Committee, including draft guideline 2.9.10, which could thus be studied more thoroughly and in greater detail, and she hoped that account would be taken of her comments.

The meeting rose at 10.35 a.m.

2976th MEETING

Wednesday, 9 July 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

THIRTEENTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. Mr. FOMBA said he had no difficulty in endorsing the reasoning behind the Special Rapporteur's erudite thirteenth report on reservations to treaties (A/CN.4/600). Addressing first the premises and postulates underpinning the report, he said that the silence of the 1969 and 1986 Vienna Conventions on the matter and the dearth of established practice were good reasons why the Commission should examine the question of interpretative declarations and reactions to them. It was important to bear in mind the distinction between reservations and interpretative declarations. Although in paragraph 4 [279] the Special Rapporteur intimated that an interpretative declaration did not, at least openly, purport to modify the treaty's legal effects with regard to the declarant, that meant, *a contrario*, that it could purport to do so. Consequently the Commission could not simply transpose the rules of the 1969 Vienna Convention on acceptance of and objections to reservations to the draft guidelines. The distinction drawn between simple and conditional interpretative

declarations had merit, as did the classification of the three types of reactions to interpretative declarations proposed in paragraph 7 [282].

2. As to the draft guidelines themselves, he concurred with the reasons given for employing the term "approval" in draft guideline 2.9.1 (Approval of an interpretative declaration), and also found the text of the draft guideline acceptable, although he wondered whether the notion of not prejudging the issue of the legal effects of such approval should perhaps be expressed there in some way. He did not, however, have any specific wording to propose at the current stage.

3. With reference to draft guideline 2.9.2 (Opposition to an interpretative declaration), he was grateful to the Special Rapporteur for drawing attention to the fact that, in practice, a variety of terms were used, and that a subtle distinction needed to be made between negative reactions to interpretative declarations and objections to reservations. The text of the draft guideline was acceptable on the whole. However, if the definition was to be based on intention and effects, he wondered whether the distinction between "opposition" and "objection" might be too tenuous, and whether there was any other valid reason for applying such a distinction.

4. He appreciated the differentiation of "approval", "opposition" and "reclassifications" made in paragraph 25 [300] with reference to draft guideline 2.9.3 (Reclassification of an interpretative declaration), the text of which was satisfactory, in that it was based on State practice. The only query which had been raised concerned the bracketed second paragraph. The Special Rapporteur explained that it was a corollary to the rules adopted with respect to the distinction between reservations and interpretative declarations and that it was justified for reasons of convenience. He agreed that, since the first paragraph provided for cases in which an interpretative declaration was reclassified as a reservation, its inclusion might be helpful.

5. Generally speaking, the texts of draft guidelines 2.9.8 (Non-presumption of approval or opposition) and 2.9.9 (Silence in response to an interpretative declaration) were acceptable, because they were based on principles drawn from State practice. There might, however, be some contradiction between the first and second paragraphs of draft guideline 2.9.9. What were the "certain specific circumstances" mentioned in the second paragraph? What was the difference between "silence" and "conduct"? Was silence not a form of conduct?

6. Draft guidelines 2.9.5, 2.9.6 and 2.9.7 constituted useful recommendations. His first reaction was that it would seem logical to draft similar provisions on interpretative declarations themselves. Although the text of draft guideline 2.9.4 (Freedom to formulate an approval, protest or reclassification) was acceptable on the whole, it would be necessary to harmonize the terminology of the title, which used the term "protest", with the body of the text, which spoke of "opposition". In his view, States and international organizations which were not parties to the treaty were entitled to react to interpretative declarations. In the context of draft guideline 2.9.10 (Reactions

to conditional interpretative declarations), the reference to the commentary to draft guideline 1.2.1 in paragraph 50 [325] of the report was useful. He shared the Special Rapporteur's doubts about using the same terminology to denote negative reactions to a conditional interpretative declaration and objections to reservations, and agreed that, for the time being, it would be better to leave the issue of terminology in abeyance until the Commission had taken a final decision on the effects of conditional interpretative declarations and on their possible assimilation to reservations. He thought that *prima facie* they could be treated as reservations. The text of the draft guideline did not call for any particular remarks.

7. He was in favour of referring all the draft guidelines proposed in the thirteenth report to the Drafting Committee.

8. Mr. McRAE said that although, as usual, he had been educated and informed by the Special Rapporteur's presentation of his report, he had not been entirely convinced by everything that had been said. As a result, while he was broadly in agreement with the report and the draft guidelines it contained, he had some comments to make, in the course of which he would respond to the specific questions regarding which the Special Rapporteur had asked for reactions.

9. As far as the categories of reactions to interpretative declarations were concerned, he tended to agree with the point made at the previous meeting by Ms. Escameia. In paragraph 7 [282] the Special Rapporteur listed three types of reaction: positive, negative and silence. Yet when he discussed them in more detail in paragraphs 8 [283] to 41 [316] they became four categories: approval, opposition, reclassification and silence. In other words, a negative reaction was broken down into two categories, namely opposition and reclassification.

10. Opposition itself comprised two categories: rejection of the interpretation, and proposal of an alternative interpretation. Reclassification, which consisted in a State characterizing an interpretative declaration of another State as a reservation was, however, really a form of opposition. The question was why the Special Rapporteur felt the need to treat reclassification as something different to opposition.

11. He detected some ambivalence in the report. In paragraph 7 [282], the Special Rapporteur referred to what he later termed "reclassification" as expressing "opposition to its classification as an 'interpretative declaration', usually on the ground that it is in reality a reservation". Yet in paragraph 25 [300], the Special Rapporteur justified not treating reclassification as opposition on the ground that it "do[es] not refer to the actual content of the unilateral statement in question, but rather to its form and to the applicable legal regime".

12. However, it was questionable whether any of that mattered and it was, in any case, unclear what the applicable legal regime was. At that stage the Special Rapporteur was simply defining categories; he dealt with the consequences attaching to those categories later. If the

consequences of opposition through rejection of an interpretation, opposition through the proposal of an alternative interpretation, and opposition through reclassification were all the same, why could those reactions not simply be referred to as opposition?

13. He would suggest that the consequences of all three reactions must be the same. Since an objecting State could not unilaterally turn an interpretative declaration into a reservation, then all it was saying, when it called the declaration a reservation, was that it disagreed with the interpretation offered. As Mr. Gaja had already pointed out, whether an interpretative declaration was in fact a reservation depended on the intent of the State making the reservation, not on the reaction of other States to it.

14. Of course, if it subsequently transpired, through a process of interpretation, that the interpretative declaration was in fact a reservation—that it was a conditional interpretative declaration—then it would have to be treated as a reservation. However, that was not the situation at the time the objection was made. An interpretation that was opposed, or for which an alternative interpretation was suggested, could equally well turn out later to be a reservation. So again, the category of reclassification seemed not to differ from other subcategories of opposition.

15. For that reason, it was unclear why States seeking to reclassify an interpretative declaration would need to apply, or be guided by, draft guidelines 1.3 to 1.3.3, or why a State that was opposing an interpretative declaration on some other ground should take account of those draft guidelines. Therefore, he did not see why the second paragraph of draft guideline 2.9.3 was necessary.

16. His broader point was whether draft guideline 2.9.3 was needed at all as a separate guideline. If, as he had suggested, reclassification was simply another form of opposition, it could be included in draft guideline 2.9.2, along with the other subcategories of opposition, namely, rejecting an interpretation or proposing an alternative one.

17. His second comment related to silence. Like Ms. Escameia, he had doubts about the second paragraph of draft guideline 2.9.9. The Special Rapporteur was right to conclude that consent could not be inferred from silence in the case of an interpretative declaration. Silence had implications when it occurred in the face of a duty to speak, but, as the Special Rapporteur had pointed out, there was no such duty in the case of an interpretative declaration.

18. However, the second paragraph of draft guideline 2.9.9 contradicted that assertion by saying that, in certain circumstances, silence alone could constitute acquiescence. That point had also been made by Mr. Fomba, but the justification given in the report for the second paragraph of draft guideline 2.9.9 said something slightly different: in paragraph 41 [316] the Special Rapporteur said that, in some circumstances, a State that was silent might be considered to have acquiesced by reason of its conduct. That statement was somewhat cryptic, but

to the extent that the Special Rapporteur was saying that silence might be relevant to deciding whether there had been acquiescence by conduct, it was a correct proposition. Yet the text of the second paragraph of draft guideline 2.9.9 did not say that. The text said that there could be acquiescence by silence *or* by conduct.

19. He was not, however, suggesting that the Special Rapporteur should delete the second paragraph. That paragraph was simply a caution to States; as such, it should make it clear that silence might be relevant in ascertaining whether there had been acquiescence by conduct, but that silence alone could not constitute acquiescence.

20. In response to the Special Rapporteur's question about the desirability of including draft guidelines 2.9.4 to 2.9.7, he thought that they should be included, subject to the corrections proposed at the previous meeting by Ms. Escameia (paras. 10–11) and at the current meeting by Mr. Fomba. The Special Rapporteur should also produce parallel draft guidelines for interpretative declarations themselves.

21. Lastly, on the subject of conditional interpretative declarations, he remained unconvinced that there was any justification for them treating as anything other than reservations. While he conceded that he had not participated in the Commission's past discussions on that issue, he failed to see how such declarations could be characterized only as "infinitely closer" to reservations than simple interpretative declarations, the implication being that there was some residual difference between conditional interpretative declarations and reservations. By making its consent to the treaty conditional upon the proposed interpretation, the author of a conditional interpretative declaration was seeking to do only what a reservation could do, in other words to modify the terms of the treaty in the State's relations with the other parties to the treaty. It was thus no more than a reservation.

22. There were therefore only two categories: simple interpretative declarations and reservations, the latter being composed of true reservations and reservations put forward in the form of a conditional interpretative declaration. For that reason, he was in agreement with the spirit of draft guideline 2.9.10, namely that the rules relating to reactions to reservations also applied to reactions to conditional interpretative declarations, although he concurred with Ms. Escameia that to make a cross-reference to such a large number of draft guidelines was not felicitous. That, however, was a matter for the Drafting Committee, to which all the draft guidelines should be referred.

23. Mr. CAFLISCH said that interpretative and conditional interpretative declarations raised such difficult issues that some had even questioned the advisability of venturing onto such slippery ground. In his view, however, there were three good reasons why the Commission should.

24. First, some multilateral agreements prohibited reservations, thereby providing States with an incentive to make declarations, which, accordingly, were of some significance. Moreover, those declarations could, after reclassification, be construed as reservations.

25. Secondly, such declarations, if they met with the approval of the other parties, could result in subsequent agreement regarding the interpretation of the treaty within the meaning of article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, so that a declaration which had been "approved" by other States that were parties came within the context, *lato sensu*, of the treaty and became an important factor in interpreting it.

26. Thirdly, attempts were frequently made to reclassify interpretative declarations, *inter alia* in international systems for the protection of human rights. If a declaration were made during the existence of a treaty and if it were subsequently reclassified as a reservation, that would raise the issue of its validity *ratione materiae* and *ratione temporis*.

27. The Special Rapporteur had therefore been right to examine the subject of declarations in depth. He had done so in a manner that made it possible to refer all the draft guidelines proposed in the thirteenth report to the Drafting Committee.

28. Mr. Caflisch agreed with the definitions given of and the distinction drawn between reservations, "simple" interpretative declarations and conditional interpretative declarations in paragraphs 3 [278] to 5 [280] of the report. He also endorsed the use of the terms "approval", "opposition" and "reclassification", and the view expressed in paragraph 5 [280] that conditional interpretative declarations came closer to being reservations than "simple" interpretative declarations.

29. With reference to individual draft guidelines, he wondered if draft guideline 2.9.1, on the approval of an interpretative declaration, should perhaps specify the effect of such approval. In paragraphs 10 [285] and 11 [286] the Special Rapporteur stated, however, that it should not be specified, referring in that connection to article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which he cited in paragraph 10 [285]. While Mr. Caflisch was prepared to accept that view, he felt that the link with that provision should be made somewhere, perhaps in the commentary.

30. The other side of the coin, namely opposition, was the subject of draft guideline 2.9.2, in which there was certainly no need to mention effects, as they were obvious: a declaration expressing opposition could bind the declaring State, and that State alone. It purported, in the words of draft guideline 1.2, "to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions".¹⁶⁵ Perhaps attention should be drawn in the commentary to the interrelationship between draft guideline 2.9.2 and draft guideline 1.2.

31. Draft guideline 2.9.3, which dealt with reclassification, defined the concept and outlined the consequences: the State that formulated a reclassification "purports to regard the [initial] declaration as a reservation and to treat it as such" (para. 28 [303] of the report). Accordingly, the declaration produced effects only for the State making the reclassification and, perhaps, for other States that might

¹⁶⁵ *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

subsequently “approve” it. Reclassification was obviously only a first step: the declarant would then have to deal with the question of the validity *ratione temporis* and *ratione materiae* of the original declaration or reservation; however, addressing that question would go far beyond the scope of the current exercise. The bracketed second paragraph of draft guideline 2.9.3 should be retained, and in view of the wording of draft guidelines 1.3 to 1.3.3,¹⁶⁶ referred to therein, the word “apply” would seem to be the more appropriate.

32. Draft guideline 2.9.9 was the one that raised the most difficulties. It dealt with the silence of States other than the State that had formulated an interpretative declaration: “in certain specific circumstances”, its second paragraph explained, the principle that silence was not equivalent to approval was overturned. Those circumstances were not identified, however, and in paragraphs 39 [314] and 40 [315] of his report the Special Rapporteur explained that it was impossible to do so. Doubtless that was true, but the fact remained that, as currently drafted, the second paragraph of draft guideline 2.9.9 raised more questions than it answered. Perhaps some of the doubts could be removed by citing certain specific circumstances enabling a State or an international organization to be considered in good faith to have acquiesced to an interpretative declaration. Despite the difficulties it raised, the draft guideline should not be deleted, since it would be inconsistent to speak of approval and opposition while remaining silent on silence itself. Lastly, he wondered from what point in time silence could be said to exist.

33. Mr. DUGARD said that, in his customary manner, the Special Rapporteur had anticipated every conceivable problem and his draft guidelines covered every conceivable situation. The draft guideline on reclassification might indeed, as Mr. McRae had suggested, be redundant, but it was nevertheless helpful to include that particular form of opposition to a declaration.

34. He wished to make some comments, mainly concerning the form rather than the substance, on draft guideline 2.9.9. Firstly, the phrase “acquiesced to”, in the English text, was incorrect: it should read “acquiesced in”. He agreed with Mr. Caflisch’s comments on the phrase “in certain specific circumstances”: those circumstances had to be spelled out. In practice, however, it might be extremely difficult to list all the circumstances that might give rise to an inference of consent. Accordingly, the phrase should be deleted. The emphasis should be on silence and, in particular, conduct, because it was the conduct of a State that might give rise to an inference of consent. However, such an inference could be drawn only when the State had full knowledge of the implications of the interpretative declaration and failed to take any action.

35. In paragraph 39 [314] of his report, the Special Rapporteur cited the comment of the Eritrea–Ethiopia Boundary Commission (*Decision regarding delimitation of the border between Eritrea and Ethiopia*) that in deciding whether a party to a treaty had given consent,

the court could apply principles variously described as “estoppel, preclusion, acquiescence or implied or tacit agreement” [para. 3.9]. In a recent case, with which the Special Rapporteur was intimately acquainted, the ICJ had relied on acquiescence and tacit agreement in order to infer consent.¹⁶⁷ Objections had been raised, however, to the way in which consent had been inferred when it was not clear that the State concerned had fully understood the implications of its silence. He would therefore suggest the addition to the draft guideline of a phrase indicating that consent could be inferred when a State had knowledge of the meaning and implications of the interpretative declaration and failed to object. That would reflect the comment of the Eritrea–Ethiopia Boundary Commission to the effect that, in order to infer knowledge on the part of the State, there must be an indication of a failure by that State to dissociate itself from or to reject a statement within a reasonable time. While it was difficult to prove knowledge of the meaning of an interpretative declaration subjectively, it was possible to do so objectively by examining the interpretative declaration: if it was clear in its meaning and the State did nothing, it was possible to infer consent on its part. Lastly, the phrase “as the case may be”, at the end of the second paragraph of the draft guideline, was meaningless and could be deleted.

36. With those comments, he had no hesitation in recommending that the draft guidelines be referred to the Drafting Committee.

37. Mr. PELLET (Special Rapporteur) said it was his firm conviction that the Commission must take a stand on questions of principle in plenary session. Two very different tendencies could be discerned with regard to draft guideline 2.9.9, which, he agreed, was the most problematic. Most members seemed to think the second paragraph did not add much and that the phrase “in certain specific circumstances” needed to be fleshed out. Mr. McRae, however, had proposed that, rather than specifying the circumstances, the draft guideline should state that silence was a circumstance. That was an interesting position and he would like to hear whether any other members supported it. In other words, could silence be considered as acquiescence, or as an element of acquiescence, or could the two ideas even be compatible?

38. Mr. DUGARD said it would be helpful if the Special Rapporteur could give some indication of what he meant by “specific circumstances”, perhaps by providing examples of circumstances other than silence or conduct involving silence.

39. Mr. PELLET (Special Rapporteur) cited the hypothetical case in which a State notified the depositary that if a conditional interpretative declaration it had made was contested, it would refuse to be bound by the treaty. If no States reacted to that declaration, it would be difficult to claim that their silence had no legal effects. A concrete example was the declaration of France with regard to the Treaty for the Prohibition of Nuclear Weapons in Latin America (“Treaty of Tlatelolco”).

¹⁶⁶ *Ibid.*, pp. 107–112.

¹⁶⁷ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, para. 121.

40. Mr. McRAE said that the statement in the second paragraph of draft guideline 2.9.9 that silence could constitute acquiescence contradicted the first paragraph, and that the circumstances in which it could do so had to be explained. If, on the other hand, the draft guideline stated that conduct could constitute acquiescence, then there was no need to explain the circumstances. Silence was one element of conduct constituting acquiescence. Mr. Dugard's proposal was problematic because it suggested that in certain circumstances States were under an obligation to react when an interpretative declaration was made. Many interpretative declarations were quite clear, yet States would be forced to react to them lest it might subsequently transpire that they had an obligation to react and had not done so.

41. Mr. SABOIA said that the second paragraph of draft guideline 2.9.9 was vague and seemed to contradict the first paragraph. He would prefer to see it deleted. That would not preclude silence, accompanied by other factors, from signifying acquiescence in certain circumstances, according to the general rules of interpretation. On conditional interpretative declarations, he agreed with Mr. McRae that they should be considered to be reservations and that the rules applicable to reactions to reservations should also be applicable to them.

42. Ms. ESCARAMEIA, responding to the questions posed by the Special Rapporteur, said that her proposal regarding draft guideline 2.9.9, made at the previous meeting, had in fact been more drastic, namely to delete it altogether as, if retained, it might seem to contradict draft guideline 2.9.8, which allowed no presumption of approval or opposition. Draft guideline 2.9.9, on the other hand, provided that silence or failure to react could signify acquiescence in some circumstances and opposition in others. Given that any exploration of acquiescence would be very complicated and would go beyond the scope of the topic, it would be better to delete draft guideline 2.9.9, perhaps also expanding the text of draft guideline 2.9.8 or referring to the matter in the commentary. She could understand the reasoning of those who claimed that the deletion of draft guideline 2.9.9 would leave a structural gap, implying that the Commission had failed to address the question of silence and had subsumed it under draft guideline 2.9.8. Yet the solution of retaining one paragraph of draft guideline 2.9.9 while deleting the other would convey the misleading impression that nothing could be inferred from silence, which was not the case. As for the Special Rapporteur's question whether silence was an element of conduct that led to acquiescence or itself constituted acquiescence, she tended to take Mr. McRae's view, as only a limited number of inferences could be drawn from silence.

43. Mr. NOLTE said that to remain silent on the question of acquiescence was certainly the safest way for the Commission to proceed, but was not helpful for States that were wondering what significance would be ascribed to their actions. The Special Rapporteur had drafted a nuanced and balanced proposal, and he wondered whether there was really as wide a divergence of opinion as had been suggested. Acquiescence was a version of the principles of *bona fides* and the protection of legitimate expectations, which were determined by the

context rather than by the inherent nature of the conduct or silence. There were certain types of contractual relations, such as those obtaining among a small group of States that met regularly, in which the partners might legitimately be expected to react, and others in which they had legitimate reasons for not reacting. While it was reasonable to establish a general rule whereby no presumption was to be inferred from silence, consideration must also be given to whether the specific circumstances called for a reaction. Perhaps at an earlier stage in the evolution of international law there had been greater freedom to remain silent. In the modern world, however, silence plus context, not silence as conduct, determined whether there was an obligation to react.

44. Mr. CANDIOTI said it was important to consider draft guidelines 2.9.8 and 2.9.9 in tandem. The first paragraph of draft guideline 2.9.9 was a clarification to the effect that consent must be explicit and could not be inferred from silence. While reference needed to be made to the role of silence, as was done in draft guideline 2.9.9, it was draft guideline 2.9.8 that contained the main principle. In his view, silence was a form of conduct; silence and conduct were not two different things. Silence was an expression of an attitude to an interpretative declaration. It was therefore important to indicate, either in the commentary or elsewhere, the particular circumstances in which significance was to be attached to silence. It might, for instance, have significance on the basis of the text of the interpretative declaration itself, where, for example, the other parties to the treaty were called upon to voice their opinions on the matter in question. The second paragraph of draft guideline 2.9.9 should therefore not be deleted; instead, it should be further refined and developed.

45. Mr. WISNUMURTI said that the Special Rapporteur had once again submitted a well-researched, analytical and comprehensive report. In its paragraph 3 [278], the Special Rapporteur had justifiably stressed the difference between reservations and interpretative declarations in terms of their respective legal effects on a treaty. Unlike reservations, interpretative declarations were intended merely to clarify the meaning of certain treaty provisions and did not purport to modify the treaty's legal effects. A possible exception was the case of conditional interpretative declarations, where the author made its consent to be bound by the treaty conditional on the interpretation proposed.

46. In analysing the practice of States and international organizations in response to interpretative declarations, the Special Rapporteur had convincingly presented three different types of reactions, namely positive, negative and reactions in the form of silence, on the basis of each of which draft guidelines were being proposed. The Special Rapporteur had also raised the possibility of a fourth reaction whereby an interpretative declaration was reclassified as tantamount to a reservation. In his view, such a category of reaction merited further discussion.

47. He had no problem with draft guideline 2.9.1, in that it reflected State practice as described by the Special Rapporteur in his report. He fully concurred that agreement with an interpretative declaration should not

be confused with acceptance of a reservation, given the differences between the two. However, he had some difficulty in understanding the Special Rapporteur's view that it was not necessary at the present stage of the study to specify the legal effects that the expression of such agreement might produce. The inclusion of a provision on the legal effects of approval of an interpretative declaration would strengthen draft guideline 2.9.1. That being said, he would appreciate any clarification the Special Rapporteur might be able to provide on the matter.

48. In his introduction to draft guideline 2.9.2, the Special Rapporteur had provided an extensive review of State practice, in which there were various ways of expressing rejection of the interpretation proposed in the interpretative declaration, including so-called "constructive" refusal or rejection. For the most part, he could go along with draft guideline 2.9.2. The Special Rapporteur had concluded in paragraph 22 [297] of his report that in rejecting interpretative declarations, States or international organizations sought "to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation". That conclusion had been reflected in the last part of the draft guideline, in the phrase "with a view to excluding or limiting its effect", which constituted the reason for the rejection. He was not convinced that the reason for rejection should be mentioned in draft guideline 2.9.2; rather, it should be left to the State or international organization expressing its rejection. He recalled that draft guideline 2.9.1 on approval of an interpretative declaration contained no reference to the reason for approval.

49. Like draft guideline 2.9.1, draft guideline 2.9.2 would benefit from an additional provision to address the legal effects of a rejection or opposition to an interpretative declaration. The Special Rapporteur had already referred to that question in a different context in paragraph 22 [297] of his report. The inclusion of such a provision would bring greater clarity to the regime of interpretative declarations.

50. Draft guideline 2.9.3 appeared to pose no problem and reflected State practice as described by the Special Rapporteur in his report. It was important to note that the reclassification of an interpretative declaration, by its very nature, differed from approval or opposition, as it referred to the form of the proposed interpretation in the declaration and to the applicable legal regime rather than to the content of the declaration.

51. He also favoured removing of the square brackets enclosing the second paragraph, concerning the need to take into account or apply draft guidelines 1.3 to 1.3.3. His preference was for the wording "apply".

52. Draft guidelines 2.9.8 and 2.9.9 were essential with a view to avoiding errors of judgement when dealing with situations in which the reaction to an interpretative declaration took the form of silence. He therefore had no quarrel with the two draft guidelines. It seemed to him that the essence of the second paragraph of draft guideline 2.9.9 should be retained. However, there was a need for clarification of what was meant by the "certain

specific circumstances" referred to therein, either in the body of the text or in the commentary.

53. In his view, draft guidelines 2.9.5 (Written form of approval, opposition and reclassification), 2.9.6 (Statement of reasons for approval, opposition and reclassification) and 2.9.7 (Formulation and communication of an approval, opposition or reclassification) were indeed necessary. With regard to the points made by the Special Rapporteur in paragraph 46 [321] of his report, it might be useful, subject to consensus within the Commission, for the Special Rapporteur to prepare a draft guideline on interpretative declarations themselves, based on the recommendations contained in paragraph 45 [320] of his report.

54. He had no problem with draft guideline 2.9.4, as it applied to any contracting State or international organization and also to any State or any international organization that was entitled to become a party to the treaty.

55. With regard to draft guideline 2.9.10, the Special Rapporteur had made it clear that a conditional interpretative declaration came close to being a reservation. However, he had stressed in paragraph 5 [280] that this did not mean that the regime for reactions to interpretative declarations should be identical to the one for reactions to reservations, adding that this was only a working hypothesis that should be explored. He agreed with both the Special Rapporteur's analysis and his suggestion for continued study of that issue.

56. Mr. PELLET (Special Rapporteur) said he wished to make a clarification in advance of the following day's discussion. In his interesting statement, Mr. Wisnumurti had urged him, in relation to draft guidelines 2.9.1 and 2.9.2, to add provisions on the effects of approval or rejection. He was opposed to that idea, not for reasons having to do with substance, but for reasons that related to the coherence of the text as a whole. The Guide to Practice would consist of five parts: the first part concerned definitions; the second part, which the Commission was trying at all costs to complete during the current session, was on procedure and formulation, with regard to either an objection to or an acceptance of a reservation or an interpretative declaration. That meant that there were provisions on the procedure for the formulation of interpretative declarations and of reactions to interpretative declarations. While it was difficult to refrain altogether from referring to the question of effects in the commentary or the discussion, it would make sense to take up the question of the effects produced by declarations made according to a certain procedure only in the third part of the Guide to Practice, which concerned the effects of reservations, of interpretative declarations, and of reactions to reservations and to interpretative declarations. Thus, for reasons having to do simply with the proposed structure of the draft, he could not agree to that proposal at the current stage because the Commission was concerned for the time being with procedures, not with effects.

The meeting rose at 11.30 a.m.

2977th MEETING

Thursday, 10 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the thirteenth report on reservations to treaties.

2. Mr. YAMADA, congratulating the Special Rapporteur on his excellent report on interpretative declarations, said that the proposed draft guidelines contained carefully selected terminology that would prove to be very useful to practitioners. Generally speaking, he had no problems with any of the draft guidelines, but, before commenting on them, he would refer to the conceptual difficulties to which they gave rise. In 1999, the Commission had adopted draft guideline 1.2 (Definition of interpretative declarations)¹⁶⁸ and draft guideline 1.2.1 (Conditional interpretative declarations). The texts of these draft guidelines and the commentaries thereto made it abundantly clear that interpretative declarations were not reservations and that they purported to specify or clarify the meaning or scope attributed by the declarant to a treaty or certain of its provisions. With regard to conditional interpretative declarations, the Commission had considered that their legal regime was infinitely closer to that of reservations, but that they were also not reservations. In that connection, he drew attention to the following excerpts from paragraph (11) of the commentary to guideline 1.2.1:

...some members of the Commission wondered whether conditional interpretative declarations should not be treated purely and simply as reservations. Although there is support for this position in doctrine, the Commission does not believe that these two categories of unilateral statement are identical: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try “to exclude or modify the legal effect of certain provisions of the treaty in their application”.... Even if the distinction is not always obvious, there is an enormous difference between application and interpretation.¹⁶⁹

Unless the Commission decided to alter that position, the draft guidelines on reactions to interpretative declarations or any other related aspect must be based on it.

3. Referring to the different types of interpretative declarations dealt with in the report, he had no problem with draft guideline 2.9.1 (Approval of an interpretative declaration) and no particular problem with the wording of draft guideline 2.9.2 (Opposition to an interpretative declaration), although the meaning of the last phrase “with a view to excluding or limiting its effects” was not clear. It could be asked why and for what purpose the other parties would oppose something that was not a reservation unless they considered that the interpretative declaration in question altered the legal relationship between the parties and that it was a disguised form of reservation. In such a case, the other parties could invoke the next guideline, guideline 2.9.3 (Reclassification of an interpretative declaration), and regard the declaration as a reservation. Then guidelines 2.6 to 2.8 could be applied and guideline 2.9.2 would no longer be relevant. Perhaps guideline 2.9.2 applied in the case where the other parties considered that the interpretative declaration in question created additional obligations or broadened their scope and they could not so agree; opposition then became meaningful. He wondered whether that was the case to which guideline 2.9.2 applied.

4. He had no problem with draft guideline 2.9.3 (Reclassification of an interpretative declaration) or with draft guidelines 2.9.5 to 2.9.8. With regard to draft guideline 2.9.9 (Silence in response to an interpretative declaration), he did not agree with some members of the Commission that the first and second paragraphs were contradictory because either all parties remained silent and consent could not be inferred, or the overwhelming majority of the parties gave their express consent and one of them remained silent and acquiescence could be inferred. In conclusion, he supported the referral of the proposed draft guidelines to the Drafting Committee.

5. Mr. HASSOUNA thanked the Special Rapporteur on reservations to treaties for his elaborate and thoughtful thirteenth report. In his introduction, the Special Rapporteur had sounded almost apologetic for the slow progress of his work, but had justified it as being the result of a deliberate attempt at thorough and deep analysis of the issues involved. He assured the Special Rapporteur that he would have his full support as long as the product of his work was of practical value to Governments and practitioners, as was the case of the draft guidelines under consideration. In his introduction, the Special Rapporteur had also stressed the importance he attached to the Commission's views on some of the issues discussed in the report, recalling that he had often in the past argued that it was up to the Commission to take clear positions of principle on certain issues, even through the voting procedure, rather than having them debated in the Drafting Committee. While he agreed that the Commission could and sometimes must adopt such positions of principle, recent experience had shown that it was not always wise to follow that course and that, by referring a matter to the Drafting Committee, an acceptable compromise could be reached through informal discussions.

¹⁶⁸ *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

¹⁶⁹ *Ibid.*, p. 105.

6. With regard to the substantive issues referred to in the report, Mr. Hassouna said that he agreed with the Special Rapporteur's general approach that reactions to interpretative declarations and objections to and acceptance of reservations were separate issues. That difference of approach was justified in the light of the different legal characteristics of the two issues and the different legal effects they were meant to produce in relation to a treaty. The report analysed the different types of reactions by States or international organizations to which an interpretative declaration might give rise. In describing the types of reaction, the report occasionally misread their nature. For example, the text submitted by Israel to the Secretary-General of the United Nations in response to a declaration by Egypt concerning the United Nations Convention on the Law of the Sea (para. 8 [283] of the report), in which the Government of Israel gave its own interpretation of the declaration by Egypt, should, in his view, be considered as a conditional approval, not a total and absolute one. That example showed that it was difficult to interpret and categorize reactions to interpretative declarations.

7. As to the reclassification of an interpretative declaration by States and international organizations, he pointed out that, although, in practice, States almost always combined a reclassification with an objection to a reservation and the reclassification in fact became a form of objection, such a reaction should be regarded as a separate category with its own rules of procedure. In draft guideline 2.9.3 (Reclassification of an interpretative declaration), he endorsed the first paragraph and was in favour of retaining the second, in which the square brackets should be removed in order to emphasize the distinction between reservations and interpretative declarations. Several parts of the report referred to the legal effects of interpretative declarations, emphasizing that they were different from the legal effects that reservations might produce, but, contrary to what the Special Rapporteur stated, the consideration of the legal effects of interpretative declarations should not be left pending. By way of clarification or illustration, it would be useful to have some explanation of those effects in the body of the draft article or in the commentary thereto.

8. Referring to the issue of conditional interpretative declarations, it was clear that such reactions could in many ways be regarded as reservations and, consequently, the legal regimes of the two categories contained many similarities. In addition, the procedure for reactions to conditional interpretative declarations would therefore closely follow the one applicable to acceptance of and objection to reservations. Although the report spelled out the content of those principles without ambiguity, draft guideline 2.9.10 (Reactions to conditional interpretative declarations) called for further clarification.

9. Some members of the Commission had proposed that draft guideline 2.9.9 (Silence in response to an interpretative declaration), which had given rise to a lengthy and interesting discussion, should be deleted on the grounds that it was redundant, while others had expressed the view that only the second paragraph was superfluous. His own preference was that the draft guideline should be retained as it stood because it shed light on the role of silence as a response to an interpretative declaration. He did acknowledge, however, that the words "[i]n certain specific

circumstances" in the second paragraph were too vague and thus required some legal clarification. In conclusion, he recommended that all the draft guidelines should be referred to the Drafting Committee.

10. Ms. JACOBSSON congratulated the Special Rapporteur on his excellent and very interesting report, which was particularly thorough and well researched. She also thanked Mr. Daniel Müller, whose major role in preparing the report had been acknowledged by the Special Rapporteur himself. In response to the Special Rapporteur's explicit request, she would focus on draft guideline 2.9.9 (Silence in response to an interpretative declaration), in connection with which she endorsed the Special Rapporteur's analysis that the concept of acquiescence was also relevant in treaty law, although "conduct" (art. 45 of the 1969 Vienna Convention and art. 45 of the 1986 Vienna Convention) was as impossible to define in that context as it was difficult to determine the circumstances when silence was tantamount to consent. That was why the Special Rapporteur concluded that the effect of acquiescence could be determined only on a case-by-case basis (para. 40 [315] of the report).

11. The crucial question was whether that conclusion was adequately reflected in draft guideline 2.9.9. The first paragraph did not give rise to any problems, but the second did. As Mr. Fomba had pointed out at an earlier meeting, since silence was simply a type of conduct, the distinction between "silence" and "conduct" in the second paragraph was rather unfortunate. Was that paragraph necessary? If it was, the "specific circumstances" being referred to should be specified. She was reluctant to have the Commission embark on an exercise focusing more on the law of acquiescence than on the formulation of a practical guideline. The question of acquiescence by a State was in itself worthy of a separate study that could be included in the Commission's long-term programme of work. Perhaps one way out would be to redraft the second paragraph as a without prejudice clause which might read: "This paragraph [i.e. the first paragraph] is without prejudice to a situation whereby silence on the part of a State or an international organization is one of the factors that may evidence acquiescence". In conclusion, she believed that some sort of reference to the possible consequences of silence as part of "acquiescence" would be better than a list of "specific circumstances" in the body of the draft guideline. She agreed that the draft guidelines should be referred to the Drafting Committee.

12. Mr. PETRIČ said that he fully supported the approach adopted by the Special Rapporteur in his thirteenth report and particularly appreciated the study of the legal effects of interpretative declarations. The rules governing interpretative declarations must therefore be more than a copy of the rules on reservations contained in the 1969 Vienna Convention and that was why the Special Rapporteur had rightly introduced different terminology. He also appreciated the Special Rapporteur's work on the issue of silence, the question of reclassification and the treatment of conditional interpretative declarations.

13. The draft guidelines proposed in the report were the result of all that work and they could, with the exception of draft guideline 2.9.9, be referred to the Drafting Committee.

14. Draft guideline 2.9.9 and its second paragraph, in particular, did not have much of a basis in the practice of States, and that was a weakness in itself. The Special Rapporteur's intention was understandable because, in certain specific circumstances, a State or an international organization might be considered as having acquiesced to an interpretative declaration via silence or conduct, but sound reasons were usually necessary. Moreover, as silence in response to interpretative declarations was common and explicit reactions were rare, care must be taken, all the more so because the effect of acquiescence was largely similar to that of approval, which must, in accordance with draft guideline 2.9.5, be formulated in writing.

15. With regard to conditional interpretative declarations, he pointed out that the legal effect of an act, not its name, determined its classification. He was not sure whether conditional interpretative declarations were not, by their effects, reservations and whether they should not be treated as such. As the Special Rapporteur stated in paragraph 50 [325] of his report, their main feature brought "conditional interpretative declarations infinitely closer to reservations than 'simple' interpretative declarations". He therefore fully agreed with the Special Rapporteur's conclusion in paragraph 55 [330] of his report that it was best to leave the terminology issue in abeyance until the Commission had taken a final decision on the effects of conditional interpretative declarations.

16. Mr. HMOUD said that the regime of interpretative declarations was a field of treaty law which required clarification and in which guidance must be given to States and practitioners in view of the lack of relevant provisions in the 1969 and 1986 Vienna Conventions. As treaties were more and more reflective of diplomatic compromises and thus contained ambiguous language, resort to interpretative declarations was becoming increasingly popular. In addition, some categories of treaties, primarily those relating to human rights, were closing the door to reservations and States were finding interpretative declarations to be a means of adopting a particular legal position in relation to a treaty and its provisions. That issue thus had to be dealt with in the draft guidelines.

17. He generally agreed with the Special Rapporteur that, as interpretative declarations differed from reservations in content, the legal regime applicable to reactions should not be the same as the one applicable to objections. That went beyond terminology and more towards a separate set of rules or guidelines. For practical purposes, the issue of reclassification and opposition to reclassification should be clearly explained in the guidelines so that practitioners and depositaries would know how to treat "disguised reservations", especially in the case of time periods for reacting to a declaration and even the legal effects of a reaction to a disguised reservation. Although a reservation was always a reservation no matter how its author named it, the practitioner or depositary still needed guidance on how to react and how to treat such reservations. The report gave examples of reactions to declarations that had been treated by the depositary as objections.

18. Although conditional interpretative declarations were a special case and were obviously distinct from simple declarations, it was not wise to make the legal regime applicable

to them closer to that of reservations or to draw an analogy between reactions to such declarations and objections. The author of a reservation purported to modify the legal effects of a treaty, whereas the author of a conditional interpretative declaration subjected its consent to be bound by the treaty to acceptance of its interpretation. That was a matter, on the one hand, of the modification of legal effects and, on the other, of conditional ratification/accession/acceptance of the legal instrument in question.

19. With regard to categories of reactions, he agreed that reclassification was separate. Although in practice it was associated with a negative reaction, it was possible that the author of the reaction might reclassify the declaration as a reservation without opposing it; that was true in the case of treaties that allowed reservations. As to guideline 2.9.3 on reclassification, it was important to make it clear that the State that reacted treated the declaration as a reservation, since the practitioner needed to know that, if it decided to reclassify, it had to assume the legal responsibilities related to such reclassification. He thus did not see the need to include the second paragraph of draft guideline 2.9.3 in order to reiterate the process of distinction and its consequence, as provided for in draft guidelines 1.3 to 1.3.3.

20. On negative reactions, States sometimes tended to limit the scope of a treaty by means of an interpretative declaration when the treaty did not allow reservations. It should be made clear that such declarations were not "interpretative", but reservations, and should not be included in the category of interpretative declarations. The reaction to them should be an objection to a reservation, not opposition. They should be excluded from the scope of draft guideline 2.9.2.

21. Silence was a very pertinent issue in relation to interpretative declarations and there should be guidance on how it should be interpreted so that States would be able to deal with the legal effects of interpretative declarations and reactions thereto. In practice, silence had been viewed as conduct or part of conduct, depending on the circumstances. He agreed with that approach: jurists treated those two categories—conduct and silence—interchangeably, and there was no harm in mentioning both silence and conduct as leading to acquiescence. He could therefore support draft guideline 2.9.9 as reflective of practice in relation to acquiescence, but he did not see draft guideline 2.9.8 as needed or as actually adding anything to the provisions of draft guideline 2.9.9. In any event, there should be provisions on silence and how to deal with it, including whether there should be a time period after which silence would be regarded as approval. That was very important, especially in view of the problem of interpretative declarations that were in fact reservations.

22. He supported draft guidelines 2.9.5 to 2.9.7 on form, statement of reasons and communication of approval, opposition or reclassification, but he hesitated to support the inclusion of draft guideline 2.9.10, pending a decision by the Commission on the legal effects of such conditional interpretative declarations.

The meeting rose at 10.55 a.m.

2978th MEETING

Tuesday, 15 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, AC/N.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. PELLET (Special Rapporteur), said that his concluding remarks concerning the discussion of the thirteenth report on reservations to treaties (A/CN.4/600) would not be particularly brief, even though the report as a whole had not prompted much opposition. By and large, members' comments had focused on the second paragraph of draft guideline 2.9.9 (Silence in response to an interpretative declaration).

2. However, he wished to begin by disposing of draft guideline 2.9.10 (Reactions to conditional interpretative declarations). Unlike several other members, he continued to be of the view that those unilateral statements, which were defined in draft guideline 1.2.1¹⁷⁰ and which sought to impose a specific interpretation of the treaty, were not reservations. Seeking to impose a specific interpretation was one thing, but wishing to exclude or to modify the legal effect of certain provisions of the treaty in their application to the reserving State was quite another matter. It would be recalled that in 2001¹⁷¹ the Commission had decided not to review the definition of conditional interpretative declarations contained in draft guideline 1.2.1. Instead, while recognizing the existence of those unilateral declarations as a hybrid category—which in some respects resembled reservations, but in others resembled interpretative declarations—the Commission, and the Special Rapporteur, had realized that conditional interpretative declarations behaved much more like reservations than “simple” interpretative declarations; moreover, their legal regime was, if not identical, at least very similar, to that of reservations, so that there was some doubt as to the advisability of including a set of guidelines on conditional interpretative declarations in the Guide to Practice. Since then, that decision had frequently been revisited, but the

Commission was not yet ready to dispense with the draft guidelines on conditional interpretative declarations altogether, since it could not be sure that their legal regime corresponded fully to that of reservations until it had ascertained that the effects of interpretative declarations were identical to those of reservations. In the interim, the Commission had decided that the draft guidelines on conditional interpretative declarations should be adopted provisionally, even though they might eventually be deleted and replaced by a single guideline to the effect that the legal regime of reservations was also applicable to conditional interpretative declarations.

3. To that end, he had recommended that the Commission refer draft guideline 2.9.10 to the Drafting Committee. He believed that the draft guideline would probably disappear once the Guide to Practice was complete; nonetheless, it seemed unwise to declare it stillborn at that juncture, since basically all it said was that the procedural rules for the formulation of acceptances of and objections to reservations applied *mutatis mutandis* to reactions to conditional interpretative declarations, whereby the authors subjected their consent to be bound by the treaty to a specific interpretation thereof.

4. Subject to those precautions, on which some members had insisted, and bearing in mind those clarifications, there seemed no reason for the Commission to depart from its “provisionally traditional” prudent position on the matter, at least for the moment. The Drafting Committee should consider and the Commission should provisionally adopt the draft guideline by placing it in square brackets, as it had done with draft guideline 2.4.7 and as, in his view, it ought to have done with other draft guidelines on the question, among them guidelines 2.4.8, 2.4.10 and 2.5.13. While some members had been dubious about the content of draft guideline 2.9.10, there had been no outright opposition to the procedure he proposed.

5. He had taken note of one member's reproach that the report proper had not distinguished clearly enough between conditional and non-conditional interpretative declarations. Although he had not yet found any instances of scope for confusion, he would endeavour to look more closely at the matter when drafting the relevant commentaries.

6. Before turning to draft guideline 2.9.9, he wished to summarize various points raised during the discussion. He apologized for the inconsistency between paragraph 7 [282] of the report, which referred to three types of reactions to interpretative declarations, and subsequent paragraphs which described four reactions: approval; opposition; reclassification; and silence.

7. One member had challenged his view that reclassification came under a separate category from opposition to interpretative declarations, suggesting that it was a subcategory. The statistics showed that reclassification of an interpretative declaration as a reservation was, more often than not, a means of rejecting the very substance of the declaration. Nevertheless, in the first place, reclassification and rejection of the substantive content of an interpretative declaration were two completely different intellectual operations; in other words “declassification”

¹⁷⁰ *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

¹⁷¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 18, para. 20.

was a first step towards rejection of the content, generally on the ground that the reservation itself was unlawful. Secondly, it was not really important whether reclassification was a category or a subcategory, since it was still a form of opposition to a declaration, albeit a very special form of opposition.

8. Thirdly, those considerations were closely bound up with an interesting comment that had been made at the start of the debate, but which had not been taken up by other speakers. He agreed with that comment to the effect that the counter-interpretation of or challenge to the nature of the interpretative declaration need not, as such, prevail, as the author of the reclassification might be mistaken. He likewise agreed that, since it could not be presumed that a State was acting in bad faith, one should instead start from the presumption that the author of the declaration had intended to interpret the treaty and not to modify its effects. He proposed to reflect that comment in the commentary to draft guideline 2.9.3.

9. Turning to the comments on specific draft guidelines, and to draft guideline 2.9.1, he noted that one member had rightly characterized the example of approval of an interpretative declaration cited in paragraph 8 [283] of the report as “conditional approval”. The wording of the relevant part of the commentary would need to be amended accordingly.

10. As to the text itself, several members had voiced concern about the possible effects of approval, as defined in draft guideline 2.9.1. However, as he had pointed out during the discussion, the second part of the Guide to Practice related not to the effects of reservations and interpretative declarations, but to the formulation of reservations and interpretative declarations and of reactions thereto. The Commission should deal with the effects of such reactions when it considered the fourth part of the Guide to Practice and at that juncture only, since the effects of reservations and interpretative declarations depended to a great extent on the reactions they prompted. On the other hand, he had no problem with the suggestion made to draw attention to the connection between article 31 of the 1969 Vienna Convention and draft guideline 2.9.1 in the commentary.

11. The terminology he had proposed in order to differentiate between reactions to interpretative declarations and reactions to reservations, whether approval or opposition, had not given rise to any objections. Nor had the principle of opposition to an interpretative declaration set forth in draft guideline 2.9.2 been challenged, although a few members had questioned the appropriateness of the last phrase, namely “with a view to excluding or limiting its effect”. While he considered it essential to point out that opposition to an interpretative declaration might take the form of a counter-interpretation, he would not insist on retaining the last phrase. A decision on the matter should be left to the Drafting Committee.

12. With regard to the comments in the report, his attention had been drawn to an error in paragraph 17 [292]: Poland could hardly have opposed its own interpretative declaration; the States in question were Austria, Germany and Turkey.

13. More importantly, one member had used his position on the declaration made by Egypt concerning the 1997 International Convention for the Suppression of Terrorist Bombings as a pretext for drawing attention to a lacuna in the Guide to Practice regarding reservations which entailed further obligations. However, he was unrepentant, adamantly maintaining his position, outlined in paragraph 18 [293], that since the declaration aimed to extend the scope of the Convention, it could not be assigned the status of “reservation”; that statement followed inexorably from draft guidelines 1.4.1 and 1.4.2, which excluded from the scope of the Guide to Practice statements purporting to undertake unilateral commitments and unilateral statements purporting to add further elements to a treaty respectively. However, he was willing to prolong the dialogue on the subject if, as was perhaps the case, he had misunderstood the comments in question.

14. Aside from the two somewhat academic questions to which he had already referred, the first paragraph of draft guideline 2.9.3 had prompted no real objections. However, several members had been in favour of deleting the bracketed second paragraph. Of the eight members who had spoken on the subject, five had favoured retaining the “hard” version of the text, whereby States and international organizations must “apply” (rather than “take into account”) draft guidelines 1.3 to 1.3.3. If he were to be allowed a vote—not that a vote on the question was necessary—he would advocate the retention of the paragraph, since it provided a useful clarification. Nevertheless, if the Commission in plenary decided to refer draft guideline 2.9.3 to the Drafting Committee, it should be on the understanding that the second paragraph would be retained, although its exact wording could be left to the Committee.

15. Only one member had suggested that the Commission should dispense with draft guidelines 2.9.4 to 2.9.7, while all the others had considered that they should be referred to the Drafting Committee; they had prompted few substantive comments. He was grateful to those members who had drawn attention to an error in the title of draft guideline 2.9.4, where the word “protest” should read “opposition”.

16. He had been relieved to note that the closing phrase of draft guideline 2.9.4 (“any State or any international organization that is entitled to become a party to the treaty”) had not caused the outcry he had expected: the Commission had understood, as he had explained during his oral presentation, that the issue at stake in draft guideline 2.9.4 was different from that in draft guideline 2.6.5.

17. There had been no objections to draft guidelines 2.9.5 and 2.9.6. He was not convinced that the proposal to delete the reference to draft guideline 2.1.6 from draft guideline 2.9.7, which had not been endorsed by other members, was a good idea. The matter could be taken up again in the Drafting Committee.

18. All members who had spoken on the question had requested the Special Rapporteur to prepare similar draft guidelines on the form of statement of reasons for and communication of interpretative declarations themselves,

which had thus far not been covered in the Guide to Practice. If the Commission endorsed that idea, he would draft a document for consideration by the Commission either during the current session or at its next session.

19. The thorniest problem dealt with in the report was undoubtedly the question of silence. Not that draft guideline 2.9.8 had elicited any major objections; in fact, almost all members had been in favour of referring both draft guideline 2.9.8 and draft guideline 2.9.9 to the Drafting Committee. However, he had the impression that the relationship between the two provisions had not always been fully grasped. Furthermore, the content of draft guideline 2.9.9, particularly the second paragraph, had been widely criticized. While he accepted that criticism, he had little to offer by way of a solution. Fortunately, only one member had proposed the deletion of draft guideline 2.9.9, and another the deletion of 2.9.8. This was fortunate because both provisions were necessary. The first, draft guideline 2.9.8, laid down the principle that, contrary to the situation in the case of reservations, acceptance of an interpretative declaration could not be presumed. However, the second, draft guideline 2.9.9, attempted to qualify it by stating, first, that silence *per se* did not equate to consent and, secondly, that silence could be considered to be acquiescence in certain specific circumstances, like other forms of conduct.

20. He could frankly see no contradiction in draft guideline 2.9.9. The general principle was laid down in draft guideline 2.9.8, and expressed more clearly in the first paragraph of draft guideline 2.9.9. However, the principle was not rigid and would allow for exceptions and nuances, as was indicated in the second paragraph.

21. Most of the doubts, criticisms and suggestions voiced had focused on the second paragraph. In particular, he had been reproached for not indicating the “specific circumstances” in which a State or an international organization might be considered as having acquiesced in an interpretative declaration. He had already pleaded guilty to that charge during his oral presentation of his report, as some members had recognized, and he maintained that it would be very difficult to go any further in the draft guideline itself without inserting a very lengthy text on acquiescence, which seemed neither realistic nor desirable.

22. In that connection, he recalled that, in 2006, the Secretariat had prepared an excellent study on acquiescence and its effects on the legal rights and obligations of States¹⁷² for the attention of the Working Group on the long-term programme of work. Unfortunately, to the best of his recollection, the paper had not convinced the Working Group that the fascinating topic should be included on the Commission’s agenda. That would not, however, justify a surreptitious attempt to place such a vast and difficult subject on the agenda by roundabout means, via a relatively minor aspect of the topic of reservations to treaties, for acquiescence in interpretative declarations seemed to follow the same logic and to be subject to the same rules as in other areas.

23. He still maintained that in the draft guidelines themselves it was impossible to do more than caution States that although, in principle, their silence with regard to an interpretative declaration did not commit them, in certain specific circumstances it might be regarded as equivalent to acquiescence, and therefore to approval of the interpretative declaration. He honestly failed to see how those circumstances could be spelled out in the draft guideline itself. Perhaps an attempt could be made to narrow them down, but the Guide to Practice was certainly not the place to restate the whole theory of acquiescence.

24. On the other hand, he was quite prepared to try to flesh out the commentary by providing some concrete examples. However, he was not entirely optimistic that he would find any, and thought it might be necessary to resort to hypothetical examples. One speaker had given the example of a State omitting to react to an interpretative declaration, when almost all of the States parties to the treaty had done so. In that case, its silence might be opposable to it. In his opinion, that would also be true of a State that remained silent with regard to an interpretative declaration of which it had been duly notified and which expressly or necessarily related to a situation of direct concern to itself. In those circumstances, a State’s silence might also be opposable to it.

25. It was difficult to find cases in which, outside the judicial framework, a State’s silence in the face of another party’s interpretation of a treaty had been deemed to be acquiescence pure and simple, although there were cases in international law of acquiescence through silence in the interpretation or modification of a treaty, as the Eritrea–Ethiopia Boundary Commission had noted in its 2002 decision (*Decision regarding delimitation of the border between Eritrea and Ethiopia*), which he had quoted in paragraph 39 [314] of his report. That decision relied on the decision of the ICJ in the *Temple of Preah Vihear* case and on the arbitral decision in the *Case concerning the location of boundary markers in Taba between Egypt and Israel*. Another example which sprang to mind was that of the 1986 arbitral award in the *La Bretagne* case, referred to in the Secretariat study. However, in all those cases, silence was only one element of some more general considerations leading the court or arbitral tribunal to conclude that a State’s interpretation had been accepted by the other State concerned.

26. He therefore endorsed the suggestion that silence might be one of the elements of an overall pattern of conduct from which acceptance could be inferred and that he should recast the second paragraph of draft guideline 2.9.9 accordingly. Basically, silence itself constituted one of those mysterious “specific circumstances” from which acquiescence in the declaration could be inferred. By following that promising lead, it could be possible for the Drafting Committee to arrive at a second paragraph to the effect that silence might constitute an element of conduct from which it might be possible to infer the acceptance of an interpretative declaration by a State or an international organization.

27. Another speaker had recommended a further alternative worth exploring, namely the possibility of drafting the second paragraph as a “without prejudice” clause.

¹⁷² Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/4 of 20 June 2006).

Once again, he would not venture to suggest any specific wording. While the Drafting Committee's deliberations should follow the lines he had suggested, it was not necessary for the plenary to provide it with firm instructions, since only one member had proposed the deletion of that draft guideline, all other speakers having taken the view that the Commission should not remain silent on the question of silence.

28. Although, in his summing up, he had not mentioned members by name, he hoped he had taken account of all the views expressed, even those which he had not found entirely convincing. He therefore requested the Commission to agree to refer draft guidelines 2.9.1 to 2.9.10 to the Drafting Committee, on the understanding that this referral included the second paragraph of draft guideline 2.9.3; that the referral of draft guideline 2.9.10 was without prejudice to the maintenance or otherwise in the Guide to Practice of the draft guidelines specifically dealing with conditional interpretative declarations that would be ultimately adopted; and, lastly, that he would submit as soon as was possible draft guidelines on the form of, statement of reasons for and communication of interpretative declarations themselves.

29. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.9.1 to 2.9.10, contained in the thirteenth report on reservations to treaties, to the Drafting Committee.

It was so decided.

30. The CHAIRPERSON said it was his understanding that, in accordance with the Special Rapporteur's proposal, the referral of draft guideline 2.9.10 to the Drafting Committee was without prejudice to the retention of the draft guidelines on conditional interpretative declarations in the Guide to Practice, and that, in the near future, the Special Rapporteur would submit draft guidelines on the form of, statement of reasons for and communication of interpretative declarations.

It was so agreed.

Protection of persons in the event of disasters¹⁷³ (A/CN.4/590 and Add.1-3,¹⁷⁴ A/CN.4/598¹⁷⁵)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

31. The CHAIRPERSON drew attention to a memorandum by the Secretariat on protection of persons in the event of disasters (A/CN.4/590 and Add.1-3), an excellent document on which the Secretariat was to

be congratulated. He invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his preliminary report on the topic (A/CN.4/598).

32. Mr. VALENCIA-OSPINA (Special Rapporteur) said that his preliminary report on the protection of persons in the event of disasters should be read in conjunction with the Secretariat memorandum contained in document A/CN.4/590 and Add.1-3, and with annex III of the report of the Commission on the work of its fifty-eighth session.¹⁷⁶ The document modestly described by the Secretariat as a "memorandum" comprised a fairly exhaustive background study, requested by the Commission at its previous session,¹⁷⁷ superseding the much briefer memorandum submitted by the Secretariat to the Working Group on the long-term programme of work at the Commission's fifty-eighth session.¹⁷⁸ In that earlier memorandum, the Secretariat, responding to a request by the Working Group, had submitted a proposal on the topic, entitled "International disaster relief law".¹⁷⁹ At the same session, the Commission, following the recommendation of its Planning Group, but without debating the matter in plenary, had decided to include in its long-term programme of work, under the title "Protection of persons in the event of disasters", the topic proposed by the Secretariat. The initial memorandum had been reproduced as a synopsis of the topic in annex III of the report of the Commission on the work of its fifty-eighth session.¹⁸⁰ Given that the report he was now presenting was preliminary in nature, he would refrain, as far as was possible, from repeating information contained in the two Secretariat memorandums.

33. It should be noted that the selected bibliography to be found in Addendum 3 to the Secretariat memorandum (A/CN.4/590) did not list a very important recent publication containing the proceedings of the forty-first colloquium of the French Society for International Law on "The responsibility to protect" held at the University of Paris X-Nanterre from 7 to 9 June 2007.¹⁸¹

34. During its fifty-ninth session, the Commission had decided to include the topic in its current programme of work.¹⁸² However, no official documentation, either from 2006 or from 2007, cast light on the reasons why the Commission had decided to single out "protection of persons" over "relief" or "assistance", the basic aspect of the subject, which the Secretariat had emphasized in its original proposal. There was, therefore, a need at the preliminary stage for the Commission in plenary clearly to define the scope of the topic, elucidating its core concepts and principles. The main aim of his report, which was strictly preliminary in nature, was to stimulate discussion which would provide him, as Special Rapporteur, with the requisite guidance to enable him to make concrete

¹⁷⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 206.

¹⁷⁷ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

¹⁷⁸ Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/1 of 12 May 2006).

¹⁷⁹ Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/1/Rev.1 of 11 July 2006).

¹⁸⁰ See footnote 176 above.

¹⁸¹ French Society for International Law, *La Responsabilité de protéger: Colloque de Nanterre*, Paris, Pedone, 2008.

¹⁸² *Yearbook ... 2007*, vol. II (Part Two), para. 375.

¹⁷³ The Commission, at its fifty-eighth session, decided to include the topic in its long-term programme of work, *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 257 (d), on the basis of a proposal by the Secretariat, annex III. It included the topic in its programme of work at its fifty-ninth session (2007) and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur, *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375; see also p. 100, para. 378 (h)).

¹⁷⁴ Mimeographed; available on the Commission's website.

¹⁷⁵ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

proposals on the approach to be followed, representing the general view within the Commission.

35. In providing a legal framework for dealing with disasters, it was necessary to bear in mind that a disaster was not an isolated event, but a process or continuum in which it was possible to distinguish three successive phases: pre-disaster, the disaster proper and post-disaster. In its widest sense, the provision of assistance in the event of a disaster raised a broad spectrum of specific issues in relation to each phase: response, in other words relief, during the disaster proper; prevention and mitigation beforehand; and rehabilitation in the aftermath. However, there was no clear demarcation between the three phases, since concepts such as “relief” and “assistance” covered the stage prior to the disaster and the stage following the immediate response. Contrasting the concept of protection with those of response, relief, assistance, prevention, mitigation and rehabilitation raised the question of whether it was distinct from those other concepts, or encompassed them.

36. In both its original proposal and its subsequent study, the Secretariat had placed the emphasis on the law applicable to the operational phase of disaster response. However, in its second memorandum, it attached greater importance to the concepts of prevention, mitigation, preparedness and rehabilitation, to some of which only passing reference had been made in the earlier memorandum. Similarly, chapter V of the second memorandum provided a more detailed examination of protection as another vital component of a regime of international disaster response and, even more, of a relief effort.

37. The approach adopted by the International Federation of Red Cross and Red Crescent Societies (IFRC) likewise focused on the law applicable to the operational phase of the response, which had been embodied in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the thirtieth International Conference of the Red Cross and Red Crescent in November 2007.¹⁸³ However, the publication entitled *Law and Legal Issues in International Disaster Response: A Desk Study*,¹⁸⁴ on which the guidelines were based, did not ignore preparedness, emergency assistance, recovery and rehabilitation, but always placed them in an operational context.

38. In his own opinion, protection was a broad concept that subsumed all the more specific notions: not only response, relief and assistance, but also prevention, mitigation, preparedness and rehabilitation. That broad general concept included both the operational side of protection, namely assistance, and also the notion of protection *stricto sensu*, which denoted a law-based approach, which he would explain later in his statement.

¹⁸³ *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008, p. 8. Available at: www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf (accessed 12 December 2012).

¹⁸⁴ D. Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2007 (summary of a larger study; the complete study is available at: www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf) (accessed 12 December 2012).

39. For the purposes of the topic, protection had been qualified as the protection of persons, a concept that was not new in international law. It denoted a particular relationship between persons affected by disasters and their rights and obligations in that context. The legal regimes which directly regulated the protection of persons were international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. Those regimes were guided by a basic identity of purpose—the protection of the human person in absolutely all circumstances—and they could apply simultaneously to the same situation, because they essentially complemented each other. The law on the protection of persons in the event of disasters shared a significant number of fundamental principles with international humanitarian law, such as humanity, neutrality, impartiality and non-discrimination, all of which would usefully guide the future development of the topic.

40. From the title of the topic adopted by the Commission, it could be deduced that the work to be undertaken would focus not on all the possible legal consequences of disasters, but on those relating to the protection of persons. The title also incorporated a distinct perspective, that of the individuals who were victims of a disaster, thereby suggesting a rights-based approach to treatment of the topic. The essence of such an approach was the identification of a specific standard of treatment to which the individual, the victim of a disaster *in casu*, was entitled. As the Secretary-General had indicated in another context, a rights-based approach dealt with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals; empowered them to demand justice as a right, not as a charity; and gave communities a moral basis from which to claim international assistance when needed.

41. From the standpoint of the victims of disasters, the task of identifying the rights and obligations that entered into play in disaster situations and the consequences that might flow therefrom raised questions not only of international humanitarian law, but also of international human rights law, including the existence or otherwise of a right to humanitarian assistance, regardless of whether such a right was a human right *stricto sensu* or simply a right of those affected by a disaster. In any event, recognition of the existence of such a right could be taken as constituting a challenge to the guiding principle of the sovereignty of the State and its corollary of non-intervention, according to which the State had the primary responsibility of affording protection to disaster victims on its territory or territory under its jurisdiction or control. The implication of that fundamental principle was that humanitarian assistance could be provided only with the consent of the State directly affected by the disaster. Yet at the same time, the ICJ had stated, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, that “the provision of strictly humanitarian aid to persons or forces in another country ... cannot be regarded as unlawful intervention, or as in any other way contrary to international law” [para. 242].

42. The traditional system of State sovereignty was, however, currently witnessing the emergence of various

concepts related to the responsibility of States. In its original proposal, the Secretariat had noted that the protection of persons could be viewed as falling within the contemporary reflection on an emerging principle entailing the responsibility to protect. That responsibility entailed the responsibilities to prevent, react and rebuild, which corresponded respectively to the three phases of a disaster situation. However, the relevance of the concept to the present topic and the appropriateness of extending it to the protection of persons in the event of disasters, which went far beyond the narrow context of armed conflict in which it had been developed, was not self-evident and required careful consideration.

43. The original proposal by the Secretariat for the topic had suggested that the definition of disaster should be limited initially to natural disasters, based on a perceived more immediate need. The truth of that statement could hardly have been confirmed more dramatically than by the events of May and June 2008, coinciding with the first part of the Commission's current session. Cyclone Nargis had devastated vast areas of Myanmar, leaving 2.5 million people homeless, over 50,000 missing and at least 84,000 dead. Ten days later, Sichuan Province in China had been hit by an earthquake measuring 7.9 on the Richter scale which, according to official Chinese sources, had killed over 80,000 people, many of them children, and left over 5 million homeless. According to an article in the 6 July 2008 issue of *The New York Times*,¹⁸⁵ in June 2008 the United States had suffered flooding of historic proportions in the state of Iowa and, after more than two months of the harshest drought in recent memory, over a thousand wildfires in California.

44. The Secretariat's study (A/CN.4/590 and Add.1–3) had taken a more inclusive approach, however, noting that while the bulk of the study pertained to disasters emanating from natural phenomena, few of the legal instruments and texts cited maintained a clear distinction between natural and man-made disasters.

45. He himself was of the view that the title eventually agreed upon by the Commission suggested a broader scope than that of natural disasters alone. Such an approach would seem the best way of achieving the underlying objective of codification and progressive development of the topic. The need for protection could be said to be equally strong in all disaster situations, whether categorized according to cause, duration or the context in which they occurred. The conceptual scope should take account of all of those categories, irrespective of whether they occurred in isolation or overlapped. In that connection, reference might be made to the very recent report by the IFRC,¹⁸⁶ dated 26 June 2008, according to which the HIV/AIDS epidemic in sub-Saharan Africa should be categorized as a disaster comparable to famine or flooding. Despite the holistic approach suggested, armed conflict

per se would be excluded because there was a particular and highly developed field of law, namely international humanitarian law, which dealt in great detail with such situations.

46. The multiplicity of actors involved in disaster situations was an indisputable fact. In its work on the topic, the Commission would clearly need to take account of the role, not only of States, but also of intergovernmental and non-governmental organizations and private entities, whether non-profit or commercial.

47. The Secretariat study contained an exhaustive list of existing instruments directly applicable to various aspects of the operational component of protection (A/CN.4/590/Add.2, annex II). While no universal instrument dealing with the general aspects of protection of persons in the event of disasters existed at the multilateral level, there were some universal, regional and subregional instruments dealing with specific aspects of protection. Much of the material relevant to the topic, however, took the form of non-legal pronouncements, non-binding instruments and soft law adopted under the aegis of the United Nations and other intergovernmental organizations, and the form of models, guidelines and the like, elaborated by NGOs or private individuals. To those must be added a significant number of bilateral agreements regulating the provision of assistance and cooperation among States parties as well as the domestic legislation which, in almost every country of the world, dealt with national calamities or aspects thereof.

48. Given such a disparate corpus of texts with varying degrees of binding force, the value that could be accorded to them as sources for the codification and progressive development of international law must be clearly determined. In its most recent study, the Secretariat had explained that reference was made to all pertinent instruments—regardless of their nature and current ratification and implementation status and of whether, as was the case with most of the instruments cited, they were of a non-binding nature—as evidence of the types of provisions that had been elaborated and adopted in other codification-related exercises.

49. In undertaking its work on the topic, the Commission should be aware, not only of its innovative nature, but also of the difficulty of squaring it with the accepted notions of codification and progressive development of international law in accordance with its Statute. Regardless of the form that would be proposed for its final product, the Commission generally embodied the result of its work in draft articles, a practice that should be applicable to the present topic. In taking up the topic, the Commission was taking up a challenge that could usher in a new era in the contribution of international law to the solution of the pressing needs of the international community. He himself would do his utmost, together with members of the Commission, the Secretariat and all State and non-State actors concerned, to achieve a result that would ensure effective protection of persons in the event of disasters, in fulfilment of the purpose of the United Nations set forth in Article 1, paragraph 3, of the Charter of the United Nations.

¹⁸⁵ Eric Klinenberg, "Are You Ready for the Next Disaster?", *New York Times*, 6 July 2008. Available from www.nytimes.com/2008/07/06/magazine/06wwln-idealab-t.html?pagewanted=all&_r=1& (accessed 12 December 2012).

¹⁸⁶ *World Disasters Report: Focus on HIV and Aids*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008. Available from www.ifrc.org/PageFiles/89755/2008/WDR2008-full.pdf (accessed 12 December 2012).

Responsibility of international organizations (*continued*)* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

REPORT OF THE WORKING GROUP (*concluded*)**

50. Mr. CANDIOTI (Chairperson of the Working Group), introducing the recommendations resulting from the discussions held in the Working Group on responsibility of international organizations, recalled that the Working Group had been established by the Commission at its 2964th meeting on 16 May 2008 for the purpose of considering the issues of countermeasures and the advisability of including in the draft articles a provision on admissibility of claims (see the 2964th meeting, above, para. 66). During the four meetings held between 28 May and 8 July 2008, it had first considered the question of the inclusion of a provision on admissibility of claims, on the basis of a draft article prepared by the Special Rapporteur. While some drafting comments had been made on the proposed text, the Working Group had agreed on the advisability of including a provision of that nature in the draft articles and had recommended that the additional draft article should be referred to the Drafting Committee. The Commission had accepted that proposal.

51. The Working Group had then proceeded to consider the issue of countermeasures. Members had engaged in a discussion on the advisability of elaborating draft articles on countermeasures taken against international organizations. Several members of the Working Group had maintained that the Commission should elaborate provisions on countermeasures with a view to regulating such measures and establishing certain limits to their use. Others had been of the view that the Commission should refrain from including provisions on countermeasures in the draft articles. The point had been made that the practice was almost non-existent and that the Commission should do nothing to encourage recourse to countermeasures. It had also been noted that countermeasures against international organizations were likely to have a destabilizing impact on the functioning of international organizations and to be a potential source of disputes.

52. The discussion had revealed that a majority of the members of the Working Group were in favour of including in the draft articles provisions regulating the issue of countermeasures. The Working Group had therefore agreed to continue its work on the basis of the draft articles proposed by the Special Rapporteur, with a view to considering some modifications thereto. It had accordingly considered whether—and if so, to what extent—the legal position of members and non-members of an international organization should be distinguished where their right to resort to countermeasures against the organization was concerned. Drawing such a distinction had generally been felt to be necessary. While it had been suggested that members of the organization should not be prevented from resorting to countermeasures against it, a majority of the members of the Working Group had emphasized that

the specific relationship existing between the organization and its members needed to be taken into account. Having considered various ways of dealing with that situation, the Working Group had come to the conclusion that the provisions embodied in draft article 52, paragraphs 4 and 5, should be reformulated and placed in a separate draft article. The substance of the new draft article should provide that an injured member of an international organization could not take countermeasures against the organization so long as the rules of the organization provided reasonable means to ensure the compliance of the organization with its obligations under Part Two of the draft articles.

53. The Working Group had also considered whether further restrictions should be added to those provided for in the draft articles already introduced by the Special Rapporteur. It had agreed that the draft articles should specify the need for countermeasures to be taken in such a manner as to respect the specificity of the targeted organization, in other words, the effect of countermeasures on the larger purposes of the organization, its capacity to perform its functions, and so forth. The precise location of that provision could be determined by the Drafting Committee.

54. Lastly, the Working Group had agreed that, in the light of the view expressed in the debate in plenary, the draft articles should not address the question dealt with in article 57, paragraph 2.

55. The Working Group thus recommended that draft articles 52 to 57, paragraph 1, should be referred to the Drafting Committee, together with the recommendations regarding their improvement that he had just outlined.

56. He wished to thank the Special Rapporteur on responsibility of international organizations and members of the Working Group for their constructive participation, and the Secretariat for the valuable support it had provided to the Group.

57. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the oral report of the Working Group referring draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the Working Group's recommendations.

It was so decided.

Cooperation with other bodies

[Agenda item 12]

**STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE**

58. The CHAIRPERSON welcomed Mr. Pérez, of the Inter-American Juridical Committee, and invited him to address the Commission.

59. Mr. PÉREZ (Inter-American Juridical Committee) said it was an honour to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of reporting, in accordance with the customary practice, on the Committee's current activities and conveying the Commission's comments and questions to the Committee.

* Resumed from the 2971st meeting.

** Resumed from the 2968th meeting.

60. The agenda for the Committee's seventy-third regular session, to be held in Rio de Janeiro in August 2008, attested to the diversity of the issues it addressed. They related both to private and to public international law and covered a vast range of policy conflicts such as the relationship between international trade and economic development; between national security, democracy and public access to information; and between universal principles and regimes for the protection of human rights and the need asserted, particularly in the context of anti-discrimination law, for systems calibrated to address regional realities, and even issues that might be considered as "constitutional" matters for the legal system of the Organization of American States (OAS). The breadth of those complex and important tasks could be explained in part by the unique nature of the Committee's mandate, which included not only the progressive development and codification of public international law but also a special responsibility to promote the harmonization of private international law among OAS member States. The Committee's competence to provide advisory opinions on matters submitted to it by the General Assembly and Permanent Council of the Organization of American States, and also its own authority to address issues *ex proprio motu*, could further expand the range of issues it addressed. The increasing artificiality of the classic division between public and private international law, and the continuous expansion of the topics and policy tensions addressed by international law, as exemplified by the topic of human rights in relation to humanitarian catastrophes, made the work of the Committee of increasing relevance to universal organizations such as the International Law Commission that nominally addressed only issues of public international law. Such, at least, was his hope in making his presentation, and the spirit in which he would attempt to answer the members' questions.

61. At its seventy-first regular session in August 2007, the Committee had been informed that the Chair of the Permanent Council of the Organization of American States had requested that it should study the scope of the right to identity. The Committee had reviewed a draft opinion prepared by one of its members, which it had then approved, albeit with one dissenting vote and with minor changes. The opinion had concluded that the right to identity had three dimensions. First, it had its own autonomous character. In addition, it was indispensable as a means for the exercise of civil, political, economic and social rights. Lastly, it encompassed other rights such as the right to a name, nationality and family, and thus established a set of rights which comprised individual identity. The nature of the right to identity was connected to values and principles inherent in human dignity, social life and the exercise of human rights. It also constituted *jus cogens*, because it was the *sine qua non* for other fundamental rights. It was thus the kind of right that could not in any circumstances be suspended under the American Convention on Human Rights: "Pact of San José, Costa Rica". Partly in response to the Committee's opinion, a working group set up in the Permanent Council's Committee on Juridical and Political Affairs was now at work on a draft inter-American programme for a universal civil registry and the right to identity.

62. At its seventieth regular session in February and March 2007, the Committee had approved a proposal from one of its members that the Committee study the topic of the rights of migrant workers and their families. After a year of extensive work, two rapporteurs had produced a document entitled "Primer or manual on the rights of migrant workers and their families".¹⁸⁷ The Committee had adopted a resolution approving that document and forwarding it to the Permanent Council and, through it, to the member States of OAS so that they could disseminate it as they considered appropriate. The object of the document was to further respect for, and promotion of, the rights of migrant workers and their families, including but not limited to respect for the provisions of the Vienna Convention on Consular Relations.

63. At its thirty-fifth regular session in June 2005, the General Assembly of the Organization of American States had adopted the agenda for the seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) and had asked the Committee to assist in the preparations for that meeting. Proposals on one of the topics to be discussed, namely "Consumer protection: applicable law, jurisdiction and monetary restitution", had been submitted by the Governments of Brazil, Canada and the United States of America by means of an innovative Internet discussion group that had facilitated the participation of civil society experts in the process. A meeting of governmental and non-governmental experts had been held in December 2006. At the Committee's seventy-second regular session in March 2008, it had discussed a report by one of the rapporteurs which suggested that negotiations were at an impasse. The Committee had then adopted a resolution seeking to provide guidance to the negotiators to enable them to move the negotiations forward. The resolution had stressed that consumer protection was one of the key emerging issues in the development of transborder trade, and that consumers involved in transborder commercial transactions needed to have access to remedies at a cost proportionate to the value of their claims and that guaranteed adequate, effective and prompt reparation. The resolution also suggested that, given the wide range of substantive topics involved in transborder commercial contracts between consumers and providers, the negotiations and deliberations to resolve the various issues, ranging from jurisdiction, applicable law and recognition and enforcement of judgements to methods for alternative dispute resolution such as arbitration and collective or class action proceedings, might require innovative forms of international cooperation on the part of OAS member States. The CIDIP process was moving into a new and very creative phase, for two key reasons: first, the drafting of treaties was giving way to the elaboration of model laws, perhaps in parallel with the move from treaties to regulations in the European Union; and secondly, the focus was shifting from technical issues of international legal cooperation to substantive policy issues such as the balance of welfare between producers and consumers, and the creation of secured bases for transactions.

64. At its thirty-seventh regular session in June 2007, the General Assembly of the Organization of American

¹⁸⁷ Document OEA/SER.Q-CJI/doc.292/08 of 5 March 2008.

States had called on the Committee to provide a comparative study on existing laws of member States concerning the protection of personal data. The Committee, while complying with that mandate, had recognized that there was a relationship between access to information and the strengthening of democracy, accountability of civil servants and the crucial role of transparency in public administration in combating corruption. Accordingly, it had approved a resolution instructing its rapporteurs to continue working on the topic in partnership with other organs of OAS. One of the Committee's rapporteurs was now participating in the initiative launched by the Carter Center to hold a seminar on access to information, which would issue a declaration and plan of action.

65. In 2007, the General Assembly of the Organization of American States had asked the Committee, on the basis of information received from member States, to prepare a model law on cooperation between States and the International Criminal Court (ICC), taking into account the hemisphere's different legal systems. The Committee's rapporteur had transmitted to member States a questionnaire concerning their existing laws and legal impediments to cooperation with the ICC. During the Committee's most recent session, the rapporteur had presented two reports extensively discussing the issues raised by the mandate. The rapporteur, as an interim proposal, had made reference to existing laws such as those enacted by Argentina, Canada, Costa Rica, Peru, Trinidad and Tobago, and Uruguay, reflecting experience in implementing the Rome Statute of the International Criminal Court in the different legal systems of the hemisphere. The Committee had adopted a resolution approving the two reports and urged the rapporteur to continue work on fulfilling the mandate to prepare a model law.

66. In June 2005, the General Assembly of the Organization of American States had instructed the Permanent Council to establish a working group in charge of receiving input, *inter alia* from the Committee, with a view to the preparation of a draft convention against racism and all forms of discrimination and intolerance. In its initial response, the Committee had recommended that the proposed convention should be precise and consistent with existing regional and universal instruments; apply not only to acts attributable to Governments but also to private acts; and address the role of the Inter-American Court of Justice and the Inter-American Commission on Human Rights. The drafting process had moved in a more positive direction in response to the Committee's recommendations. The Committee expected, at its next session, to provide more detailed comments on the current draft, which raised important issues such as the tension between the desire to punish hate crimes and the need to protect freedom of expression.

67. The two remaining topics on the Committee's agenda were quasi-constitutional matters. The first was entitled "Reflections on an Inter-American court of justice". In 2007, one of the Committee's most senior members had proposed reopening the debate on the idea of establishing an inter-American court of justice. His proposal had been to amend the Charter of the Organization of American States in order to establish a body whose purpose would be, like that of the International Court of

Justice, to settle disputes and to issue advisory opinions. In that member's opinion, the Inter-American Juridical Committee could assume the role of a court serving both those new functions. At its most recent session, the Committee had decided to study the idea at greater length, in view of the fact that the Secretary General of the Organization of American States had indicated his support for the establishment of an inter-American court and in the light of the concerns expressed by many member States about the expediency of relying on the International Court of Justice to resolve wholly intra-American disputes. However, that study would not be predicated, as had initially been proposed, on an expansion of the role of the Inter-American Juridical Committee, which already had more than enough responsibilities of its own.

68. The last topic, which constituted a very interesting development, was entitled "Follow-up on the application of the Inter-American Democratic Charter".¹⁸⁸ The Charter was a unique instrument that had been adopted as a resolution of a special session of the General Assembly of the Organization of American States on 11 September 2001. The Charter prescribed special procedures for the involvement of the political organs of the OAS in responding to threats to democracy in OAS member States and set forth standards and procedures for determining sanctions against Governments that failed to meet the requirements of the Charter. In August 2007, the Committee had met with the Secretary General of the Organization of American States to discuss his report on the implementation of the Charter, in which he had stated, *inter alia*, that a range of issues relating to its implementation called for clarification. Among the key issues that had been identified by the Secretariat of the Organization of American States and noted by the Committee were such fundamental questions as the precise legal status of the Inter-American Democratic Charter in relation to the Charter of the Organization of American States. Some argued that the Inter-American Democratic Charter had no more than interpretative significance, while others maintained that it was at best a political statement. On the other extreme were those who saw it as an authoritative interpretation of the Charter of the Organization of American States comparable to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970. Some narrow interpretative issues had also been raised: for example, the Secretariat of the Organization of American States questioned whether the term "government", as used in the Charter for the purposes of establishing a member State's consent to a mission by the Secretary General, also included non-executive branches of government, such as the judiciary. After an extended debate, with one dissenting vote, the Committee had decided to return to the item so as to provide answers to the interpretative questions raised by the Secretariat of the Organization of American States; to date, however, the rapporteurs on that topic had not yet submitted their reports.

¹⁸⁸ Inter-American Democratic Charter (Lima, 11 September 2001), OEA, *Official Documents*, OEA/Ser.G/CP-1 (www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm). See also ILM, vol. 40, No. 5 (September 2001), p. 1289.

69. The range of issues addressed by the Inter-American Juridical Committee was vast, largely because it responded to an ever-increasing number of requests submitted by the political organs of OAS. However, that breadth of range was also partly attributable to the fact that the Committee was sometimes “ahead of the curve”, in that it anticipated future developments in international law well before political interest in—much less political support for—those topics had manifested itself. Although the Committee’s effectiveness depended on its not being too far ahead of the curve, it ran the risk of becoming irrelevant if it failed to anticipate future needs. Closing with that humbling reminder of the precarious position in which the Committee found itself, Mr. Pérez thanked the members of the Commission for their attention and invited their questions and comments.

70. Mr. BROWNLIE said that the idea of a regional system of peaceful settlements in the form of an inter-American court of justice was one that had far-reaching implications. He would be interested to know more about the rationale behind States’ desire to avoid referring regional problems to the ICJ. The Court regularly dealt with territorial and maritime disputes between Latin American States and it was not usual to hear criticisms of the way in which it handled those disputes. A more difficult issue was that, in cases involving regional issues, there was often an overlap between regional and international adjudication. For example, the Court of Arbitration in the *Beagle Channel* case had been composed of present and former members of the ICJ, yet neither party in the dispute had wished to include any Latin American judges, on the grounds that, since the case concerned a boundary dispute, the Court of Arbitration should be composed of non-regional members.

71. Mr. VASCIANNIE, referring to the conclusion drawn by Mr. Pérez that the Inter-American Juridical Committee was “ahead of the curve”, asked how the Committee set about distinguishing between policy and legal questions when proposing topics for study to the General Assembly of the Organization of American States. He wondered whether there was any consensus within the Committee as to how such a distinction should be made.

72. Mr. PÉREZ (Inter-American Juridical Committee), responding to Mr. Brownlie’s question, said that the concerns he had heard expressed by Spanish-speaking members of the Committee related, not to partiality or substantive bias on the part of the Court, but rather to the fact that in disputes between countries with Spanish-speaking populations, the burden of conducting litigation in a foreign language was perceived as excessive and something of an affront to the dignity of those concerned. There was also a perception among the Latin American legal intelligentsia that in a few specific areas, such as the boundary dispute mentioned by Mr. Brownlie, insufficient consideration was given to specialized Latin American norms such as *uti possidetis juris*. While he appreciated Mr. Brownlie’s point about the desirability of wholly dispassionate adjudication, his personal view was that adjudication by a stranger to a region sometimes involved forgoing the advantage of localized knowledge. A balance between the two was therefore needed.

73. In response to Mr. Vasciannie’s question, he said that each member of the Committee presumably had his or her own internal algorithm for distinguishing between legal and policy questions. There was an interesting divide between *common law* lawyers trained in dynamic adjudication, who were very open to policy sensitivities, and civil law lawyers, who, having been trained in textual exegesis, were perhaps less inclined to accept the dynamic character of law. Beyond that distinction and the influence of each member’s own professional experience, he could not hazard a guess as to how members distinguished between legal and policy questions.

74. Mr. NOLTE said he would like to hear more about the background to the dispute as to whether the term “government”, as used in the Inter-American Democratic Charter, also included the judiciary. His instinctive reaction was that the term definitely included the judiciary for the purposes of international law.

75. Ms. ESCARAMEIA said that both her questions related to the relationship between the Inter-American Juridical Committee and the International Law Commission. With regard to the proposal to establish an inter-American court of justice, she asked whether any objection had been raised to the regionalization of international law on the grounds that it might lead to the fragmentation of international law. In its work on that topic, the Commission had not dealt with the proliferation of or the relationship between judicial institutions themselves. She also wished to know whether any initiative had ever been proposed, either by a member of the Committee or by the General Assembly of the Organization of American States, to discuss the work of the International Law Commission systematically. Other regional bodies, such as the Asian–African Legal Consultative Organization, periodically discussed the Commission’s work.

76. Mr. PÉREZ (Inter-American Juridical Committee) said that, when a topic was discussed by the Committee, it was considered to be standard practice and a matter of due diligence to ascertain whether the International Law Commission had already addressed that topic; however, no system had been established to institutionalize a regular study of the Commission’s work. He would certainly transmit Ms. Escameia’s very interesting proposal to the Committee. It was true that there was some overlap and cross-fertilization between the work of the two bodies, some members of the Inter-American Juridical Committee having served as members of the International Law Commission and *vice versa*. Consequently, there was considerable sensitivity within the Committee to the work of the Commission.

77. Concern regarding the fragmentation of international law was a matter constantly discussed in the Committee. The centenary of the Inter-American Juridical Committee had been marked by an attempt to draft a corpus of specialized regional law. His own reaction as a participant in that discussion had been astonishment at the strength of members’ commitment to avoiding any discrepancy between regionalized law and general international law. Nevertheless, there was a perception that the need for regional attention might sometimes require a deviation from general international law. The Working

Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, for example, was founded on the premise of a need for specialized attention, notwithstanding the earlier recommendation of the Committee that the existing body of international instruments was commensurate with the task and that the work of implementation had higher priority.

78. With regard to Mr. Nolte's question concerning the definition of "government" contained in the Inter-American Democratic Charter, he said that the judiciary was obviously a part of government for the purposes of State practice in international law; nevertheless, in the case of the Inter-American Democratic Charter, the issue of *lex specialis* arose. That Charter was founded on the premise that OAS member States were a kind of league of democracies, the notion being that when a State diverged from an agreed set of democratic norms, the principle of non-intervention should be accorded less significance, and procedures for international intervention should be invoked. One of the specific procedures provided for was that the Secretariat could undertake a mission to a member State's territory with the consent of that member State's government. The technical question that arose was whether the Charter should be interpreted to mean that "government" for the purposes of giving such consent meant only the executive, which was the ordinary branch of government that had international capacity under the 1969 Vienna Convention and other relevant instruments, or whether the invitation could be submitted by the judiciary, if it considered, for example, that its own rights under a democratic constitutional structure had been breached by the executive. That was a difficult question of interpretation; some might argue that it was fundamentally a policy question. He would hesitate to offer a view on the matter at the current juncture, as the Committee had not yet discussed it.

79. Mr. HASSOUNA said that the activities and experience of the Inter-American Juridical Committee might be useful to other regional organizations, such as the League of Arab States and the African Union. Consequently, he would like to propose that some form of cooperation be established between the various judicial bodies for the benefit of all concerned.

80. International criminal responsibility was an important issue, not only in the Americas, but in all regions of the world. Given that some OAS member States, such as the United States of America, had not yet signed the Rome Statute of the International Criminal Court whereas others were perhaps already parties to it, he wondered whether OAS had a common position concerning the desirability of signing and ratifying that Statute.

81. The CHAIRPERSON, speaking as a member of the Commission, said that, like Mr. Vasciannie, he had had the honour of serving on the Inter-American Juridical Committee. On the basis of that experience, he felt it was necessary to strengthen cooperation between the International Law Commission and other regional bodies concerned with the codification of international law, and also between those regional bodies and the Inter-American Juridical Committee. As for the proposal to

establish an inter-American court of justice, he was inclined to think that it might create more problems than it solved.

82. Mr. PÉREZ (Inter-American Juridical Committee), responding to Mr. Hassouna's question, said that there was no common inter-American position regarding the International Criminal Court; however, there was a consensus that States that wished to join the Court should be able to do so, and that they should make every effort to overcome any technical barriers thereto within their domestic legal systems. In that spirit, the Committee had sought to serve its technical and administrative function of solving member States' problems on the basis of lessons learned from other member States. In that sense, it was the least political and most dispassionate form of international civil service. The suggestion, made by Mr. Hassouna and supported by the Chairperson, for closer interregional co-operation was in keeping with that spirit, and he would commend it to the Committee.

83. In closing, he thanked members for their very thoughtful and revealing questions and comments, which he would take back to the Committee so that all its members could learn from them.

84. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his valuable contribution to the work of the Commission, and wished him a safe journey home.

The meeting rose at 12:50 p.m.

2979th MEETING

Wednesday, 16 July 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflisch, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Protection of persons in the event of disasters (continued) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL
RAPporteur (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/598).

2. Ms. ESCARAMEIA thanked the Special Rapporteur for his extremely detailed and instructive report and for the contacts he had made with bodies within and outside the United Nations system. She supported the approach he had adopted in his preliminary report, the purpose of which was to identify the basic assumptions on which the Commission's work would be based, focusing on the scope of the topic. The Special Rapporteur seemed to have proceeded on three basic assumptions. The first was that a broad approach should be adopted. The study should cover natural and man-made disasters, State and non-State actors, and the several different phases, namely prevention, mitigation of damage and rehabilitation. The second assumption was that an approach based on victims' rights should be adopted, and the third presupposed the existence of some kind of responsibility to protect.

3. She fully supported the first assumption and noted with interest how the Special Rapporteur had derived the scope of the topic from its title, as reflected in paragraphs 10 to 12 of his preliminary report. He had then defined the scope *ratione materiae*, *ratione personae*, *ratione temporis* and even, without explicitly saying so, *ratione loci*, since he had addressed the question of the location of the disaster in paragraph 47 of his report.

4. It was important not to confine the scope of the topic *ratione materiae* to natural disasters for the reasons given by the Special Rapporteur in paragraph 49 of his report, namely that natural disasters could be aggravated by human activity or failure to take timely action. The definition contained in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, cited in paragraph 46 of the report, offered a sound basis on which to proceed. She also agreed with the Special Rapporteur that protection of the environment and property should be covered since they were linked with the protection of persons. She had some difficulty in understanding the distinction made by the Special Rapporteur in paragraph 51 of his report between protection *sensu lato* and protection *stricto sensu*, and would welcome some clarification in that regard.

5. With regard to the scope of the topic *ratione personae*, she agreed with the Special Rapporteur that the practice and role of non-State actors should also be studied, especially since they had spearheaded the development of existing rules. All phases of the temporal dimension of the topic should be studied, from disaster prevention to post-disaster rehabilitation.

6. Turning to the second assumption, she welcomed the fact that the Special Rapporteur had adopted an approach based on victims' rights. In that connection, he had cited the Secretary-General of the United Nations, who had stated in his 1998 report on the work of the Organization that a rights-based approach dealt with situations not just in terms of human needs, "but in terms of society's obligation to respond to the inalienable rights of individuals",¹⁸⁹ which seemed to imply some sort of right to humanitarian assistance. Although legal opinion was clearly divided on the subject, the rules developed by the Red Cross and the

Red Crescent as well as the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies¹⁹⁰ recognized a basic right to such assistance. The Institute of International Law also treated it as a right in its 2003 resolution on humanitarian assistance, equating non-assistance with a violation of the rights to life and human dignity.¹⁹¹ It was therefore necessary to study the question of the right to assistance.

7. The third—albeit very tentative—assumption regarding the existence of some kind of responsibility to protect flowed logically from the foregoing considerations. It really amounted to a principle rather than an enforceable rule. In any case, if a right to assistance existed, there should also be a corresponding obligation. The next question was who owed the obligation. While it seemed to be generally recognized that the State in which the disaster occurred had an obligation to protect, one might also enquire about the obligations of third States, non-State actors and even individuals. Questions also arose with regard to the content of the obligation and whether it encompassed prevention, reaction and rebuilding. A further question was what triggered the obligation: did it ensue automatically from the disaster, was a decision by some organ required, or should a claim be filed by an individual? A further question concerned the means available to enforce the obligation nationally or internationally. In any event, the responsibility to protect was a question that could not be ignored and the Special Rapporteur would do well to submit a separate report on the subject.

8. In the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ had concluded that the provision of humanitarian aid could not be regarded as unlawful intervention, or in any other way contrary to international law. Moreover, the idea of a responsibility to protect had been widely accepted since the High-level Panel on Threats, Challenges and Change had published its report,¹⁹² the conclusions of which had been bolstered by the Secretary-General's report entitled "In larger freedom: towards development, security and human rights for all", which referred to the need to ensure "the accountability of States to their citizens, [and] of States to each other".¹⁹³ Furthermore, according to the 2005 World Summit Outcome document, each individual State had the responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing.¹⁹⁴ All those documents should be analysed, as well as the voluminous 2001 report of the International Commission on Intervention and State Sovereignty entitled *The Responsibility to Protect*.¹⁹⁵ It thus seemed to be

¹⁹⁰ See J. M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance", *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192–208.

¹⁹¹ Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, pp. 263 *et seq.*

¹⁹² "A more secure world: our shared responsibility" (A/59/565 and Corr.1).

¹⁹³ "In larger freedom: towards development, security and human rights for all" (A/59/2005 and Add.1–3, para. 22).

¹⁹⁴ General Assembly resolution 60/1 of 16 September 2005, paras. 138–140.

¹⁹⁵ *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, International Development Research Centre, 2001.

¹⁸⁹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 1* (A/53/1), p. 23, para. 174.

generally accepted that States had an obligation to protect people present in their territory and that foreign entities might assist them in the task, subject to their consent. While that assumption was virtually unchallenged, opinions were deeply divided on whether such foreign entities could protect people without their consent—or indeed whether they were under an obligation to do so. Lastly, she cited article 11 of the Convention on the Rights of Persons with Disabilities, which required States to protect persons with disabilities in situations of risk, including those pertaining to natural disasters.

9. With regard to sources, she agreed with the Special Rapporteur that the principal sources were international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. However, other sources should also be studied, for instance privileges and immunities law, customs law and transport law, which were important in operational terms. Moreover, account should be taken of international and domestic jurisprudence, domestic legislation, General Assembly resolutions and also the general comments of treaty monitoring bodies. The Special Rapporteur held that there was no relevant customary law but emphasized the importance of general principles. She submitted, however, that some of those principles, such as the principle of cooperation and the principle of humanity, could be held to form part of customary law.

10. With regard to the final form of the Commission's work on the subject, she agreed with the Special Rapporteur that the Commission should take a decision at a relatively early stage and concurred with his suggestion that a framework convention would be highly appropriate, since it would lay down general principles that States could incorporate in bilateral or regional treaties.

11. Mr. HMOUD, thanking the Special Rapporteur for his excellent preliminary report on the protection of persons in the event of disasters, said that while the report and the Secretariat's study drew attention to a large number and wide range of legal instruments and soft law dealing with different aspects of disasters, it was essential to identify more clearly the areas that warranted adoption by the Commission of draft articles or guidelines on the topic. What problems were encountered in protecting persons in the event of disasters? The answer to that question was of key importance when it came to delimiting the scope of the topic, which seemed from a reading of the preliminary report to be very broad. Should the Commission adopt a practical approach, creating norms to be applied in dealing with problems of prevention and relief on the ground and in improving available means of response, or would it be preferable to adopt a conceptual approach, developing rules that were applicable in a great variety of situations and might therefore overlap with existing rules? He was in favour of the former approach, namely, first identifying the core problems and then creating legal norms to be applied in resolving them, thereby enhancing actors' ability to respond to such situations. This would also limit the scope of the topic and enable the Commission to contribute usefully to the legal framework in the area of disasters.

12. Disasters had detrimental consequences for individuals exposed to them and for the State on whose territory

the disaster occurred or might occur. A disaster prevented individuals from enjoying several basic rights, such as the rights to life, food, property, housing and work. Victims should continue to enjoy such rights, as far as possible, in the event of a disaster, and should subsequently resume their full enjoyment. The State was also confronted with a disruption of the functioning of society which affected its ability to exercise certain rights and discharge certain responsibilities. While persons in disaster situations were the primary concern in dealing with the topic, the consistency of their rights with the interests of the State contending with the disaster should also be taken into account. The rights of the individual and those of the State were interdependent under the circumstances. A State without access to international relief would be unable to assist affected persons. A rights-based approach focusing on the human person should bear that premise in mind. Moreover, State sovereignty and the principle of non-intervention should not be viewed as incompatible with the rights-based approach. Sovereignty entailed obligations owed by the State to its population, and non-intervention could not serve as a pretext for a State to deny its population access to international assistance when it was unwilling or unable to provide such assistance itself during a disaster.

13. The Commission should consider, in that perspective, whether existing general principles should be reviewed or amended, namely the principles that the State had a duty to protect persons in the event of a disaster and to request assistance, and that a requested entity had the discretion to offer or withhold such assistance. It should also consider whether the establishment of a right to humanitarian assistance, which would either complement or amend the principles in force, would solve existing problems, or whether there were other ways of achieving a solution. Would the right to assistance serve as the core principle for enhancing the existing prevention, response and assistance regime? Such questions did not need to be answered at this stage, but the issue of the right to assistance was directly related to the rights-based approach.

14. With regard to the classification of disasters, the distinction between natural and man-made disasters did not, as such, justify the exclusion of the latter from the scope of the study. The basic goal, namely strengthening protection and dealing with problems, was the same for the two categories of disaster that disrupted the functioning of societies. The rights of persons were jeopardized in both cases and the legal principles were generally applicable to the two categories of disaster. However, the content of the principle of prevention could entail more obligations in the case of man-made disasters. During an armed conflict, international humanitarian law was, as affirmed by the ICJ, a *lex specialis*, but that did not rule out the application of other laws to the extent that they were not incompatible with international humanitarian law. Nevertheless, armed conflict was a particular situation in which the State's ability to act differed from its ability to act in peacetime. States addressed questions of access, freedom of movement for relief workers and the privileges and immunities of such workers from the standpoint of military imperatives that did not exist in peacetime. War situations should therefore be excluded from the scope of the study.

15. It was also extremely important to define protection for the purposes of the topic, inasmuch as it determined the rights and obligations of the different beneficiaries and actors in a disaster situation. In the absence of a clear definition, such rights and obligations would not be properly implemented. In his preliminary report, the Special Rapporteur stated that the concept of protection embraced response, relief and assistance, adding that there was a general all-encompassing concept of protection which included protection in the strict sense, denoting a rights-based approach, and other concepts, in particular assistance. The Secretariat, on the other hand, considered in its memorandum that the concept of protection included humanitarian access to victims, the creation of safe zones, the provision of adequate and prompt relief, and ensuring respect for human rights. There was thus clearly a disparity that the Commission must address by defining the concept correctly. It could not draw an analogy from the definition in other fields of law such as international humanitarian law, international human rights law or international refugee law. Defining the concept of protection would also offer guidance regarding the content of the protection regime, including which rights of persons were to be protected. In any case, he did not think it would be wise to include environmental protection, since it would broaden the scope of the topic and was subject to other fields of law governing matters such as prevention, mitigation, containment and rehabilitation. Given the importance of swift action in situations where persons were most vulnerable, the Commission should concentrate on identifying rights and obligations that were particularly relevant in emergency situations. It should also avoid developing principles that might be deemed to contravene the rule of non-intervention in the internal affairs of a sovereign State. Recent situations had demonstrated that States remained unwilling to assert that they had a “right” to provide assistance to people in difficulty in a State in which a disaster occurred against the will of that State.

16. With regard to the *ratione personae* aspect, problems pertaining to the legal framework applicable to disasters clearly related not only to the rights of victims but also to the status, rights and obligations of providers of relief and assistance. They included other States, international organizations and NGOs. The problems related, *inter alia*, to access, movement, privileges and immunities, and protection of relief workers. It was essential to regulate, where necessary, the status and rights of all actors, including the State in which the disaster occurred, which also had legitimate rights and concerns. As there were already several legal instruments concerning the protection of United Nations and associated personnel, including NGO personnel, the Commission should concentrate on areas in which the existing regime was inadequate.

17. With regard to the *ratione temporis* aspect, he agreed in principle with the Special Rapporteur that the scope of the topic should include the pre-disaster, disaster and post-disaster phases. However, to avoid broadening the scope beyond reasonable limits, the Commission should identify areas of law that needed to be developed in order to create specific obligations incumbent on States. Disasters often arose from complex and unpredictable sources, including a combination of natural and man-made factors. It would be necessary to determine

what could legitimately be expected of the State in which the disaster occurred or of other States in terms of the duty of prevention. He did not share the Special Rapporteur’s view that the Commission’s work on the prevention of transboundary damage was relevant, since the content of that topic was different and entailed different rights and obligations. First, as it dealt with transboundary damage, it created rights that could be invoked by potentially affected States against the State in which the hazardous activity originated. Second, the latter State had knowledge of the activity in question and controlled to some extent the manner in which it was conducted. Hence, that State could legitimately be expected to prevent damage, coordinate with potentially affected States and manage the risk. The situation was different in the case of natural disasters, particularly so-called “complex disasters”. It followed that the Commission should take up the question of prevention only when it could ascertain the circumstances in which it would be useful and appropriate to have a set of rules.

18. Lastly, as it was still necessary to identify the rules requiring codification and those requiring progressive development as well as the areas in which binding principles were necessary and those in which guidelines would suffice, he shared the Special Rapporteur’s view that it was preferable to defer any decision on the final form of the draft articles until work on the topic was completed.

19. Mr. CAFLISCH thanked the Special Rapporteur for his clear and wide-ranging report, especially the background section, which had convinced him of the importance and usefulness of a study by the Commission. He proposed to follow the structure of the Special Rapporteur’s preliminary report, dealing first with the question of sources and rules applicable to the protection of persons in the event of disasters (paras. 21–42 of the report). The first sources mentioned were international humanitarian law and international human rights law. With regard to the former, the Commission should resist the temptation to reproduce all rules flowing from international humanitarian law in a set of draft articles. As far as the individual right to protection was concerned, while the situation was certainly comparable to that of a person asserting a human right *vis-à-vis* the State, the question arose as to how enforcement could be ensured. Multilateral and bilateral treaty law was also an important source, although the relevant provisions were widely dispersed.

20. The role played by “other key instruments”, analysed in paragraphs 37 to 40 of the report, showed that the Commission was confronted with a major task of systematization, involving *lex ferenda* rather than *lex lata*, progressive development rather than codification. That fact should be borne in mind, since the nature of the task entrusted to the Commission could—at least partially—determine the nature of the outcome. Of course, it was not only a matter of *lex ferenda*. As suggested by the Special Rapporteur in paragraph 42, relevant customary rules might also exist. Some had perhaps already been identified: the rules governing sovereignty and intervention. However, they were not positive rules but precepts limiting persons’ rights in the event of disasters. Steps should therefore be taken to ensure that the limits applied were not unduly restrictive.

21. With regard to the delimitation of the topic, he noted that the Special Rapporteur, in paragraphs 44 to 49 of his

report, opted for a broad definition of the term “disaster”, which would include three separate phases, both natural and man-made disasters, and both sudden-onset and slow-onset or creeping disasters, but which would exclude armed conflicts as such. He supported that approach, at least in the early stages of the Commission’s work. It would probably prove easier to reduce the scope of the study, if necessary, than to broaden it. As far as armed conflicts were concerned, there was little to be gained from reviewing a topic that had been carefully studied and regulated in great detail.

22. With regard to the form of the final product, a question that was raised, *inter alia*, in paragraph 59 of the preliminary report, it would seem at first glance that the development of principles, guidelines or a code would be most appropriate, but it was probably still too early to decide, unless simply as a form of guidance.

23. In general, he supported the Special Rapporteur’s approach. The next steps should be, in his view, to compile a sort of inventory of points to be covered so as to have a clearer vision of where the work was heading.

24. Mr. DUGARD, congratulating the Special Rapporteur on his interesting report on a subject that would undoubtedly present the Commission with a great challenge, said that the Commission should determine the scope of the topic at the outset, as requested by the Special Rapporteur in paragraph 43 of his report. He also supported the idea of considering both natural and man-made disasters and the proposal to adopt a rights-based approach. In other words, the study should supplement international humanitarian law, international human rights law and environmental law, and it should undertake a close analysis of concepts such as humanitarian intervention.

25. Although the whole concept of an armed conflict was rapidly expanding, he also shared the Special Rapporteur’s view that situations of armed conflict should be excluded from the scope of the topic for the reasons set out in paragraph 24 of the report.

26. The Special Rapporteur had rightly noted that, unlike refugees, displaced persons did not enjoy adequate protection under international law, and that the Commission could make a useful contribution in that regard. He suggested broadening the concept of the duty to protect contained in the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1 of 16 September 2005 so that it was no longer confined to extreme circumstances. In general, the Commission’s study could supplement existing international law, especially where it failed to deal adequately with the obligation to protect in cases of natural or man-made disasters.

27. The Commission should address controversial issues such as situations in which a State not only failed to protect its own people but actually deprived it of assistance or distributed assistance selectively. They were controversial issues because such situations were considered by some to fall within domestic jurisdiction. For instance, the practice of the Security Council had recently shown that States defended the right of a State to oppress its own people and to deny them access to food and other resources.

28. While the Commission should delimit the scope of the topic, it would certainly need to consider not only the obligations of the State in which a disaster occurred but also the rights and obligations of the international community in such a situation. In that area, it could make an important contribution to the development of *erga omnes* obligations. As noted by the Special Rapporteur and as emphasized by Mr. Caflisch, the Commission’s work on the subject would tend to fall into the category of progressive development rather than codification, especially when it considered the rights and obligations of the international community, but that should not dissuade members from tackling the subject.

29. Mr. BROWNLIE drew the attention of Commission members to a question of methodology. While the compartmentalization of international law into international humanitarian law, international human rights law, international refugee law and other branches was useful for compiling a textbook, in practice it proved to be entirely artificial. Instead of basing itself on sources, which already involved creating separate “boxes”, it would be preferable for the Commission to base its approach on the problems that arose in practice. Quite a substantial corpus of law already existed, for example, on the situation of displaced persons, and there was little to be gained from simply adding more material.

30. To illustrate more clearly what he meant by a problem-based approach, he referred to the 2007 tsunami, which had originated off the coast of Sumatra. Among the many villages on the Indian coast located very close to the ocean, one had been spared solely because a diplomat based in Singapore who was a native of the village had sensed the danger and warned the inhabitants by telephone, urging them to take refuge in the surrounding hills. India actually had an early warning system for earthquakes, but only if they occurred in its territory. That was one instance of an enormous deficiency that the international system could easily remedy by developing standards of care and of risk assessment and management.

31. As a further illustration of the types of problems on which reasoning could be based, he drew attention to the need to develop standards to ensure that foreigners and minorities, among others, would receive the same treatment as the rest of the population in the event of a disaster. Another case was that of major rivers requiring international risk management. In the case of the Indus, for example, pressure from the Tarbela dam was such that the manner in which the Pakistani authorities maintained and monitored the site was crucial for the countries located downstream. Such situations again afforded material for developing international norms applicable to what were termed “preventable” disasters.

32. Lastly, he had proposed some time ago that food banks should be established in different regions. It was an idea that should be explored in greater depth, with a view to developing appropriate standards. For example, there had been serious famines in India in the 1940s and the then-administration had sought to tackle the problem. Unfortunately, the foodstuffs it had sent were inappropriate for the cultural and religious context in the affected areas. Although that was a purely practical matter, human rights, quality and religious standards should have been taken into account to ensure that the food banks were not

at odds with the local circumstances and could alleviate the disasters they were intended to mitigate.

33. Mr. AL-MARRI congratulated the Special Rapporteur on his report. He had adopted an appropriate approach by addressing the question of protection of persons in the event of disasters during the three phases of every disaster situation, namely pre-disaster, the disaster itself and post-disaster, by mentioning different types of accident or other circumstances likely to result in a disaster, and by considering the protection of property and the environment in addition to the protection of persons. The Special Rapporteur had also mentioned, as a further dimension of the topic, the various domestic or transboundary circumstances that disrupted the functioning of society, exceeding a State's ability to deal with a disaster or threatening human life and health or the environment. Given the nature of the Commission's work and the task assigned to it, he had focused on human rights (the rights to life, food and housing), taking into account the rights of children, women and persons with disabilities. He had also emphasized the need to explore the concepts of humanity, neutrality, sovereignty and non-intervention as well as other principles affirmed by the ICJ. He had not confined his remarks to individual needs but had also mentioned society's obligation to provide assistance, and the need to ensure that victims enjoyed a right to justice and were not mere beneficiaries of charity. Mr. Al-Marri said that it would be worth carrying out further studies to fully understand all these elements, especially the people and the time frames that must be taken into account. The starting point is the study of the limits and the importance of the principle of the responsibility to protect because these rights and obligations, in particular the rights and obligations of third parties, are complex and unclear, and sometimes contradictory, especially with regard to State responsibility and perhaps the obligation of protection. The importance of the international peacekeeping and security programme of the United Nations must be emphasized. The report also addresses the question of the role of state actors and, in particular, non-state actors, in all phases of disasters and the right of victims to assistance—no doubt it would also be worth carrying out additional studies to examine these aspects more closely.

34. Mr. DUGARD, referring to the problem-based approach mentioned by Mr. Brownlie, said that it would be helpful if the Special Rapporteur were to draw up a list of the topics that he wished to consider and those which, in his view, fell outside the scope of the study.

35. Mr. HMOUD said he agreed that the problem-based approach was a far more practical way of tackling the subject. He supported Mr. Dugard's suggestion that the Special Rapporteur identify relevant topics.

36. Mr. PETRIČ, concurring with Mr. Brownlie and Mr. Dugard, presented an example which showed why the Commission should adopt a problem-based approach. In 1974, he was living in Ethiopia when a major famine had claimed the lives of between 700,000 and 900,000 people. The situation was critical but, oddly enough, although everyone in Addis Ababa was talking about the famine that was raging, mostly in Tigre and Wollo, the Government remained oblivious, reacting only very cautiously when it could no longer ignore the displaced people, some of whom had

begun to seek refuge in churches. On recognizing the facts, the Government sought the assistance of the international community, which responded out of solidarity rather than on the basis of an obligation. The Government was reluctant to accept assistance from Western countries, since it was hoping for assistance from the East, which failed to materialize. Finally, after a considerable delay during which people were dying, the Government accepted aid from the United States, the European Community, NGOs and other sources. When the aid began to arrive, however, the Government proved unable to distribute it efficiently. The food, instead of reaching the needy, rotted in trains and boats. Moreover, the Government tried to confine aid to the regions under its control, withholding it from guerrilla-controlled areas, where the impact of the military conflict was compounded by that of the famine. Finally, the Eastern countries decided to send aid, which was channelled by Governments and was not based on solidarity. It arrived very late, when the famine was virtually over and rehabilitation had begun. The Government then decided to resettle displaced persons from the north to the western and southern regions of the country. As they were unaccustomed to the new climate, the displaced persons died in droves, so that the operation was an absolute disaster.

37. There could be no doubt that States had a responsibility to act, but the question was which criteria the Commission should take into account and how far it should go. Two points should be borne in mind: first, the fact that needy persons should receive aid was the basic principle and *lex maxima*; and second, State sovereignty was a major problem that could not be ignored. Failure to address the issue of State sovereignty might well prove counter-productive, impeding rather than facilitating the delivery of aid.

38. Ms. ESCARAMEIA cautioned against implying that there was any conflict between the problem-based approach and the rights-based approach. That had certainly not been the intention of the Special Rapporteur. On the contrary, the Special Rapporteur had been referring in all likelihood to the problem-based approach when setting out a general approach with a breakdown into categories, within which he had listed existing problems. The rights-based approach was, however, of fundamental importance because the study could not be confined to purely operational problems such as how to speed up the delivery of visas or the acceptance of credentials. The focus should remain on the rights of victims of tragic situations. Thus, the Commission could discuss the extent to which the rights of persons prevailed and the question of State sovereignty, but it should be aware that they were complementary and not conflicting issues, so that a problem-based approach could be adopted while focusing on human rights.

39. Ms. JACOBSSON concurred with Ms. Escarameia. She did not fully understand what was meant by a problem-based approach and she would be very reluctant to adopt it if the Commission decided to depart from a rights-based approach. However, that was perhaps not what Mr. Brownlie had intended, since he had stated very strongly that international law was not a collection of different legal components such as humanitarian law, refugee law or the law of the sea. Even if a problem-based approach was adopted, it was essential to have an overview of the proposed general structure of the topic and to establish, as noted by Mr. Dugard, how that approach

related to the concept of *erga omnes* obligations, to States' responsibility to protect their own people and to questions such as non-intervention and sovereignty. The question of the protection of persons could not be dealt with on a case-by-case basis without contemplating how the Commission's work fit into the system of international law.

40. M. HMOUD said that the alleged conflict between the rights-based approach and the problem-based approach stemmed from a misunderstanding. He had raised the point in order to state his view that, when a problem arose, the first step was to identify the applicable rules and to codify them. There was no conflict with the rights-based approach because one was clearly referring to rights. A conflict might arise between, for example, the duties of States and the rights of individuals, but not between the two approaches, which were complementary. The Commission must, however, identify the problems facing the existing regime of disaster relief and prevention and try to assist in solving them. It must therefore review existing rights (individual rights, right of access, etc.) and consider what kind of responsibility flowed from denial of such rights.

41. Mr. PETRIČ agreed that there had been a misunderstanding. He supported the approach based on victims' rights, as presented by the Special Rapporteur. However, he shared Mr. Brownlie's view that the Commission, while adopting as its guiding principle the well-being of persons exposed to grave danger, should bear in mind the real problems that must be addressed. It all depended on the structure and scope of the topic: the scope clearly included natural disasters but the question of armed conflicts, such as that in Darfur, also arose. The first step was to determine what kind of disaster should be dealt with.

42. Mr. VALENCIA-OSPINA (Special Rapporteur) thanked Mr. Brownlie for having raised the question of what he had characterized as the "problem-based approach", the purpose of which was to set standards for concrete cases of natural disasters or, to use the terminology of international disaster relief law, for the operational part of the problem. There was no contradiction, in his view, between the rights-based approach and the problem-based approach, but it was precisely because one or the other was emphasized depending on the perspective adopted that a false impression of such a distinction was given. He had referred in his report to the initial study carried out by the Secretariat,¹⁹⁶ which might be considered to have adopted a problem-based approach, although its scope had subsequently been broadened to include the protection of persons, which corresponded to a rights-based approach. The members had received two sets of guidelines produced by institutions that dealt with real problems: the guidelines used by the IFRC,¹⁹⁷ which adopted an operational or problem-based approach, and the Operational Guidelines on Human Rights and Natural Disasters adopted in 2006 by the Inter-Agency Standing Committee on Post-War and Disaster Reconstruction and Rehabilitation,¹⁹⁸ which took a rights-based or, more precisely, a human-rights-based approach. The two sets were not irreconcilable and, to make it clear that he was fully

aware of the two approaches, he had stated in paragraph 62 of his report that "[w]ork on the topic [could] be undertaken with a rights-based approach that [would] inform the operational mechanisms of protection". He had sought to encapsulate in that sentence, which was perhaps too lapidary, the problems that had been raised in the mini-debate.

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

[Agenda item 1]

43. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that it had been agreed, following consultations, that the Working Group on expulsion of aliens should be composed of the following members: Mr. Brownlie, Mr. Caffisch, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Yamada. Ms. Escarameia, Mr. Kamto, Special Rapporteur, and he himself as Chairperson of the Drafting Committee were *ex officio* members.

The meeting rose at 11.30 a.m.

2980th MEETING

Thursday, 17 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Protection of persons in the event of disasters (*continued*) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to continue its debate on the preliminary report of the Special Rapporteur (A/CN.4/598).

2. Mr. NIEHAUS said he wished to thank the Special Rapporteur for a very lucid and inspiring preliminary report, and also the Secretariat for its outstanding memorandum on the topic, which represented an entirely new area of study for the Commission. As the Special

¹⁹⁶ See *Yearbook ... 2006*, vol.II (Part Two), p. 206, annex III.

¹⁹⁷ See footnote 183 above.

¹⁹⁸ Reproduced in the addendum to the Report of the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin (A/HRC/4/38/Add.1).

* Resumed from the 2971st meeting.

Rapporteur rightly noted, the topic constituted a major challenge and marked the beginning of a new era in which action at the international level would empower individuals to request and receive assistance as a right, not as a form of charity. The report was necessarily preliminary in character and was mainly intended to stimulate a general debate on the topic with a view to delimiting its scope. The topic was complex and fraught with problems, and the Special Rapporteur had already succeeded in awakening a high level of interest—indeed, in his own case, enthusiasm—in that novel undertaking.

3. With regard to the need clearly to define the topic and elucidate its core principles and concepts, he agreed with the Special Rapporteur that an initial step must be to determine the scope not only *ratione materiae*, but also *ratione personae* and *ratione temporis*. The Special Rapporteur was right to infer from the topic's title that the work to be undertaken should focus on the consequences of disasters from the standpoint of the protection of persons and should consider those persons as victims demanding a response to their legitimate rights. The fairly short section of the report dealing with the evolution of the protection of persons in the event of disasters should be read as evidence of the scant attention paid to the question until the beginning of the twentieth century.

4. As was pointed out in paragraph 20 of the report, international disaster response laws had a great deal in common with international humanitarian law, international human rights law and international law on refugees and internally displaced persons, and the Special Rapporteur rightly viewed those areas as sources of relevance to the Commission's own topic. To those sources must be added multilateral and bilateral treaties, domestic legislation and various non-binding instruments concerning disaster relief.

5. With regard to the concept and classification of disasters, referred to in paragraphs 44 to 49 of the report, he agreed with the Special Rapporteur on the need for a broad definition of disasters in order to achieve the underlying objective of progressive development of the topic and its codification. There was no doubt that the need for protection was equally strong in all disaster situations, the categorization of such situations was a complex matter, the categories might overlap and it was sometimes difficult to maintain a clear delineation between the causes of disasters. Armed conflict *per se* would obviously be excluded as it was already covered by international humanitarian law.

6. As for the concept of protection of persons, referred to in paragraphs 50 to 55 of the report, emphasis should be placed on the basic principle that informed not only international humanitarian law but also international human rights law and international law relating to refugees and internally displaced persons, namely protection, *stricto sensu*, of the human person in all circumstances.

7. Protection entailed respect for fundamental rights, and, first and foremost, for the fundamental right to life. Accordingly, respect for the other principles relating to the protection of persons in the event of disasters, such as humanity, impartiality, neutrality and non-discrimination,

and beyond that, sovereignty and non-intervention, must be subjected to some order of priority. While it would certainly be desirable to uphold all those principles, he wondered whether, realistically, that would always be possible. With specific reference to paragraph 53 of the report, in which the Special Rapporteur requested guidance as to whether protection of property and the environment should also be treated, he would be inclined to reply in the negative. To include those aspects of protection of persons within the scope of the topic would be both unrealistic and overambitious.

8. As to the scope of the topic *ratione personae*, he agreed with the Special Rapporteur's conclusion that the Commission's work would clearly need to take proper account of the multiplicity of actors involved in disaster situations.

9. He had a number of doubts concerning the scope of the topic *ratione temporis*, addressed in paragraphs 57 and 58 of the report. In principle, he endorsed the suggestion that a broad approach should be adopted with regard to the phases to be included in the definition so as to ensure complete coverage from the legal standpoint. In practice, however, it was hard to understand how assistance was to be provided in all phases of disasters—not only in the response phase, but also in the pre- and post-disaster phases, involving prevention, mitigation and rehabilitation. Were prevention and mitigation applicable in all disasters, and was rehabilitation feasible in every case? Those questions would no doubt be clarified in the course of the Commission's discussion.

10. As to the form that the final product should take, he was of the view that the Commission's drafts constituted both codification and progressive development of international law. Irrespective of the fact that the Commission might wish to complete its work on the topic before deciding on the form to be recommended to the General Assembly for its final draft, he endorsed the Special Rapporteur's suggestion that the Commission might wish to arrive at an early understanding of what the final form should be. In that case, it might be more realistic to suppose that States would find the final draft more acceptable if it took the form of guidelines, rather than a convention.

11. Mr. NOLTE said that the Special Rapporteur's thoroughly researched and thought-provoking report provided an excellent introduction to the subject. The discussion held at the previous meeting on whether to adopt a rights-based or a problem-based approach to the subject had been very valuable and should be continued. He concurred with the Special Rapporteur's view that the two approaches were not contradictory but instead complemented each other, and that it was essentially a matter of emphasis. The question of emphasis therefore merited further and ongoing discussion.

12. In accordance with its mandate, the International Law Commission should, in principle, adopt a law-based approach. Its members were not well-versed in the operational aspects of disaster relief and had to rely on consultations with experts, as they had done in the work on shared groundwaters. Although disaster relief was perhaps not as far removed from its area of expertise as was

hydrology, the Commission should nevertheless be mindful of its limitations. That did not mean that he disagreed with Mr. Brownlie; on the contrary, if the Commission's work was to be useful to those in urgent need of protection, it must be aware of realities on the ground and capable of ascertaining where the problems lay in practice.

13. A law-based approach was not necessarily a human rights-based approach. Although human rights should play an important part in the current exercise, it would not be advisable to make them the sole basis for the Commission's work, as many other legal and non-legal principles also came into play. For example, a large proportion of disaster relief resources was provided out of a sense of solidarity and of moral rather than legal obligation. Although, taking a rights-based approach, one might say that victims were entitled to disaster relief, any attempt to place the international solidarity on which many disaster relief efforts relied on a purely legal basis might run the risk of cutting off a most valuable source of such relief. He was not advocating a charity-based approach, but simply saying that human rights should be only one component of an overall law-based approach to the issue. If, for the purposes of the current exercise, the Commission nevertheless wished to emphasize the role of human rights, it might wish to consider using the concept of a "human rights-oriented approach", which left more room for other important legal principles and for focusing on specific problems on the ground.

14. With regard to the scope of the topic *ratione materiae*, he was not in favour of using the definition of the term "hazard" found in the Hyogo Framework for Action 2005–2015,¹⁹⁹ which was much too broad. He preferred the one found in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which more clearly highlighted the emergency nature of the issues being addressed by the Commission.

15. In paragraph 47 of the report, assisting actors were referred to as "agents of humanity". While that might be the way those actors saw themselves, it was perhaps too presumptuous a designation; "agents *for* humanity" might be a better rendering, in that it underscored that their perception of their role must always be measured against their success in accomplishing it.

16. On the question whether the topic should be limited to natural disasters or should cover all disaster situations, including man-made disasters, he agreed that there was a considerable overlap between natural and man-made disasters (of which the situation in Darfur provided a good example); nevertheless, he was not convinced that this justified adopting a holistic approach. Even when natural disasters resulted from human activity, they clearly had a non-political dimension that made it easier for States to accept special assistance. He would therefore tend to place the emphasis on natural disasters, and include only those man-made disasters that had acquired the characteristics of natural disasters.

17. A similar approach could be taken with regard to the question of whether the protection of property and the environment should be included in the scope of the topic. His suggestion would be that if the disaster affected or threatened persons' lives, bodily integrity or basic needs, then the concept of disaster relief should be extended to include those related issues. If, on the other hand, only their degree of affluence, or the environment in general, was affected, such protection should not fall within the scope of the study.

18. Paragraph 54 raised the question whether a right to humanitarian assistance should be recognized. While it was certainly too early to discuss the matter in detail, he had no problem, in principle, with regarding such a right as implicit in international human rights law, and his instinct would be to regard it as an individual right that was typically exercised collectively. At the same time, a right to humanitarian assistance must be enforceable in the same manner as other human rights; in particular, there was no right or obligation to enforce it through the unauthorized use of force. Thus conceived, such a right would not challenge the principles of sovereignty and non-intervention. The concept of the responsibility to protect should be understood in the light of that classical interpretation of the law; it remained primarily a political and moral concept that had not altered the law relating to the use of force. It would not be appropriate for the Commission to propose changes in that area.

19. As for the scope of the topic *ratione personae*, paragraph 56 of the report raised the question whether—and if so, how—the practice of non-State actors should be assessed and what weight should be accorded to it. That question came close to touching on the very nature of international law. While not wishing to deal with the matter at length, he would venture the opinion that although the practice of non-State actors might be relevant for the purposes of identifying best practices, it could not, as such, constitute practice relevant for the development of customary international law or the interpretation of treaty law. It was States, not non-State actors, that were competent to make and change the rules at the international level. Thus, while States might delegate or recognize the rule-making or practice of other actors (which they were doing increasingly often, perhaps particularly in the area of disaster relief), the fact remained that they themselves had the last word and the legal authority to recognize a certain practice by a non-State actor as legally relevant.

20. Clearly there were other dimensions to the legal status of non-State actors. A human rights-oriented approach raised the question of the obligations of non-State actors. In that connection, he could recommend Andrew Clapham's book entitled *Human Rights Obligations of Non-State Actors*.²⁰⁰ He cautioned against accord-ing quasi-official status to non-State actors: while they might have a so-called "right of initiative", why should that right not simply derive from the universal freedom of expression? Non-State actors might have an obligation to protect, but only on the basis of and within the limits of general human rights law, and certainly not in

¹⁹⁹ Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6, chap. I, resolution 2).

²⁰⁰ *Collected courses of the Academy of European Law*, vol. 15/1, Oxford University Press, 2006.

the same way as States had obligations to protect. To a certain extent, persons in need of protection had a right in relation to non-State actors, but account had to be taken of the fact that many disaster relief efforts were fuelled by a sense of solidarity and charity, not out of a sense of legal obligation. As far as commercial subcontractors were concerned, his initial instinct was that there should be no distinction in law, in principle, between commercial and non-commercial non-State actors, since good intentions alone did not justify privileges.

21. Lastly, on the question of what form the Commission's work on the topic should take, the answer depended on whether the emphasis was to be placed on codification and strictly operational pointers, or on progressive development. A convention would make sense only if those States that typically hesitated to allow a free flow of disaster relief would be likely to ratify it. Such States would ratify a convention only if it was a credible effort to codify existing law and ensure good practice. If, on the other hand, the emphasis was placed on progressive development, the approach that the Special Rapporteur seemed to favour, then guidelines would be more appropriate. Personally, he would be inclined towards a more cautious approach, in the interest of providing effective relief to disaster-stricken persons, and he would therefore be open to a framework convention.

22. Mr. VASCIANNIE said that the Special Rapporteur's preliminary report had got the project off to an excellent start, not only by carefully identifying the main issues to be considered, but also by pulling together different strands of practice and posing specific questions concerning the way forward. He wished to thank the Secretariat for its comprehensive review of the topic, and in particular for its memorandum of 11 December 2007 and the addenda thereto (A/CN.4/590 and Add.1–3).

23. The topic prompted a number of legal and organizational questions. With regard to the legal questions, the Special Rapporteur had suggested in paragraph 12 of his report that the title suggested "a definite rights-based approach". The essence of such an approach was the identification of a specific standard of treatment to which the victim of a disaster was entitled. That was an important starting point, given that the individual should be at the centre of the Special Rapporteur's work. As the project went forward, however, the Special Rapporteur might wish to give greater precision to the concept of rights in the context of the current topic. In a disaster, an individual might have both legal and moral rights. In respect of the former, some State or entity would have duties arising from existing regimes. Thus, for example, some rights might arise from the principles of humanity, neutrality and impartiality applicable in disaster situations, and a State providing assistance to a disaster-stricken country should respect those principles. Likewise, individual victims in a disaster would retain their enforceable legal rights as set out in applicable conventions, such as the International Covenant on Civil and Political Rights, and under customary law.

24. It was important, however, to distinguish those binding legal rights from moral rights or morally desirable results. As an illustration of that distinction, in the event of a disaster, the State in which it occurred would remain

obliged as a matter of existing law to respect the right to life. On the other hand, the question arose whether the State would also have a duty to satisfy, for example, some of the programmatic rights enumerated in the International Covenant on Economic, Social and Cultural Rights. While moral rights were of critical importance, it was not clear that they existed on the legal plane. Because they were unquestionably important, there would be a strong inclination, even a temptation, to say that they should be given the status of legally enforceable rights held by individuals and immediately available. However, if one said that an individual in a disaster area had certain legal rights, it was also necessary to identify the State whose duty it was to satisfy those rights. Assigning that duty to the victim State was perhaps counterproductive, in that it imposed an additional legal duty on it at its time of greatest need. Alternatively, if the Commission were to assign that duty to non-victim States, it would have to confront the fact that neither State practice nor *opinio juris* supported that perspective. For the time being, the point was that there were some legal rights and duties that might be readily accepted as such in the instrument that emerged from the Commission, while there were others—such as moral rights and duties—that would need to be recommended *de lege ferenda*.

25. If the Commission decided to take a rights-based approach to the topic, he hoped that it would avoid the temptation to describe every result that might be desirable as a human right. With reference to the debate prompted by Mr. Brownlie at the previous meeting, he assumed that a rights-based approach did not alter the fact that the instrument resulting from the current project would need to incorporate standards that promoted solutions to specific real-world issues pertaining to disasters.

26. Another question of general significance raised by the report was whether there existed a right to humanitarian assistance, which, in that context, referred to the right to impose assistance on a State that did not want it. The Special Rapporteur had adopted a balanced position, concluding in paragraph 54 that "[t]ension is created between, on the one hand, the principles of the sovereignty of States and of non-intervention and, on the other, international human rights law". While the Special Rapporteur might have good reasons for finding the question of the existence of the right to humanitarian assistance in the law to be an area of uncertainty, in his personal view, the weight of the argument was heavily against the existence of the right to impose such assistance.

27. In the first place, as the Special Rapporteur had noted, such a right would directly conflict with the principles of sovereignty and non-intervention—no strangers among the core principles of the international system. Secondly, States themselves had expressly adopted the view, affirmed in General Assembly resolution 46/182 of 19 December 1991, that humanitarian assistance was to be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country".²⁰¹ As a matter of *opinio juris*, therefore, the principle of sovereignty gave the victim State the right to decide whether to accept

²⁰¹ General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations, annex, para. 3.

humanitarian assistance, and the principle of non-intervention prevented third States from imposing the compulsory acceptance of assistance on the victim State.

28. States' views on that matter seemed unequivocal. Footnote 75 to paragraph 22 of the Secretariat memorandum (A/CN.4/590) was instructive. At least 18 countries, developed and developing, weak and strong, large and small, some more prone to natural disasters than others and from different geographical regions, had been quoted in that footnote as attaching central importance to State sovereignty and non-intervention in the context of humanitarian assistance. That exemplified a general attitude. To suggest, therefore, that the right to humanitarian assistance in times of disaster could trump the principles of sovereignty and non-intervention would conflict, at the very least, with the views of a majority of States.

29. Admittedly, that conclusion on the positive law could sometimes be harsh, particularly in the midst of humanitarian crises that would shock the conscience of mankind if they were brought about by human action. Furthermore, with regard to the emerging concept of the responsibility to protect, and State pronouncements in favour of that concept, it might be possible to suggest that certain policy arguments in favour of intervention in some circumstances had gained ground in the international system. Yet, even if that premise was accepted, the right to humanitarian assistance, which would allow forcible intervention in cases of disaster, was still untenable. The notion of the responsibility to protect had developed outside the context of disaster relief to address a particular, well-known dilemma, namely, gross human rights abuses. Hence, even if it was now part of the law, it would not be readily transferable to the realm of disaster relief without clear State support.

30. Moreover, there were good policy reasons to resist establishing the right to provide humanitarian assistance against the will of the receiving State. Those included, first, the fact that the right could easily be abused to undermine or overthrow a Government, whether or not democratically elected; second, the fact that it could easily be abused to force Governments to adopt foreign policy and other positions that were contrary to the State's will—a point of special importance for small and weak countries; third, the fact that such a right would entrench an undesirable double standard, for it would hardly be enforceable in practice with respect to rich countries; and, fourth, that the threshold point for intervention would be arbitrary.

31. The fact that such policy problems could result from the right to humanitarian assistance at the very time the victim State's attention should be directed towards the disaster counselled against acceptance of that right. Yet people might be dying at the hands of a recalcitrant or incompetent Government, and the need to respect the most basic human rights might plead urgently in favour of a relief effort. The answer to that dilemma was not to allow intervention, but to encourage diplomatic action through the United Nations and by other peaceful means. In the case of disaster relief, the virtuous end of saving lives did not justify means that involved taking lives. He therefore suggested that the Special Rapporteur should proceed on the express assumption that there was no right to impose humanitarian assistance in international law.

32. Turning to some specific questions raised in the preliminary report, he fully endorsed the Special Rapporteur's suggestion that the topic should cover disasters irrespective of whether they occurred in one or in several States. He also supported the idea of including both man-made and natural disasters, both of which caused human suffering, but of excluding armed conflicts.

33. As suggested in paragraph 57 of the report, all stages of a disaster should be covered, although, as Mr. Brownlie and Mr. Hmoud had implied, the standards applicable in the different stages might vary.

34. The proposed rules for the protection of persons could cover matters pertaining to loss of property and environmental issues, but such matters need not be explored in detail. The rules should be broad in scope, taking into account actors such as States, international organizations, NGOs and commercial entities. However, while those entities might take the initiative, to refer to a right of initiative in all cases might imply that the victim State had a duty in law to respond to every commercial entity that offered assistance, which was not the case.

35. As to the form of the final product, it was too early to tell. The Special Rapporteur should commence with the treaty form and, at a later date, the Commission and the Special Rapporteur could consider whether that was the appropriate legal vehicle for the rules proposed.

36. Mr. DUGARD expressed concern that Mr. Vascianie appeared to be recommending that the Special Rapporteur should proceed on the express assumption that there was no right in humanitarian law with respect to the provision of humanitarian relief. That was not a principle that should be assumed by the Special Rapporteur, but one that should be considered by the Commission. There were rules relating to humanitarian intervention and the duty to afford protection that might provide a basis for such a right. He would therefore advise the Special Rapporteur and the Commission to leave the issue open for the time being.

37. He sought clarification regarding the intent of Mr. Nolte's statement to the effect that the Commission should consider man-made disasters only if they had acquired the characteristics of natural disasters. He wondered whether that would include the withholding of food aid, essential utilities and relief to communities in times of crisis for political purposes. It seemed to him that the result would be the same as in both cases. The statement could be construed as a useful formulation to avoid politicization of the topic; and if that were its intent, he would raise no objection.

38. Mr. NOLTE confirmed that this had indeed been his intent. The justification for disaster relief and the principles on which it rested presupposed that the situation was considered as having moved out of the realm of political conflict. He was in favour of a broad interpretation of natural disasters, and cautioned against attempts to apply neutral principles to conflicts that were subsequently defined as disasters, and against the politicization of disaster relief.

39. Mr. HMOUD said that the right of States to provide humanitarian relief was a very contentious issue and should be considered only after the Commission had decided on the scope of the topic; he hoped that it would not hinder the Commission in its work. Nonetheless, he supported Mr. Vasciannie's view that it was not a right under international law. Even those States that were the most fervent advocates of the responsibility to protect did not claim that the right of States to provide humanitarian relief existed under international law, but viewed it as an emerging right. Recent events showed that there was no *opinio juris* among States that there was a right of intervention in the event of a natural disaster.

40. Mr. BROWNLIE said he wished to comment on the concept of humanitarian intervention, not in terms of its legality, but on the assumption it was a concept which could be approached on a factual and policy basis. One aspect of the NATO intervention in relation to Kosovo that had never been discussed was whether the modalities of the force used had been in conformity with the concept of humanitarian intervention. Aside from the loss of life, much of the infrastructure of the Federal Republic of Yugoslavia had been destroyed. There had seemingly been no correlation between the choice of targets and the allegedly "humanitarian" purpose of the intervention. Thus, when the Commission embarked on a discussion of intervention, as it was entitled to do by way of the progressive development of the law, it needed to reflect carefully on what exactly was meant by the term "intervention". For instance, the treaty-based right of intervention exercised by Turkey in 1974 had involved a full-scale assault on a populated island by NATO-level armed forces and the bombing of forest areas with napalm. In other contexts, however, "intervention" might be construed as something narrow, instrumental and relatively harmless.

41. Mr. PETRIČ expressed support for Mr. Dugard's views. On the assumption that the Commission was working within the framework of *lex ferenda*, he would be reluctant to say at the outset that something was or was not a right. Instead, the Commission should rely on the Special Rapporteur's guidance and the outcome of its own debate. If, however, it decided to work within the more restrictive framework of *lex lata*, then he would be more inclined to agree with Mr. Vasciannie's point of view.

42. Mr. VASCIANNIE said his basic position was that States did not have the right to impose assistance on other States. It was for the State in need of assistance to determine whether it wished to request it, and to consent thereto. That was a statement of the current law, but it should also be a statement of *lex ferenda*, because there were serious policy consequences. If the Commission were to accept that humanitarian assistance could be imposed on another State, that right could be exercised by major Powers over smaller States, citing pretexts that might be less humanitarian than political.

43. However, there were other considerations. It was increasingly claimed that humanitarian intervention was permissible in the context of the responsibility to protect. Even if that controversial idea was accepted as part of the law, that did not necessarily mean that the right to intervene to provide relief had also to be accepted. The context

for humanitarian intervention, namely, gross human rights violations, was well established. Humanitarian intervention should be distinguished from disaster relief, particularly in the event of natural disasters, where the Government of the victim State had to deal with the crisis and at the same time was at the mercy of larger States. Intervention for disaster relief purposes was neither part of *lex lata* nor justifiable *de lege ferenda*.

44. Ms. JACOBSSON said that the current debate showed the need for a more structured and organized approach to the issue; she shared Mr. Dugard's view that the Commission should make no assumptions regarding the existence or otherwise of a right to provide humanitarian assistance. The question of its legal implications also needed to be discussed.

45. She welcomed the fact that Mr. Brownlie had raised the issue of the concept of intervention *per se*, rightly observing that the intervention in relation to Kosovo had been far from humanitarian. It was important clearly to define the concept of intervention and to determine how it differed from, for instance, interference in the internal affairs of a State. She hoped that the Special Rapporteur would address those issues and allow the Commission an opportunity to return to them at a later date.

46. Mr. CANDIOTI said he fully shared Mr. Vasciannie's view that there was a very considerable difference between the right to impose humanitarian assistance and the right to provide it.

47. Mr. DUGARD endorsed Ms. Jacobsson's remarks. Several aspects of the issue required further consideration. The sort of "humanitarian" intervention involving the use of force referred to by Mr. Brownlie was clearly unacceptable. There was also a distinction to be made between imposing and providing assistance. Another matter that troubled him was whether food aid dropped by aircraft by one State into another State, thereby invading its territorial airspace, was a permissible form of humanitarian intervention. Since ultimately the topic involved both codification and progressive development, the Commission should not attempt to limit the scope of the debate at such an early stage, but should instead allow for its further development.

Shared natural resources (concluded)* (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

CONFERRAL OF A SPECIAL AWARD ON MR. CHUSEI YAMADA
BY THE INTERNATIONAL ASSOCIATION OF HYDROGEOLOGISTS

48. The CHAIRPERSON welcomed Mr. Wilhelm Struckmeier, Secretary General of the International Association of Hydrogeologists, and Mr. Shaminder Puri, member of that Association, to the Commission. The morning was a special one for the Commission, as one of its members, Mr. Yamada, was to receive a well-deserved award from the International Association of Hydrogeologists for his work

* Resumed from the 2971st meeting.

as Special Rapporteur on the law of transboundary aquifers, which would shortly conclude with the adoption of draft articles. Through its work on the topic, the Commission had demonstrated its ability to adapt its working methods by taking a collaborative, multidisciplinary approach to difficult technical questions so as to produce texts that were “user-friendly” for practitioners. In order to ensure that members had a better understanding of those technical and scientific issues, Mr. Yamada worked tirelessly to organize exchanges with relevant experts in groundwater resources. UNESCO and the International Association of Hydrogeologists had played a critical role in facilitating that dialogue. Mr. Yamada was to be congratulated on his outstanding achievement. His efforts would serve as an example to the Commission when it came time to take up other complex multidisciplinary topics in the future.

The meeting was suspended at 11.10 a.m. to enable the award ceremony to take place and resumed at 11.55 a.m.

Effects of armed conflicts on treaties (concluded)
(A/CN.4/588, sect. D, A/CN.4/589, A/CN.4/592
and Add.1, A/CN.4/L.721, A/CN.4/L.726, A/
CN.4/L.727/Rev.1 and Add.1)**

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE (concluded)

49. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the revised texts of draft articles 5 and 13 [10] and the annex (reproduced in document A/CN.4/L.727/Rev.1/Add.1) adopted by the Drafting Committee on first reading on 9 and 10 July 2008, which read:

**Article 5. Operation of treaties on the basis of implication
from their subject matter**

In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.²⁰²

**Article 13 [10]. Effect of the exercise of the right to individual or
collective self-defence on a treaty**

A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right.

**Annex. Indicative list of categories of treaties referred to
in draft article 5**

- (a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;
- (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

** Resumed from the 2973rd meeting.

²⁰² At its 2973rd meeting, on 6 June 2008, the Commission amended and adopted draft article 5 by adding the phrase “in whole or in part” at the end of the sentence. In its review of the annex containing an indicative list of categories of treaties referred to in article 5, the Drafting Committee considered it appropriate as a matter of drafting to have the phrase inserted within the text between “operation” and “during armed conflict”. Draft article 5 was revised accordingly.

- (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) Treaties relating to aquifers and related installations and facilities;
- (h) Multilateral law-making treaties;
- (i) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
- (j) Treaties relating to commercial arbitration;
- (k) Treaties relating to diplomatic relations;
- (l) Treaties relating to consular relations.

50. In introducing the Drafting Committee’s second report on the effects of armed conflicts on treaties, he recalled that the Commission had considered the Committee’s first report on the topic (A/CN.4/L.727/Rev.1) at its 2973rd meeting on 6 June 2008, when it had adopted 17 draft articles on first reading and had referred draft article 13 back to the Drafting Committee. With respect to draft article 5, the Special Rapporteur had undertaken, during the period between the two parts of the session, to prepare an annex to the draft articles, which would enumerate several categories of treaties the subject matter of which involved the implication that they continued in operation during armed conflict. The Drafting Committee had completed the work with which it had been seized at two meetings on 9 and 10 July 2008.

51. He wished to pay tribute to the Special Rapporteur, Mr. Ian Brownlie, whose mastery of the subject, perseverance, openness and positive spirit of cooperation had greatly facilitated the Drafting Committee’s task. He likewise acknowledged with gratitude the important role played by Mr. Caflisch, who had chaired the Working Group on the topic, in helping the Drafting Committee to find balanced solutions to the difficult legal and policy problems confronting it.

52. On draft article 5, it would be recalled that, at its 2973rd meeting, the Commission had adopted draft article 5 as amended by the insertion of the phrase “in whole or in part” at the end of the sentence. The footnote to that draft article contained a cross reference to the annex which the Drafting Committee was to consider. In its review of the annex containing an indicative list of the categories of treaties referred to in draft article 5, the Drafting Committee, among other things, considered the implication of the phrase “in whole or in part” in relation to the whole scheme under the draft articles. It had been the Drafting Committee’s understanding that it was not always the case that the operation of the entire treaty would be affected; in some instances, only certain provisions would be affected. That understanding was relevant to the indicative list of categories of treaties referred to in article 5. There had thus been a general impression that, as a matter of drafting, it would be appropriate to insert the phrase “in whole or in part” in the text between the first occurrence of the word “operation”

and the words “during armed conflict”, rather than at the end of the sentence. Furthermore, the Drafting Committee, having adopted an annex containing an appropriate reference to draft article 5, had decided to delete footnote 2 linking the draft article to the annex. The title of the draft article remained unchanged.

53. It was his hope that the Commission would deem it appropriate to reconsider draft article 5 as amended in the light of circumstances.

54. As for draft article 13, the debate in plenary had revolved around the question whether the phrase in the latter part of the draft article, “subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor”, contradicted the opening phrase of the draft article, which spoke of self-defence “in accordance with the Charter of the United Nations”. That wording had also given some members the impression that it enshrined a right of pre-emptive self-defence. It had further been held that there was an overlap between that draft article and draft article 14. At the time it had been decided to refer the draft article back to the Drafting Committee, some ideas had been put forward on how to address the problem. For example, it had been suggested that the draft article could begin with the phrase “A State purporting to exercise its right of individual or collective self-defence”. Although that proposal had met the concerns of some members, it had failed to satisfy others, who did not see how an inherent right of self-defence could be purportedly exercised. It had also been suggested that the latter part of the draft article should be deleted, since it contradicted the first part and the situation foreseen in the last part of draft article 13 was in any case addressed in draft article 14.

55. After considering draft article 13, the Drafting Committee had decided to delete the phrase “subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor”, on the understanding that the application of draft article 13 would be subject to any consequences that might ensue, given the “without prejudice” provisions of draft article 14.

56. The annex contained a list of categories of treaties to which reference was made in draft article 5, namely categories of treaties the subject matter of which involved the implication that they continued in operation, in whole or in part, during armed conflict. That list was only indicative. Although the selection of categories was based largely on doctrine and available State practice (because admittedly there was more State practice in some categories than in others), it was recognized that the categories were not rigid and that there might be some overlaps. The Drafting Committee’s work had been based on a proposal submitted by the Special Rapporteur.

57. In considering the various categories of treaties concerned, the Drafting Committee had discussed whether treaties embodying *jus cogens* norms should be included in the list. The preponderant view had been that such a category would not be qualitatively similar to the other categories listed in the annex. The effect of *jus cogens* principles and rules was not prejudiced by the provisions of draft article 5. Moreover, inasmuch as such norms were ubiquitous, they would cut across the various categories

of treaties already identified. Some members had nevertheless felt that it would have been appropriate to include such a category. The consensus finally reached had been that treaties containing *jus cogens* provisions should be left out of the list of the categories under consideration, since those categories were based on a classification by subject matter, while *jus cogens* was a cross-cutting notion of fundamental importance to the law of treaties as a whole. It had further been agreed that the Special Rapporteur would clarify that issue in the commentary.

58. The adoption of the second report by the Drafting Committee meant that the current stage of work on the topic had been completed, and the Drafting Committee was pleased with this achievement. The Chairperson wished to congratulate and pay a special tribute to the Special Rapporteur for the conclusion of the work on that important topic, which was a remarkable accomplishment. A sensitive and complex matter had been dealt with in just four years of intense discussions and profound reflection on legal and policy issues. In the process, significant conclusions had been drawn which had resulted in the product now before the Commission. While that success was certainly a result of the Commission’s collective labours, it was largely attributable to the Special Rapporteur’s personal dedication and commitment. He had worked hard on the topic and had frequently advised members on the best path to pursue and the best approach to follow. His advice had always been based on sound doctrine and solid State practice. His hard work had been fully rewarded, for the draft articles on the effects of armed conflicts on treaties were an outstanding product. Accordingly, he invited the Commission to take action on the Drafting Committee’s second report, so as to complete its first reading of the draft articles.

59. The CHAIRPERSON endorsed the tribute paid to the Special Rapporteur and invited the Commission to adopt the two draft articles 5 and 13 [10] and the annex contained in document A/CN.4/L.727/Rev.1/Add.1.

Draft article 5 and the footnote thereto

Draft article 5, including the footnote thereto, was adopted.

Draft article 13

Draft article 13 was adopted.

Annex

The annex was adopted.

The two draft articles 5 and 13 [10] and the annex contained in document A/CN.4/L.727/Rev.1/Add.1, as a whole, were adopted.

Protection of persons in the event of disasters (continued) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (continued)

60. Mr. SABOIA commended the Special Rapporteur’s well-prepared preliminary report on the protection of persons in the event of disasters and his lucid presentation of

the report. He was also grateful to the Secretariat for its memorandum, which contained a wealth of useful background information. The report and memorandum demonstrated the topic's contemporary relevance and the wide range and diversity of available legal sources and practice in matters of protection and assistance in the event of disasters. Although there were very few comprehensive universal legal instruments on the matter, national legislation, bilateral and regional instruments and practice by States and organizations abounded.

61. The different approaches adopted presented the Commission with the challenge of deciding on the most appropriate treatment of the topic. As the Special Rapporteur had indicated, it would therefore be necessary to define its scope in terms of the Commission's mandate, namely the progressive development and codification of international law. In light of that mandate, it seemed best to concentrate on the legal aspects of the question and to avoid unnecessary overlaps with operational or technical issues.

62. He agreed with those members who saw no incompatibility between a "problem-based" and a "rights-based" approach. When approaching the topic from the perspective of the victims of disasters and their rights, it would be necessary to take account of all the specific problems that arose in disaster situations. At the same time, the Commission ought to concentrate on those aspects of the subject in which its contribution as a body of legal experts advising the General Assembly would be most helpful.

63. The Special Rapporteur had drawn attention to a shift in emphasis from "relief" or "assistance" to "protection". In his own opinion, the new choice of title indicated a preference for a delimitation concentrating on the protection of persons, rather than on the operational aspects of relief. That view had been borne out by the statement made at the previous meeting by Ms. Escameia, who had taken part in the deliberation process leading to the change. He also agreed with the Special Rapporteur that the concept of the protection of persons should apply to all phases of assistance in the event of disasters.

64. Furthermore, he concurred with the view that, although natural disasters should be the main phenomenon to be considered under the topic, a broader definition of disasters was needed, to take in man-made disasters, complex humanitarian disasters and situations where different contributory causes and factors were present, including elements of armed conflict. Like the Special Rapporteur, however, he thought that armed conflicts proper should remain outside the scope of the topic, because a well-delimited *lex specialis* was applicable to them.

65. There were indeed similarities between the basic principles of international humanitarian law, such as humanity, neutrality, non-discrimination and impartiality, and the core rules on protection and relief when disasters struck. To the extent that those similarities could be extended to situations other than armed conflict, they could provide guidance when guidelines were being prepared on the topic under consideration.

66. Human rights standards and international human rights instruments also provided indispensable inputs.

Those standards should apply to the protection of persons in the event of disasters, as should standards covering categories of highly vulnerable persons such as refugees, displaced persons, women and children, the elderly and persons with disabilities. Vulnerability in times of disaster could be exacerbated by people's individual circumstances or, as was the case for minorities and indigenous peoples, because they were less favourably viewed by the State or dominant social group.

67. Human rights must be seen as a cross-cutting, complex body of standards that encompassed economic, civil, cultural, political and social rights and applied to various categories of holders of those rights. Human rights should therefore be viewed not only from the point of view of the individual, but also from that of persons who, as members of families and communities with specific cultural or social characteristics, were more easily affected by disasters.

68. Using a rights-based approach should not, however, lead the Commission to adopt the extreme position of denying the role of other general principles of international law underpinning international relations and cooperation. Respect for the sovereignty and territorial integrity of States and the principle of non-intervention must be taken into account along with human rights standards. States were the primary guarantors of respect for human rights and the rule of law at the national level and, at the same time, they were the institution primarily responsible for protecting and assisting of persons under their jurisdiction who were victims of a disaster.

69. States' ability to act might also be severely curtailed by disasters. While that predicament was the main basis for international solidarity and assistance, the prevailing circumstances, and, sometimes, the security situation, might force the State to impose restrictions on the enjoyment of certain human rights, or might limit its ability to deliver certain services or goods which might be seen as social rights. Human rights instruments such as the International Covenant on Civil and Political Rights made provision for emergencies and allowed carefully circumscribed derogations from certain rights.

70. A new principle was emerging, that of the right to humanitarian assistance, especially when disaster-stricken States were unable to fulfil their primary obligation to provide prompt and effective assistance to disaster victims but refused, or were reluctant, to accept offers of international assistance. In extreme situations, that attitude might give rise to justified and grave concern to the international community, which could not remain indifferent to the human suffering brought about by calamities. Legally competent bodies might then deem political, diplomatic and legal measures to be warranted in order to ensure that humanitarian assistance reached victims. It would, however, be necessary to provide safeguards against the misuse of that concept.

71. While he personally was in favour of the development of international law with a view to affording greater protection for the rights of persons and took a positive view of the notions of a right to humanitarian assistance and the responsibility to protect, he counselled the Commission to be cautious in dealing with those new

principles, as their legal status and their implications with regard to other principles of international law were still relatively unclear, as the current debate had shown.

72. As the Special Rapporteur had pointed out in paragraph 52 of his report, the different regimes relating to the protection of persons—international humanitarian law, international human rights law and international law on refugees and internally displaced persons—were guided by a basic identity of purpose: the protection of the human person in all circumstances. In the same paragraph, the report stressed that the protection of persons in the event of a disaster was also predicated on the principles of humanity, impartiality, neutrality, and non-discrimination, as well as sovereignty and non-intervention.

73. It was too early to adopt a position on the final form of the project. In principle, given that the Commission would be engaging mostly in the progressive development of international law, it would be prudent to envisage the formulation of draft articles with a view to providing legal guidelines. The evolution of the work and States' reactions might, however, lead the Commission in a different direction.

74. While he had not addressed all the questions posed by the Special Rapporteur, the idea that he had endeavoured to convey was the importance of preserving a balance between the individual and collective human rights of persons affected by disasters, the duties of and limitations upon States affected by disasters, and the legal and institutional framework best suited to the exercise by the State and other actors of the duty of solidarity and humanitarian assistance in disaster situations.

75. Mr. GAJA commended the Special Rapporteur's outstanding work on a complex topic, which provided an overview of the subject and thereby offered the Commission an opportunity to think about the possible options. Recent events in Myanmar showed the timeliness of the subject matter and the magnitude of the problems arising in relation to disasters. The Special Rapporteur's first report had been usefully supplemented by the Secretariat's memorandum, which was a remarkable piece of work, indeed one of the best of its kind. The Commission had been provided with a wealth of carefully presented material covering a wide range of legal instruments and practice.

76. The Special Rapporteur favoured a wide scope for the topic, encompassing a variety of questions relating to the protection of persons in the event of disasters. It could be argued that a more narrow approach, based on the idea of simply facilitating the provision of assistance when a State had requested it, would prove less controversial and would therefore ultimately be more useful to persons in need. However, once the Commission had defined the subject matter as protection of persons, it seemed inevitable that some more contentious issues should be addressed, such as whether a State might make an offer of assistance before receiving a request from the State in whose territory the disaster had occurred. The General Assembly had stated that, in principle, such action was undesirable, although there might be cases in which a different view might be taken. Another much more difficult question was whether that State could lawfully refuse assistance, even

when it was essential for the victims' survival. The point at issue was not whether assistance could be imposed, but whether the State had a duty to accept it. Perhaps the Commission should examine the consequences of what might possibly constitute an unlawful refusal of assistance. The resolution on humanitarian assistance adopted in 2003 by the Institute of International Law²⁰³ indicated some of the problems which would have to be discussed in the future and offered some possible solutions. That text deserved to be given greater prominence because of the manner in which it had attempted to strike a balance between the conflicting implications of State sovereignty and the rights of the victims.

77. Paragraph 49 of the report made a convincing case for not restricting the subject matter to natural disasters. The Special Rapporteur noted that the need for protection was equally strong in all disaster situations and that it was not always possible to maintain a clear delimitation between causes. One might add that the causes of a disaster might be uncertain. One sad example of such an event had occurred in 1963 in northern Italy, when over 1,000 people had perished after a rockslide had caused water to overflow from a reservoir. It had not been immediately clear whether the rockslide had been due to the existence of the reservoir. That question had been debated at length in the courts. Hence it would be preferable not to make the application of the future draft articles conditional upon what might be a complex assessment of whether the causes of the disaster were natural. Accordingly, the Commission should follow the Special Rapporteur's suggestion to allow for as few exceptions as possible. It should also discuss in greater depth the relationship between disasters and armed conflicts. Perhaps the Commission should not totally disregard the consequences of armed conflicts, but should exclude only those aspects of the question that were governed by the law of armed conflict.

78. He believed that the Commission should not only aim at drafting a series of rules of conduct for all the actors concerned, but should also consider the institutional aspects addressed in paragraphs 175 to 189 of the Secretariat memorandum. One possible outcome of the Commission's work might be a proposal to establish a specialized agency within the United Nations system with the function of responding to large-scale disasters, wherever they occurred. Were assistance from States to be channelled through such an agency, that would offer the great advantage of it being more willingly accepted and perceived as impartial. The agency could delegate some of the response action to other entities, leaving ample scope for the involvement of non-governmental actors as well as States. The coordination of international assistance, in cooperation with the competent authorities of the State concerned, was often problematic, and having a central agency would help to avoid gaps, overlaps and conflicting offers of various types of assistance.

79. He had a procedural proposal to make, elaborating points made by Mr. Caffisch and Mr. Dugard about the need to know more about the kind of issues that would have to be dealt with in the future. In view of the broad

²⁰³ Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, pp. 263 *et seq.*

scope of the topic, it would seem advisable for the Special Rapporteur to submit a provisional plan for future work, to be discussed in a working group, if possible at the current session. That would provide an opportunity for a comprehensive exchange of views that could give further indications regarding the best way to proceed.

80. Mr. McRAE said that the topic presented a number of challenges, the first issue that he wished to address being that of scope. Given the topic's extreme breadth, the question was how it could be framed in a way that was both meaningful and manageable. The second important issue related to the objective of the Commission's work—not the final form, but rather what the Commission hoped to achieve substantively.

81. On the question of scope, he agreed with the Special Rapporteur that disasters should include man-made as well as natural disasters, but was not sure that the definitional difficulties were that easily resolved. As the Special Rapporteur pointed out, man-made disasters could result from direct but also from indirect human action, as in the case of famine and epidemics. More clarification was needed on whether the varying needs in such a wide range of disaster circumstances could all be subsumed under one heading, and whether a meaningful regime that would cover all of them could be developed.

82. The related point made by the Special Rapporteur that armed conflict *per se* should be excluded also required further clarification. Did that mean that as long as an armed conflict was in progress, the resulting disaster would not be covered by the Commission's work on the topic? That the consequences of an armed conflict, once the conflict had ceased, would fall within the scope of that work? The consequences of armed conflict were as much a man-made disaster as any other kind of disaster. However, that raised the difficult question of the overlap with international humanitarian law. The purpose of the current exercise was obviously not simply to replicate such law for non-conflict disaster situations. In short, further clarity with regard to definitions and scope was required.

83. Another aspect of scope was the question of whether the Commission's work should cover all phases—pre-disaster, immediate response and post-disaster. In his view, they all fell within the scope of the topic, but that did not mean that the Commission should deal with them all at once. It might be that a more manageable approach would be to address each aspect separately—although not necessarily dealing with the pre-disaster, response and post-disaster phases sequentially. Perhaps the initial focus should be on the response to disaster, and once that aspect of the topic had been fully developed, the other two aspects could then be addressed.

84. The second important issue was what the Commission hoped to achieve in taking up the topic. For better or worse, by taking it up, the Commission had raised expectations. It was a topic of great contemporary relevance and high public visibility, and the Commission's work on it would be closely scrutinized. It was thus important to ensure that its efforts would stand up to that kind of scrutiny. At its previous meeting, it had held an interesting but rather strange debate about the false dichotomy between

a rights-based approach and a problem-based approach. However, not only were the two approaches not alternatives, but neither provided a particularly useful perspective on the best way forward.

85. The real question was what consequences flowed from the Special Rapporteur's focus on a rights-based approach. It was no doubt correct to say that the topic of protection of persons must be centred on persons. The real question, however, was whether the best way to protect persons in the event of disasters was to focus on their rights. He doubted that attempting to codify and progressively develop a catalogue of the rights of persons in the event of disasters was a useful exercise. To some extent, that would mean simply articulating rights that already existed, thereby embroiling the Commission in lengthy and perhaps unproductive debates. It would also mean that attention would have to be given to the enforcement of rights. He suspected that such an approach would not live up to the international legal community's expectations. The fact that individuals affected by disasters had rights was of course an important part of the background to the topic, but it was only the background. The real question was what action needed to be taken to protect those rights; and if action had to be taken, then there must be obligations to act.

86. Thus, obligations should be the real focus of the topic. What were the obligations that would facilitate the action needed to protect persons in the event of disasters? What obligations derived from existing law, and what obligations needed to be developed *de lege ferenda*? They might be obligations on the State or States in which the disaster had occurred, obligations placed on third States, obligations placed on relevant international organizations and, in a novel development, obligations placed on NGOs and perhaps even on corporate entities engaged in disaster relief.

87. To build on Mr. Nolte's comments somewhat, it was necessary to move from an approach based on solidarity and charity to consideration of whether any legal obligations could be articulated in addressing the protection of persons in the event of disasters. Such an approach should be viewed as independent of any identification of a responsibility to protect, a subject on which it was not necessary for the Special Rapporteur to embark. What was needed was a much more pragmatic approach—identifying specific needs and determining the obligations that would respond to those needs. It might be that, in the future, observers would see the Commission's work on the topic as an illustration of a responsibility to protect, but it would not necessarily further the acceptance of that work to argue that specific obligations could be deduced from a principle of the responsibility to protect at the present time.

88. Although it would be premature to decide on the final form of the work on the topic in its initial stage, the Special Rapporteur was right to take the view that the Commission should have some idea of where it was going. The pragmatic goal was to lay down a framework of rules, guidelines or mechanisms that would facilitate practical international cooperation in responding to a disaster, in order to make such responses more effective and thus provide protection to individuals who were entitled to it. The Commission had to work towards principles or

guidelines that would facilitate such cooperation, which would involve placing obligations on States, international organizations and NGOs. That might ultimately mean the conclusion of a draft convention.

89. Mr. WISNUMURTI welcomed the commencement of discussion on a subject of paramount importance. The earthquake and tsunami that had struck Aceh, Indonesia and other parts of Sumatra and the coasts of Sri Lanka and India, the cyclone that had hit Myanmar and the destructive earthquake in China that had brought about the loss of thousands of lives, human misery and devastation and destruction all made the need for a study on the protection of persons even more urgent.

90. He agreed with the Special Rapporteur that there was a need at the preliminary stage to clearly define the topic, elucidating its core principles and concepts. He endorsed the Special Rapporteur's view that it was necessary, as an initial step in the process, clearly to determine its scope, and that a rights-based approach should be adopted to the treatment of the topic.

91. The report extensively reviewed the evolution of the protection of persons in the event of disasters and the different sources of international disaster protection and assistance. Together with the Secretariat's excellent and extensive memorandum, it showed that a number of core principles underpinned legal instruments related to disaster relief activities—the principles of humanity, neutrality, impartiality, non-discrimination and cooperation; sovereignty and non-intervention; and prevention, mitigation and preparedness. While all those principles should guide the Commission's work, none should have primacy over the others. It was essential, however, to recognize the importance of respect for the principles of sovereignty and territorial integrity, so as to ensure the success of international efforts to protect persons in the event of disasters. Paragraphs 20 to 23 of the Secretariat memorandum (A/CN.4/590) elaborated the principles of sovereignty and non-intervention, as established by the ICJ in 1949 in the *Corfu Channel* case and in 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case. In resolution 46/182, the General Assembly had stated that humanitarian assistance was to be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country".²⁰⁴ It was also recognized that, during a disaster, the affected country had the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control.

92. Nevertheless, the principles of sovereignty and non-intervention should not be unreasonably and illegitimately invoked at the expense of international cooperation aimed at protecting people who needed urgent relief assistance. Indeed, in paragraph 12 of his report, the Special Rapporteur suggested that in line with the title, the Commission should adopt a rights-based approach to the topic. That approach was certainly warranted, given that the victims' very survival was at stake. The Special Rapporteur seemed to define the essence of a rights-based approach to protection and assistance as the identification of a specific standard of treatment to which the individual, the victim

of a disaster *in casu*, was entitled. Before proceeding further, however, it was imperative to know exactly what was meant by a rights-based approach and what its parameters were. It should be clear from the start that a rights-based approach must be defined as encompassing not only the right of the victims to humanitarian assistance but also the rights of the affected country. In various resolutions, the General Assembly had reaffirmed the sovereignty of the affected States and their primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories. The principle of the primary responsibility of the affected State had been reaffirmed in the ASEAN Agreement on Disaster Management and Emergency Response of 26 July 2005.

93. Mr. Brownlie's remark concerning the need to adopt a problem-based approach to the topic had sparked an interesting debate. As he himself saw it, a problem-based approach was a methodology whereby lessons learned from various disasters, especially recent and ongoing major disasters, could be an instrument to develop both the concept of the rights of persons in the event of disasters and also new standards of treatment.

94. In paragraphs 44 to 49 of his report, concerning the scope of the topic *ratione materiae* and the concept and classification of disasters, the Special Rapporteur had confirmed that there was no generally accepted legal definition of the term "disaster" in international law. For the Commission's purposes, however, the definition of disaster contained in the Tampere Convention of 1998 could be used as a guide. He also concurred with the various methods of classifying disasters listed by the Special Rapporteur in paragraphs 47 and 48 of the report.

95. As to the conceptual scope of the topic, the Special Rapporteur argued in favour of a broader scope covering both natural and man-made disasters, rather than one limited initially to natural disasters. He himself had serious doubts that such a broad scope would offer the best way forward. Man-made disasters raised complex issues, such as who was to decide whether a disaster was man-made or a natural phenomenon and to whom responsibility should be apportioned. A case in point was a major disaster currently occurring in Sidoarjo, East Java, caused by a volcanic eruption of mud, that was affecting the lives and livelihood of hundreds of families and rendering a vast area uninhabitable. There was no consensus among scientists and experts as to whether the disaster was a natural phenomenon related to the earthquakes that had occurred in different parts of Java, or a man-made disaster resulting from a faulty system of oil drilling and negligence for which a private company was responsible. It would therefore be prudent for the Commission to focus for the time being on natural disasters, while recognizing that man-made disasters were sometimes relevant to natural disasters.

96. On the concept of protection of persons, addressed in paragraphs 50 to 55 of the report, he was of the view that it should cover response, relief and assistance. He fully concurred with the statement in paragraph 52 with regard to the principles on which the protection of persons in the event of disasters was predicated. As to the question raised in paragraph 53, in accordance with the title of the topic, the Special Rapporteur should confine his study to

²⁰⁴ See footnote 201 above.

the protection of persons and not extend it to protection of property and the environment, which would only complicate the discharge of his mandate.

97. Paragraphs 54 and 55 of the report highlighted the tension between the principles of sovereignty of States and non-intervention and international human rights law, and between the rights and obligations of the assisting actor and those of States affected by a disaster. While those tensions or potential tensions undoubtedly existed, the Commission's work on the topic should lead to the elaboration of a concept and provisions that would prevent or minimize them.

98. In paragraph 55 and elsewhere, the Special Rapporteur referred to the emerging principle of the responsibility to protect, which, in his view, was a euphemism for humanitarian intervention. The United Nations 2005 World Summit Outcome adopted by the General Assembly in its resolution 60/1 had recognized in its paragraphs 138 and 139 that “[e]ach individual State ha[d] the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and to act to prevent such crimes, and had reaffirmed the responsibility of the international community to take collective action, should national authorities fail to protect their population from such crimes. It had also stressed the need for the General Assembly to continue consideration of the responsibility to protect in that context. It was therefore obvious that while the responsibility to protect was recognized by the United Nations, it was not yet operational. It was his understanding that the Secretary-General had initiated the process of elaborating that principle. In that process, one thing that had to be recognized was that collective action against a country accused of having committed those serious crimes, pursuant to the principle of responsibility to protect, could work only with the consent of the Government concerned. In that connection, he wished to associate himself with the view expressed by Mr. Vasciannie to the effect that, under current law, States did not have the right to impose humanitarian assistance on affected States against their will. That being the case, it would not be appropriate to extend the scope of the topic of protection of persons in the event of disasters to include the principle of the responsibility to protect.

99. The Special Rapporteur had raised a number of pertinent questions regarding the scope *ratione personae*. While the role of non-State actors in providing assistance was important, he had serious doubts as to whether the Commission should recognize that non-State actors had the obligation to protect. With regard to the scope *ratione temporis*, he agreed with the Special Rapporteur that provision of disaster assistance should encompass the pre-disaster, response and post-disaster phases, involving prevention, mitigation and rehabilitation. As to the final form of the Commission's work on the topic, he agreed that a decision on the matter should be made at an early stage, to assist in the drafting of provisions on the topic. His own preference would be for draft articles that could eventually be incorporated in a convention.

The meeting rose at 1.05 p.m.

2981st MEETING

Friday, 18 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Protection of persons in the event of disasters (*continued*) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/598).

2. Mr. PETRIČ, having congratulated the Special Rapporteur on his excellent report and thanked the Secretariat for its comprehensive study, said that the topic under consideration was not only of crucial importance—since it addressed issues of life and death—but also complex and politically sensitive. Following the preliminary report, it was essential to define the main lines of emphasis and hence to tackle head-on the dilemmas identified both by the Special Rapporteur in his report and by the members who had taken the floor. All those who had spoken agreed that the issue at stake was the protection of persons and not merely assistance, and he shared that view. However, it remained to be seen how far the Commission should go in that direction. Was it a matter of protecting specific human rights? Should a duty to protect be established? Should the right to intervene in support of humanitarian action be recognized? Or, alternatively, should the convention give primacy to State sovereignty, focusing on the development of pragmatic rules that would enable assistance to flow smoothly? Another question was whether to rest content with *lex lata* or to embark on *lex ferenda*. In the former case, State sovereignty would remain in the forefront. In the latter case, the Commission could place greater emphasis on human rights, the obligation to protect or even the right to intervene under certain extreme circumstances. He was personally in favour of going quite far in that direction.

3. With regard to the final product, he suggested first deciding on a set of principles and then formulating guidelines with a view to eventually elaborating a framework convention. However, it was unnecessary to take a decision on the matter at that stage.

4. With regard to scope, the approach adopted by the Special Rapporteur, who had identified the *ratione materiae*, *ratione personae* and *ratione temporis* aspects of the topic in his preliminary report, was excellent. The topic could also be broken down into three components: persons affected by disasters, the State in which the disaster occurred and assistance actors. With regard to disasters and their victims, while it might seem easier at first glance to limit the scope of the study and the concept of a disaster to natural disasters, that approach would be inadequate because most disasters were caused by a combination of natural and human factors. Moreover, the definition of a disaster should not be based on its origin, but rather on its effects.

5. It was necessary for practical purposes to set limits, deciding, for instance, whether to include epidemics or damage to the environment. With regard to armed conflicts, unlike most other members who had addressed the question and, apparently, the Special Rapporteur himself, he was unsure whether they should be excluded from the study. While he agreed that they constituted special circumstances governed by special rules of international law, he submitted that cases such as Darfur, which had already been mentioned, or southern Sudan indicated that the question needed to be examined in greater depth. With regard to the victims, the persons to be protected, he was in favour of adopting an approach based on individual rights—and not collective rights—in the event of disasters. Such rights should, of course, be exercised without discrimination, and persons belonging to vulnerable groups should be given special attention. With regard to the goal of protection, account should be taken not only of life and health, but also of different categories of property which could lead to different kinds of losses and hence also of recovery. However, as the basic goal was the protection of persons, he was in favour of concentrating on resources that were essential for the protection of life, such as medicine, water, food and shelter.

6. With regard to the phases of disasters, the Special Rapporteur proposed including rehabilitation, but he thought it was preferable to limit the study for the time being to prevention and mitigation because rehabilitation was a long-term process requiring long-term solutions. Moreover, it was affected by economic, political and other factors, raising issues that the Commission would be well advised to avoid.

7. Turning to the second component of the topic, that of the State in which the disaster occurred, he noted that it should make no difference in principle whether one or more States were involved. In practical terms, however, differences would inevitably arise. While the State in whose territory a disaster occurred had a duty to protect all victims, nationals and non-nationals, it could, exercising its sovereign authority, choose to fulfil that obligation alone, request or accept assistance from other States, or turn down or impede the delivery of assistance.

8. The role of the third component, assistance actors, who could be foreign States, international organizations, NGOs or individuals, was based on the principle of solidarity which, in his view, should not be replaced by a legal obligation. Such an obligation would undermine

State sovereignty and it would be very difficult to determine the procedures for its implementation. However, technical rules aimed at facilitating assistance ought to be elaborated. The Commission should decide to what extent those already established by the Red Cross and Red Crescent Societies, which were very active in that area, needed to be bolstered or supplemented.

9. Of course, the Commission would have to envisage cases in which the three “components” did not function “normally”. State sovereignty was the main impediment it would encounter. As already noted, a State could deprive its own people of foreign assistance, thereby greatly exacerbating the impact of the disaster, for political, economic or other reasons. The core endeavour would therefore consist in striking a balance between respect for State sovereignty and the need to protect human life and safety.

10. Mr. PELLET said that he was taking the floor to convey his interest in the work of the Special Rapporteur rather than from any conviction that the Commission would pay much attention to his statement, since he was about to contradict, to a large extent at least, what had been said so far. He would speak only about the Special Rapporteur’s preliminary report and not about the Secretariat’s memorandum, since only the two addenda thereto had been distributed in French, a fact concerning which he wished to lodge a strong protest.

11. In paragraph 59 of his report, the Special Rapporteur stated that “given the amorphous state of the law relating to international disaster response, striking the appropriate balance between *lex lata* and *lex ferenda* poses a singular challenge”. One might also state in bolder terms that, apart from some vague general principles, such as those of sovereignty and non-intervention, the topic consisted almost exclusively of *lex ferenda*. As Mr. Caflisch had rightly noted, that was not a defect in itself, but he continued to hold the view that the progressive development task entrusted to the Commission alongside its task of codification of international law should not be equated with international legislation pure and simple. The members of the Commission were not lawmakers and were not mandated to invent new rules of international law in cases where, as the Special Rapporteur had stated somewhat bluntly in his report, the existing rules had no basis in law. In other words, while the Commission could indeed contribute to the progressive development of international law, its role was not to supplant States in negotiating a new legal instrument when the instrument in question, while it could be useful, would inevitably lead to the questioning and radical reorientation of fundamental principles of international law.

12. He emphasized that he was a strong advocate of a dynamic and bold approach to the concept of the responsibility to protect, a concept of which, in his view, the protection of persons in the event of disasters was only one component, however important. He shared the view that sovereignty should not serve as a pretext to impede the channelling of assistance in the event of a humanitarian disaster, that it could not justify inaction in the face of genocide and that disorder was preferable to injustice. The problem was that all such convictions were political and ideological. The Commission’s role was not to “bring

tears to the eyes of onlookers” but the codification and progressive development of existing international law. Even though the Special Rapporteur’s preliminary report had not thrown caution to the wind and reached such an undiplomatic conclusion, it pointed inexorably towards such a conclusion and bore out his conviction that the topic, at least in the form in which it was conceived by the majority of Commission members, contributed to an insidious but increasingly pronounced trend in the International Law Commission, which was gradually evolving from what it was supposed to be, namely a body of independent legal experts, into a sort of “Sixth Committee *bis*”, minus the political legitimacy. In that connection, the discussion which had taken place at the previous meeting following Mr. Vasciannie’s unfortunately rigorous analysis had proved sadly revealing.

13. With regard to the general approach to the topic, he was quite attracted to and convinced by the idea of an approach based on the rights of disaster victims. Moreover, he felt that here the Commission was on more solid ground, juridically speaking, than if it approached the subject solely from the angle of State obligations. After all, the right to life and certain so-called “third generation” rights—the right to food, medical care, etc.—belonged in all likelihood to positive law, and one might be justified, although the case was not as clear-cut, in viewing them as “enforceable” rights, which meant that they imposed obligations on a State *vis-à-vis* its population. Nevertheless, such reasoning had almost no bearing on the “awkward” questions, at least those that the Commission would inevitably run up against if it persisted in adopting a sweepingly political approach to the issues: did international disaster response law justify the delivery of assistance within the territory of a sovereign State in the absence of consent or in the event of opposition on the part of the State in question? Quite clearly, a State that authorized such action was by no means limiting its sovereignty but exercising it, but that did not solve the problem: could a State be compelled to exercise its sovereignty for the good of its population, and who was best equipped to assess what constituted the good of the population? As no answer existed in nor could be inferred from positive law, the wisest option would certainly be to do nothing: not to codify or develop progressively, not to legislate in that area. It would be preferable for the Commission’s jurists to concede that the law was not the only recourse available, and that it was sometimes better, when faced with human suffering, to seek solutions outside or even against the law. In other words, if the Commission really wished to deal with the topic, it should refrain from indulging in vain exhortations which, he repeated, did not form part of its mandate, and should content itself with what was reasonable and responsible, namely codification and progressive development of the right to protection, without troubling itself unduly with the means, even the legal means, whereby such protection should be achieved. It would be difficult, but it might nonetheless be feasible. On the other hand, if the Commission ventured onto the slippery slope of obligations, it would doubtless succeed in moving and attracting the sympathy of some well-intentioned NGOs, but it would certainly run up against a brick wall.

14. No distinction should be made, in his view, between natural and man-made disasters, if only because, as the

Special Rapporteur had clearly explained in paragraph 49 of his report, it was often quite difficult to tell them apart. On the other hand, he was strongly opposed to the inclusion of situations of armed conflict within the scope of the topic, not necessarily for the reasons set out by the Special Rapporteur at the end of paragraph 49 of his report, but rather because they were the subject of a well-established body of rules of positive law which he feared might be unduly diluted in the exercise that the Commission was about to perform: instead of strengthening international disaster response law through humanitarian law, one ran the risk of weakening it.

15. In paragraph 53 of his report, the Special Rapporteur requested the Commission’s guidance as to whether his study should cover the protection of property and the environment. In general, there seemed to be a clear-cut case for answering in the negative, since the Commission was concerned with men and women, but it seemed equally clear that in some cases the protection of persons was intimately bound up with the protection of their property, at least in the case of vital needs such as housing and people’s environment.

16. He shared the Special Rapporteur’s view that the sooner the Commission defined the final form of its work, the sooner the Special Rapporteur could forge ahead with his study. If the Commission confined itself to codification *lato sensu* of the rights of persons in the event of disasters, a framework convention (a concept that he did not find as strange or unfathomable as Mr. Caflisch) seemed to be an attractive option, an appropriate compromise between a traditional treaty—“hard” in form and substance—and “soft” instruments whose good intentions set alarm bells off in advance.

17. In closing his presentation, the Special Rapporteur had said that the topic assigned to him constituted “a challenge that could usher in a new era”. Those were very fine words, and they might even be true. However, as it was often wiser to let well enough alone, it would be preferable, instead of contemplating the inauguration of a new era, to make do with a modest approach, bearing in mind the limited scope of the Commission’s action, influence, mandate and responsibilities. If the study of the topic was to be pursued, the Commission could only hope to assuage human suffering—which was, after all, its goal and, broadly speaking, the goal of law in general—if it remained practical, modest and reasonable.

18. Mr. DUGARD said that the need to find a balance between conflicting legal norms (the principle of State sovereignty, respect for domestic jurisdiction, human rights and humanitarian intervention, notions of *jus cogens* and *erga omnes* obligations, etc.) was a legal exercise that fell well within the Commission’s mandate. It would not therefore be acting immodestly if it were to embark upon that task.

19. Mr. BROWNLIE said that he agreed with a great deal of what Mr. Pellet had just said and noted with satisfaction that the debate so far had proved to be of high quality and very useful. Unfortunately, however, the mini-debate that he had attempted to launch had not been picked up: his reference to the need to adopt a problem-based approach

had sparked off a debate about the conflict between that approach and the rights-based approach although the two were probably compatible, as noted by the Special Rapporteur. Such comments, however true, served little purpose, and the Commission was still bogged down in a form of conceptualism, as though everything had to be converted into some form of human rights. The examples of the large dam and tsunami that he had cited were obviously related to the human rights of victims, but they were also related to other departments of law. A considerable proportion of the work of the ICJ and international courts of arbitration concerned boundary disputes between States or territorial disputes, for instance with regard to islands. Recourse to such courts for the settlement of disputes was a substitute for the use of force and formed part of a holistic approach. There was a relationship between human rights and the peaceful settlement of boundary disputes, because if States failed to use the courts, disputes would be settled by other means entailing widespread devastation and the deaths of innocents. The very idea of making a distinction between issues that involved human rights and others that did not was extremely superficial. It was necessary instead to define priorities, as noted by Mr. Pellet. He supported Mr. Gaja's proposal to create a working group to identify the issues on which the Commission should focus and the order in which they should be addressed, in other words the priorities.

20. When he had referred to the problem-based approach, he had meant to emphasize the existence of several categories of disasters, a point that had not been taken up. Tsunamis were one category, and large dams and large water reservoirs involved an inherent risk of disaster, creating a situation in which certain legal rules were applicable, such as those related to the risk assessment project already discussed in the Commission. As noted by Mr. Wisnumurti, classifiable disasters should be dealt with as a matter of priority, with a view to ensuring that the expectations of public opinion were in line with what the Commission chose to address on a priority basis. Unfortunately, conceptualisation was still making its presence felt in the Commission. Some form of "decontamination" was necessary, but he did not expect it to take place.

21. He was fairly sure that the Commission would end up discussing some form of humanitarian intervention. Although he agreed with much of what Mr. Vasciannie had said, the idea that one could separate the notion of humanitarian assistance from that of humanitarian intervention involving the use of force was unduly optimistic. The outside world and the members of the Sixth Committee would probably find it difficult to make such a distinction. The Commission would run up against the glass ceiling of the Charter of the United Nations, since it was not supposed to take up subjects that would entail, directly or indirectly, an amendment to the Charter of the United Nations. If it were to take up the question of some form of mandatory humanitarian intervention, it would have to discuss the use of force in general, the relevant provisions of the Charter of the United Nations and the extent to which those provisions could be modified in the light of developments in customary law. Hence, there were many points to be discussed in greater depth and he urged the Commission to set up a working group to establish priorities once the content of the topic had been identified.

22. Ms. ESCARAMEIA said that she was deeply disturbed by the fact that, when the Commission addressed subjects of great interest on which the world required some kind of response, Mr. Pellet frequently cautioned that they were political subjects and should not be taken up by the Commission. It was a position that was based, in her view, on a very limited understanding of progressive development, a position that would require the Commission to content itself with compiling and organizing existing rules without proposing anything new on the grounds that its members were not negotiators. She submitted that the Commission should, on the contrary, perform the legal function of providing guidance, just like other lawyers throughout the world and in all branches of law. The protection of persons in the event of disasters was an excellent and timely topic and almost all countries had supported it in the Sixth Committee. Even if one adopted an extremely legalistic approach and dealt only with law, the fact was that in some cases there were still no rules but only general principles and, in the case in point, a number of mutually compatible principles. It was all the more difficult to accept the argument that the members of the Commission were there simply to enforce pre-existing rules at a time when the world was undergoing structural change. At times of great stability, it was admittedly easy to focus on developing precise definitions of existing rules. However, in a world where the framework was changing and questions of compatibility of rules arose, lawyers must perform the role assigned to them and take account of those changes. The contemporary world was far removed from the 1950s and 1960s when it was necessary to specify matters that were still undefined: the task now was to establish priorities and provide guidance.

23. In response to Mr. Brownlie, she expressed concern that the Commission might confine itself to operational aspects when it had a duty to go a great deal further. Although such aspects were important, they had already been addressed by the IFRC and other organizations. The Commission could have an impact if it dealt with them in the framework of a convention with binding provisions, but it would not change anything in qualitative terms. With regard to Mr. Brownlie's fear that the Commission might go astray if it failed to confine itself exclusively to operational aspects, she saw no grounds for such fear since the Commission could draw the line wherever it wished: it could take up certain aspects of assistance without necessarily addressing the question of armed intervention in support of its delivery, which should be excluded from the scope of the study.

24. Mr. PELLET said that Mr. Brownlie had failed to do justice to the Special Rapporteur's report, paragraphs 44 to 49 of which adopted a problem-based approach to the topic. Although that section remained very general in terms of content, it nevertheless envisaged a more practical approach. However, he had no objection to the creation of a working group, a proposal that Mr. Brownlie had supported. Contrary to Mr. Dugard's claim, he was in favour of including man-made disasters in the study. A second misinterpretation by Mr. Dugard was far more serious: the main goal of law was of course, as he himself had pointed out, to assuage human suffering. However, that was not the main problem. A distinction needed be drawn between two very different aspects: the protection of persons was

indeed a legal problem, but the main problem consisted in identifying who should and could deal with a specific issue and what constituted the appropriate and legitimate framework for such action. All law was political; it was generated by politics and no rule of law came from any other source. Moreover, laws were not forged in just any manner and in just any place: when they departed from established principles, they were decided upon in political circles—in State parliaments, in the General Assembly or at international diplomatic conferences. Blurring the borderlines was therefore quite unacceptable, contrary to what Ms. Escameia said and believed, without challenging her sincerity: the Commission had no mandate to take the place of States; it should simply operate within its own legal sphere. He was horrified to hear some speakers wondering whether the Commission should position itself within international law; it was not for the Commission to take up any other position, and even though jurists were clearly concerned by human suffering, it was not their job to make laws to deal with it—they should help to elaborate new rules, but they should not invent them or discard existing rules.

25. Mr. PETRIČ expressed support for Mr. Gaja's proposal to set up a working group to study the topic in detail. Some statements reminded him of debates in the 1940s and 1950s, when the idea of human rights became topical. The question he wished to raise was, given that one of the Commission's tasks was to contribute to the progressive development of international law, should it invariably lag behind States or should it take the lead? In his view, the Commission should remain slightly ahead of the field.

26. Mr. KAMTO congratulated the Special Rapporteur on the highly scrupulous intellectual approach he had displayed in his report and on having had the courage to take on a sensitive topic which fell largely within the domain of *lex ferenda*. The degree of *lex ferenda* involved was particularly difficult to assess inasmuch as the topic touched on a highly sensitive area for States, namely the conflict between their sovereignty and the intervention of foreign powers or even private actors, such as NGOs and commercial companies, invoking the principle of protection of persons in critical circumstances, a principle whose existence in international law remained to be established. The Special Rapporteur's preliminary report was cautious but detailed. He had identified the core problems and the difficulties inherent in the nature of the subject and, where necessary, had sought guidance from the Commission on specific points, particularly in paragraph 53 of the report. What he required most at the present stage of his work was not a substantive debate on the subject, but an indication of the Commission's understanding of its scope and possibly some methodological guidance.

27. With regard to the scope of the topic, the key terms "protection", "persons" and "disaster" must first be defined. In the case of protection, reference was made in some cases to the "duty to protect" and in others to the "responsibility to protect": it should be made clear whether the two terms meant the same thing and whether the duty or responsibility in question was a moral standard or a legal obligation. With regard to the scope of protection, in other words the extent of the duty or obligation, it should be made clear whether, as suggested by the

Special Rapporteur, it encompassed prevention, response and rehabilitation. He would prefer to exclude the obligation to prevent, not only because it would prove difficult in some cases, but also because it would impose obligations on many States that they would be unable to fulfil. For example, it was sometimes possible to prevent earthquakes or volcanic eruptions, but only a few States possessed the technological capacity and the financial means to set up the necessary protection systems, not to mention earthquake-resistant building specifications which developing countries were unable to apply on a systematic basis. Furthermore, some measures of protection necessitated a very long period of implementation. The Special Rapporteur should therefore focus on response and rehabilitation inasmuch as the aim of the topic was to identify the action that States or the international community should or could take when an unforeseeable and unavoidable event occurred, whether it was natural or man-made.

28. With regard to persons, the question arose whether the topic covered only natural persons or whether it also included legal entities. If legal entities were included, protective measures would be necessary even where only their property, and not the lives of natural persons, was endangered. The basic postulate underlying the topic—both when the idea was first raised in the Commission and when the United Nations discussed the responsibility to protect—was that the international community was under a moral obligation not to stand idly by in the face of crises affecting human life. The protection of persons under diverse circumstances had become a core axiological value underlying contemporary law, as reflected in the concept of "elementary considerations of humanity" in the case law of the ICJ—although it was unrelated to natural disasters. The concept, which appeared in 1949 in the *Corfu Channel* case and in other later judgments, permeated international law and could be explored in greater depth by the Special Rapporteur in the context of the topic under discussion.

29. The third key term was "disaster". Like most members of the Commission, he thought that the concept should embrace both natural and man-made disasters. However, while the definitions set out in paragraphs 45 and 46 of the report were very useful, any broadening of the concept to include damage to the environment could, as rightly noted by Mr. Pellet, raise difficulties where such damage was not accompanied by injury to natural persons. For example, should there be a duty to respond if an earthquake or volcanic eruption occurred in an uninhabited area? In his view, the Commission would be wise to limit the topic to the protection of natural persons, confining the applicability of the rules to be developed to cases in which human beings were affected by a disaster.

30. On the methodological front, several questions arose. First, the Commission would have to determine the manner in which protection should be provided, whether it should take the form of intervention or should solely involve cooperation. If persons required protection, the existence of the State on whose territory the disaster had occurred could not be ignored. A balance would therefore have to be struck between the requirements stemming from "elementary considerations of humanity" and those imposed by respect for State sovereignty. By virtue

of their sovereignty, States remained at the core of the concept of protection of persons. A second question was: who was required to protect? Was it the State on whose territory the disaster had occurred, the international community, NGOs and commercial companies, or all those actors and, if so, how were their respective roles to be defined? Where an offer of assistance was refused, as had recently occurred in practice, did international positive law, in particular the Charter of the United Nations, offer an alternative basis for assistance notwithstanding the State's refusal? The Special Rapporteur could usefully examine the various existing regimes for the protection of persons in crisis situations—for instance in armed conflicts, which should not be excluded from the scope of the subject before the Commission took stock of the current situation. The law of armed conflicts or international humanitarian law might seem to regulate certain issues while only doing so in part or not at all, so that some aspects of the impact of armed conflicts on persons should perhaps be included in the concept of a disaster.

31. A narrow legal approach would be of little relevance in either legal or practical terms, since it would basically consist in a mere reaffirmation of human rights that were already established in various international legal instruments: the right to life, the right to health, the right to food, the right to housing and so forth. The Commission's task was to determine how international law could respond when such rights required protection from violations occurring in the event of a disaster. It would have to consider what *lex lata* offered in that regard and seek to determine, in the light of current trends in international practice, whether such practice was well established or just emerging, what new rules the Commission could propose to States, *de lege ferenda*, promoting progressive development in line with its Statute. It was for States to say whether or not they supported such a development, since they alone were the final decision makers. The Commission, however, had a duty as a technical body to make their task easier by proposing rules after examining current trends in international law. With regard to the final form of the Commission's work on the topic, he thought that the Special Rapporteur should propose draft articles which could give rise to a draft framework convention or mere guiding principles, depending on what the Commission decided in due course.

32. Mr. FOMBA thanked the Special Rapporteur for his detailed preliminary report, which identified the core issues and indicated avenues that might usefully be explored. Three key concepts emerged from the current title of the topic: the concept of disaster, the concept of protection and the concept of persons. The core issues that arose in disaster situations concerned the basic rights that victims enjoyed, the rights and duties of all actors involved, and appropriate ways and means of taking rapid and effective action. In order to respond adequately to those questions, the Commission would also have to determine what constituted a disaster, the scope of the concept of protection and who exactly were the persons concerned.

33. The key concepts should be examined in the light of *lex lata* and, if necessary, from a *lex ferenda* perspective. What lessons could be drawn from the preliminary report? With regard to the concept of disaster, the

Special Rapporteur indicated that it was not a legal term and that there was no generally accepted legal definition of the term in international law. He also indicated that two approaches were discernible in practice: either the complete omission of a definition, or the provision of what purported to be an all-encompassing definition. At the end of paragraph 46, he proposed a helpful definition that could serve as a sound basis for reflection. According to paragraphs 47 and 48, the *ratione loci* or spatial scope was not a decisive criterion. On the other hand, the seriousness of the disaster was a relevant criterion and disasters could be classified on the basis of a number of criteria (natural or man-made, duration, single or complex emergency). He supported those statements and shared the Special Rapporteur's view that a broad approach covering all types of disasters should be adopted. The only proposed exclusion concerned armed conflicts, which was acceptable in the light of the special legal regime applicable in that area, although some speakers had rightly suggested during the debate that a measure of caution should be exercised in that regard.

34. The concept of protection of persons had three components: the persons to be protected, the persons who should provide protection and the tools to be used. He was in favour of adopting a holistic approach. The concept of a victim should be defined in the context of the fundamental rights and interests of victims that must be protected. The question arose whether the term should be defined in terms of a single meaning or whether a distinction should be made between "direct victims" and "indirect victims" involving the application of a different legal regime. In practice, however, such questions were of purely theoretical interest, since the identity of the victims was clear when an earthquake or volcanic eruption actually occurred.

35. With regard to protection, the report stated that the concept needed to be explored in greater depth. While disaster victims did not constitute a separate legal category, their distinct factual situation created specific needs that called for an adequate response. While he agreed with that reasoning, he nonetheless submitted *a contrario* that steps could be taken to define a specific legal category of victims. Moreover, he shared the Special Rapporteur's view that the principle of humanity constituted the fundamental tenet of international humanitarian law and international human rights law applicable in the event of disasters and hence underpinned all humanitarian action. He also agreed that the concept of protection should be all-encompassing, covering response, relief and assistance. While the distinction drawn between protection *stricto sensu*, which seemed to denote a rights-based approach, and protection *lato sensu*, which would embrace other concepts, was of some interest, he found it somewhat unhelpful to become engrossed in such subtle distinctions.

36. The concept of protection of persons was not new in international law and reflected a particular relationship between the victims of a disaster and the rights and obligations attached thereto (para. 52). The protection regimes involved were international humanitarian law, international human rights law and international law relating to refugees and displaced persons. Together with the principles

of sovereignty and non-intervention, they constituted the basis of protection of persons in the event of disasters. There was, in his view, some tension between humanitarian principles on the one hand, and the principles of sovereignty and non-intervention on the other. The Commission would have to address the question of how to deal with the power struggle between the two categories and whether it was necessary to strike a balance between them. His opinion regarding that question of legal policy was that sovereignty and non-intervention should not be allowed to thwart efforts to achieve the best possible protection for disaster victims and that the Commission should send out a message along those lines. With regard to the question of whether property and the environment should be taken into account, he was in favour of addressing those issues, since it would be somewhat artificial to divest victims of their material and environmental context; the degree of detail with which such matters should be addressed would depend on the circumstances of each case.

37. With regard to rights and obligations and their consequences, in particular the fundamental question of whether a right to humanitarian assistance existed, the Special Rapporteur noted that there was some measure of doubt or uncertainty in contemporary international law because no legal instrument recognized the right in question *expressis verbis* (para. 54). In his view, the Commission should proceed without vacillating in the direction of progressive development of the law in that area. With regard to the famous question of the responsibility or duty to protect, he shared the views expressed by the Special Rapporteur in paragraph 55 and considered that an in-depth study should be undertaken to clarify the ins and outs of the question.

38. Turning to the scope of the topic *ratione personae*, he expressed the view that all actors should be taken into account. With regard to the scope *ratione temporis*, he considered that all phases should be taken into consideration and the questions raised in paragraph 57 should be discussed. His first impression was that the Commission could draw on its work concerning the prevention of transboundary harm from hazardous activities that were not prohibited by international law.²⁰⁵ The Special Rapporteur's reservation regarding the need to take account of rehabilitation activities was at first glance acceptable. However, he felt that more reflection was required because the need to reason in terms of covering the entire process, from the occurrence of a disaster to the reparation of the consequences, seemed to point in the opposite direction.

39. Lastly, with regard to the final form of the Commission's work, logic demanded that the question should be decided at the outset, although he admitted that the Commission had almost invariably run into difficulties when it adopted such an approach. At first glance, he would opt for a binding legal instrument, given the importance and seriousness of the topic. The Commission should, in any case, work towards developing draft articles without worrying too much about the final decision regarding form, although such an approach might appear somewhat illogical. The Special Rapporteur seemed to have a preference

for guidelines, since, in his view, States found them more acceptable. While that argument had some merit, the Commission should endeavour to assess the acceptability of the outcome of its work. He fully shared the Special Rapporteur's conclusions (paras. 61–66) and agreed that it was essential to adopt a rights-based approach that would inform the operational mechanisms of protection.

40. Ms. XUE joined other members of the Commission in paying tribute to the Special Rapporteur for his illuminating report and in complimenting the Secretariat on its well-documented study. The preliminary report provided a most helpful and comprehensive overview of the current state of the law and practice in the area of protection of persons in the event of disasters, and raised pertinent and thought-provoking questions. With regard to the general approach to the topic, she agreed with the Special Rapporteur that the Commission's decision to opt for the term "protection" reflected a clear shift of emphasis from an operation-oriented approach to a rights-based approach, which placed the victim at the centre of the legal debate. The Special Rapporteur was right when he noted that such an approach dealt with situations not simply in terms of human needs but also in terms of society's obligation to provide protection and assistance (para. 12 of the report). Such a policy declaration had two legal corollaries: the obligation to protect at the national level, on the one hand, and the obligation to assist, implying solidarity, at the international level.

41. Responding to the questions on which the Special Rapporteur had sought guidance from the members of the Commission, she noted first that, in terms of *ratione materiae*, the existing legal instruments listed in the Secretariat's memorandum seemed to cover all types of natural disasters. From a technical point of view, however, the definition of prevention, relief and assistance varied greatly from one treaty to another, depending on the object and purpose of the treaty, so that the concept of a disaster was defined on a case-by-case basis. Disasters could fall into certain categories, but the most clear-cut and convenient distinction was that between natural and human-caused disasters. If one wished to focus on the protection of persons, it seemed appropriate to define the concept of a disaster as broadly as possible to ensure the widest possible protection. However, caution should be exercised in applying such a general approach. More often than not, human-caused disasters stemmed from industrial activities; as such highly hazardous activities could cause large-scale damage, there were already national laws or treaties in place, in particular the two instruments adopted under the auspices of the International Atomic Energy Agency after the Chernobyl nuclear disaster in 1986 concerning the early notification of a nuclear accident and emergency assistance (Convention on early notification of a nuclear accident and Convention on assistance in the case of a nuclear accident or radiological emergency).

42. Having participated in the negotiations regarding those instruments, she had come to appreciate the complexity of the legal issues involved and was aware of the need to handle the protection of victims of such disasters with professionalism and to apply special standards. While international rules and regulations on emergency assistance and disaster relief for accidents of that kind

²⁰⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 148–170.

required further development, natural disasters had proved in recent years to be even more problematic in terms of rescue operations and emergency response, and legal regulation was urgently required, particularly to ensure appropriate coordination of national and international rescue efforts. Of course, it was not always easy to draw a clear-cut distinction between natural and human-caused disasters, since in some cases natural disasters were partly due to long-term mismanagement of natural resources. It would be helpful, however, if the Commission were to adopt a progressive approach and tackle natural disasters first; it could define natural disasters flexibly, extending the definition to include grey areas in which natural disasters were partly attributable to human causes.

43. While protection of persons was the top priority in the event of a natural disaster, other factors such as property and the environment should not be ignored. Whether such factors were taken into account largely depended on progress in rescue operations and the specific circumstances of each case. While efforts had focused, in the immediate aftermath of the recent devastating earthquake in the Chinese province of Sichuan, on rescuing victims and providing food, water, medical care, temporary shelter and sanitary facilities to people in the disaster area, daily reports from the region showed that a major effort was also under way to rescue cultural heritage sites and to repair public, industrial and agricultural facilities that were of crucial importance for the local people. Such matters were largely addressed at the local level during the post-disaster phase. While the pre-disaster and post-disaster phases were very important, international legal guidance was most urgently needed for the disaster phase itself. To ensure that the scope of the topic was manageable, the Commission should focus on the disaster proper and on the protection of persons. It went without saying that armed conflicts should be excluded from the scope.

44. Turning to the question of the general principles applicable to the protection of persons in the event of natural disasters, she noted that the Special Rapporteur had enumerated a number of principles drawn from humanitarian law. She shared the view expressed by a quite a number of Commission members that placing the interests of disaster victims at the core of the discussion did not imply that human rights law and humanitarian law provided answers to all the questions raised. She did not agree that there was necessarily some form of tension between the principles of State sovereignty and non-intervention, on the one hand, and international human rights law, on the other. As a general legal principle, State sovereignty should prevail, because when one spoke of rights and obligations pertaining to the protection of persons, it was basically the rights and obligations of States at the national and international level that were being invoked. In the event of a natural disaster, the odds were that uncoordinated relief efforts would fail to reach all victims promptly and effectively in the absence of leadership and coordination by the Government concerned. It followed that the establishment of national relief plans and the enactment of legislation on emergency mechanisms geared to conditions in the affected State should no longer be regarded as a purely domestic matter, but as an international obligation for the protection of human rights. The

principles of State sovereignty and human rights would thus prove mutually reinforcing. The Sichuan earthquake had demonstrated that it was politically essential, legally required and technically necessary for the affected State to bear primary responsibility for the protection of its people. Similarly, the principles of neutrality, impartiality and non-discrimination implied that humanitarian assistance efforts should be directed solely towards providing relief to the population of the receiving State, so that they coincided with the principle of non-intervention. Acting otherwise, for instance conducting political, religious or economic activities, constituted not only interference in the State's internal affairs but also a violation of those basic principles.

45. With regard to the more controversial questions of consent and the right to humanitarian assistance, she said that all States without exception could be expected to emphasize the basic principle of consent, first because disaster relief operations were never conducted in a political vacuum. As eloquently stated by Mr. Vascianie, the State had a legitimate right to accept or refuse humanitarian assistance and to choose the provider in line with its interests. The timely distribution of food to disaster victims was certainly desirable, but without the consent of the Government concerned, who would be held responsible if anything went wrong with the food or the operation itself? Such seemingly trivial practical matters could have a serious social impact during a sensitive period, especially if such action was taken against the will of the State concerned. From a legal point of view, the right "to impose" rather than "to give" humanitarian assistance lacked the necessary character of generality and enforceability. Moreover, if protection was held to be an absolute right and duty and if one could require a State to accept humanitarian assistance, it could be argued as a corollary that a State might be required to provide such assistance. Terms such as "unwilling or unable" and "lawful or unlawful refusal", to cite Mr. Gaja, were subject to arbitrary or subjective interpretation, and a well-intended offer might give rise to an international dispute. She agreed, however, that in exceptional circumstances, where problems arose in channelling humanitarian assistance to a disaster-stricken area, bilateral, regional or multilateral political and diplomatic efforts should be undertaken to find appropriate solutions. Even in disaster situations, however, treating humanitarian intervention as a matter of law would undermine the very foundations of the international legal system.

46. Turning to technical matters, she emphasized that it would be virtually impossible to conduct relief operations on the ground in the event of a disaster without the consent of the affected State. China, which was very grateful to the rescue teams from Japan, the Republic of Korea and the Russian Federation, to mention only a few countries, had undertaken major coordination work to facilitate their task. Hence the consent of the affected State was required not only in its own interest, but also in the interest of the States providing assistance. Nevertheless, it should not be concluded that the requirement of consent was absolute and that all assistance without exception should be delivered in response to a request. It could be offered or arranged, or it could result from implicit consent, such as through the issue of a visa.

47. With regard to the scope of the topic *ratione personae*, she noted that NGOs and volunteers were important actors when it came to ensuring the success of natural disaster relief operations. However, the affected State remained primarily responsible for mobilizing and coordinating relief efforts which did not mean that such actions could be conducted only at the request of the State concerned. Non-State actors had the right to initiate relief activities but they should operate under the jurisdiction and control of the affected State, which should be able to accept or refuse the assistance offered. Once accepted, the activities of non-State actors should be subject to the domestic law of the affected State and comply with the rules of international law. In other words, non-State actors had a clear legal status, whether they acted as “agents of humanity” or “agents of the international community”. When the Commission advocated the principle of solidarity in the present context, it should not base its definition of international humanitarian assistance solely on morality or charity, but rather on a kind of legal obligation consistent with the existing international legal order. It should not design a potentially contentious and confrontational legal mechanism for disaster relief, but lay the basis for a legal framework founded on cooperation and coordination that was conducive to the promotion of international solidarity. Only by adopting such an approach could the Commission best serve the interests of the people in the greatest need of assistance in the event of a disaster. With regard to the final form of the Commission’s work, it was difficult to take any decision before the scope of the topic had been delimited. If its scope was appropriately restricted, in other words if it focused on natural disasters and emergency relief operations and included non-State actors on appropriate terms, the Commission might opt for a draft convention.

48. Ms. JACOBSSON commended the Special Rapporteur on his excellent preliminary report. She was impressed by his approach to the topic, which had resulted in an independent and well-structured first report that clearly mapped out the theoretical and practical problems. The Commission thus had an excellent basis for delimiting the general scope of the topic. She noted that the topic had received strong support in the Sixth Committee, which was perhaps not so surprising since most peoples and States were bound to be concerned when faced either with real natural disasters or with media footage of disaster situations. States and people wished to help and were frustrated when their assistance was turned down, failed to reach the right people or failed to reach any victims at all, as was sometimes the case. The desire to assist stemmed from the spirit of solidarity mentioned by Mr. Petrič and was not necessarily triggered by legal considerations or a perceived right to assistance. The abundance of relief or humanitarian organizations was sometimes more of a hindrance than a help for people in disaster-stricken areas.

49. In a publication entitled *Law and Legal Issues in International Disaster Response: A Desk Study*,²⁰⁶ the IFRC noted: “The right aid is often quite literally trapped behind the wrong aid”. The study had not been undertaken by IFRC to complain about the occasionally

excessive willingness to extend a helping hand to victims, but because it was confronted with serious legal barriers that impeded effective international disaster relief operations. In 2007, after several years of work under the International Disaster Response Law Project, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²⁰⁷ had been adopted at the thirtieth International Conference of the Red Cross and Red Crescent by representatives of national Red Cross and Red Crescent Societies and by States, so that the document carried a certain weight. The Guidelines, which dealt with the conditions whereby States could facilitate the access of assisting organizations to legal facilities, particularly those relating to entry and operations, were important because they were both detailed and problem-oriented. They were furthermore a useful source of information for compiling the glossary proposed by Mr. Hmoud.

50. The Commission should be careful not to duplicate these Guidelines. No doubt that was why the Special Rapporteur had suggested in paragraph 62 of his report that a rights-based approach should be adopted, since such an approach was lacking. She drew attention in that connection to the opening address of Ms. Mary Robinson, former United Nations High Commissioner for Human Rights, to the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of United Nations Reform.²⁰⁸ A rights-based approach required the following questions to be raised in each case: what was the content of the right? Who were the rights-holders and were they able to claim their rights? And who were the corresponding duty-bearers and were they able to fulfil their obligations?

51. Those questions clearly demonstrated that the protection of persons in the event of disasters was not solely a “charity-based” project and that legal issues were at the heart of the matter. Moreover, the rights-based approach was not limited to a human rights perspective, but also raised the question of the rights and duties of States. The final outcome of the Commission’s work could not be limited to *ad hoc* solutions to practical problems, which—however laudable—were primarily political and diplomatic solutions. The challenge facing the Commission was to present a set of draft guidelines or draft articles that would fit into the system and structure of the law without being purely academic. At the same time, the outcome should demonstrate that the Commission was aware of the problems “on the ground” and sought to achieve concrete results for the protection of persons affected by disasters. The outcome should constitute a useful legal contribution to the enhancement of such protection. The Commission had already engaged in a number of “mini-debates” on the concept of the responsibility to protect, humanitarian intervention and the right to humanitarian assistance. However interesting they might be, she would prefer to focus on the content of the rights and obligations in question rather than on the labels.

²⁰⁷ See footnote 183 above.

²⁰⁸ *Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform*, Stamford (United States), 5–7 May 2003, pp. 37–40.

²⁰⁶ See footnote 184 above.

52. Turning to the Special Rapporteur's request for the Commission's views regarding the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, she noted with respect to the scope *ratione materiae* that, in the absence of any generally accepted legal definition of the term "disaster" in international law, the Commission would either have to establish its own definition or compile a list of situations to which the draft articles would be applicable. In order to be meaningful, any such definition or list of situations should be based on what had been deemed to constitute a "disaster" by other entities that had been closely involved in adopting measures to prevent and respond to disasters.

53. Several members of the Commission had noted that the 1998 Tampere Convention contained a workable definition of the term "disaster". In her view, it had the additional advantage of being almost identical to the definition contained in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the International Conference of the Red Cross and Red Crescent, the only difference being that the definition in the Guidelines explicitly excluded armed conflicts.

54. She agreed with the Special Rapporteur that a transboundary effect was not a prerequisite for characterizing a situation as a "disaster". However, the legal consequences of a disaster that had a transboundary impact should be analysed and compared with those of a disaster occurring solely within a State's territory. The legal frameworks applicable to the two situations were very different.

55. In the Special Rapporteur's view, the title eventually chosen by the Commission suggested that the scope of the topic was broader, and Ms. Escameia had confirmed that interpretation. She agreed that such an approach seemed to be the best way of achieving the aim of codification and progressive development of the topic, which was to forge rules for the protection of persons. As the need for protection was equally great in all disaster situations, the Special Rapporteur advocated the adoption of a holistic approach but considered that armed conflicts *per se* should be excluded. While she agreed in principle, she felt that it would be difficult in practice to avoid crossing the threshold between situations of peace and armed conflict. It would not only be difficult to distinguish between the different causes of a war but also to determine and even agree on whether an "armed conflict" existed, especially if it occurred in specific parts of a State's territory. Moreover, the rules of international humanitarian law concerning assistance in international armed conflicts were far more developed than those pertaining to internal conflicts. It followed that while the Commission should refrain from covering situations of armed conflict as such, at the same time it should not rule out the possibility of discussing specific situations in which an armed conflict was part of the problem. She agreed with Mr. Kamto's comment in that regard.

56. With regard to the second component of the scope of the topic *ratione materiae*, the concept of protection, all phases should be addressed, but the starting point should be the disaster itself. The Special Rapporteur stated that the protection of persons was also predicated on such

principles as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention. She shared that view but noted, in addition, that protection was closely linked to aspects of human security, an area that should also be examined. Issues relating to the protection of property and the environment could be discussed, but only if they could be shown to constitute an integral part of the protection of persons.

57. With regard to the scope of the topic *ratione personae*, States were at the core of international law and the protection of persons was their responsibility. It was therefore essential to focus on States. That did not mean that the Commission should disregard the numerous actors who were involved in disaster situations, but that the starting point should be States and their rights and obligations.

58. Turning to the scope of the topic *ratione temporis* and the concept of prevention, she noted that, according to the Special Rapporteur, "the concept of responsibility to prevent [was] also a recognized component in the emerging concept of protection in international humanitarian law". She would go further and say that prevention had always been a core component of both *jus ad bellum* and *jus in bello*. The entire structure of the modern law of warfare was geared towards preventing a situation from deteriorating, for either the combatants or the civilian population (given that, in such circumstances, prevention in the context of *jus ad bellum* would have clearly failed). It was another facet of the principle of proportionality. The Special Rapporteur was therefore to be commended for raising the question of prevention and shedding light on an important aspect of the responsibility to protect. She was unable to share Mr. Wisnumurti's view that responsibility was "a euphemism for humanitarian intervention", particularly if he was referring to military intervention. She submitted that the responsibility to protect was an important concept when it came to adopting preventive measures that would address both the root causes and the direct causes of crises that placed a population at risk. The extent to which a State was also required to take preventive measures in the event of a natural disaster was certainly a question that merited discussion. Still on the issue of the scope *ratione temporis*, it seemed legally necessary for the time element to encompass the pre-disaster and post-disaster phases. She did not mean that the Commission should create a set of new legal rules but that, in terms of working methods, the analysis should also cover the consequences of rights and obligations that could be deemed to exist before and after the disaster occurred.

59. With regard to the final form of the outcome of the Commission's work, it was still too early to take up a firm position. However, it would be unfortunate if the Commission were to add another set of "practical guidelines" to the plethora of soft law instruments already applicable to the subject. It would be preferable, as the Special Rapporteur had put it, to strike an "appropriate balance between *lex lata* and *lex ferenda*", with the final form depending entirely on the future orientation of the Commission's work.

60. Lastly, she felt that Mr. Gaja's proposal to establish a working group might be premature. The Special Rapporteur should first sum up the discussion. If he considered

that a working group might be of some assistance, the Commission could act on the idea. It might also be helpful to invite the IFRC to present its work and conclusions to the Commission and to have an informal discussion on how to ensure that their work was complementary. Later on, other entities such as the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Fund for Women (UNIFEM) and the United Nations Children's Fund (UNICEF) might be invited to present their views on particular aspects of people's needs in disaster situations.

61. Mr. PERERA said that the delimitation of the scope of the topic of protection of persons in the event of disasters, as set forth in the Special Rapporteur's preliminary report, was undeniably of crucial importance for a subject that raised a wide range of social, economic and political issues. With regard to the scope of the topic *ratione materiae*, the Special Rapporteur considered that the title eventually agreed upon by the Commission suggested a broad scope encompassing all kinds of disasters. Drawing attention to the difficulties involved in undertaking a strict categorization of disasters, the Special Rapporteur contended that a holistic approach was best suited to the codification and progressive development of the relevant rules. While there was certainly merit in that argument, he submitted that it would nevertheless be desirable for the Commission to consider adopting a two-step approach to the topic, confining its study first to natural disasters and then broadening it to cover man-made disasters. The approach adopted for the topic of aquifers and oil and gas²⁰⁹ could serve as a useful precedent. His experience of the tsunami disaster that had struck Sri Lanka in December 2004 had convinced him of the need to give priority, when considering the topic, to the protection of victims, with a view to developing a legal framework.

62. The Special Rapporteur had rightly excluded armed conflicts from the scope of the topic on the ground that international humanitarian law constituted a *lex specialis* in such situations: the same reasoning was applicable to protection of the environment.

63. In response to the Special Rapporteur's question as to whether the concept of protection should be regarded as a separate concept or whether it encompassed the concepts of response, relief and assistance, he emphasized that the concept of protection would have very little tangible meaning unless it was based primarily on the idea of an immediate response in the form of relief and assistance—distribution of essential goods, materials and services to the victims of disasters. In that connection, he referred to Mr. Brownlie's idea of a problem-based approach and the interesting discussion to which it had given rise.

64. In paragraphs 53 to 55 of his report, the Special Rapporteur raised a number of relevant issues that were both legally complex and politically sensitive. In paragraphs 54 and 55, for instance, he discussed the possible existence of a right to humanitarian assistance. He wished to associate himself, in that regard, with the view

expressed by a number of speakers, particularly Mr. Nolte at an earlier meeting, that human rights constituted only part of the overall legal approach to the topic: what was required was a human-rights-oriented approach rather than an approach based exclusively on human rights.

65. Referring to the debate at the previous meeting during which a number of General Assembly resolutions, particularly resolution 46/182, had been cited, he noted that, according to the principle of subsidiarity, it was the territorial State that played the primary role in the initiation, organization, coordination and implementation of humanitarian assistance in its territory. It followed that international humanitarian assistance should constitute subsidiary action that was never taken unilaterally. According to the Secretariat's study, a broad spectrum of geographically and politically diverse States had espoused that view. The principle of subsidiarity could be supplemented by that of international cooperation, which was clearly recognized as a fundamental principle of international law and was elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV). While those principles should form the core of a legal framework of general principles for the protection of persons in the event of disasters, establishing the necessary balance between the principle of sovereignty, on the one hand, and victims' right to assistance, on the other, it must nonetheless be conceded that there could be, and had been, situations of an exceptional nature calling for political and diplomatic action outside the general framework of the principles in question. He cited as examples situations in which international assistance was refused or in which there was a complete breakdown of national assistance institutions, mechanisms and procedures. Nevertheless, the general norms and principles to be formulated should address situations that normally arose in the event of disasters.

66. The Special Rapporteur had also raised the question of the appropriateness of extending the concept of the responsibility to protect and the question of its relevance to the topic. In doing so, he had rightly struck a cautious note. The Commission should exercise caution in invoking a concept that was essentially political and without precise legal contours, since it might find its work mired in political controversy. As noted by a number of speakers, the concept had been developed in a political context and was liable to be abused for political aims. He drew attention to the fact that it was mentioned in the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1 in connection with very specific and extreme situations involving flagrant violations of human rights, namely genocide, crimes against humanity and war crimes.

67. With regard to the scope of the topic *ratione personae*, the Special Rapporteur referred to the involvement of a multiplicity of actors and raised the question, with a view to assessing the weight to be accorded to the practice of non-State actors, of whether a right of initiative existed along the lines of that recognized in various international humanitarian right instruments. It was important to emphasize again in that context the primacy

²⁰⁹ See *Yearbook ... 2003*, vol. II (Part Two), chap. IX, *passim*, and especially *Yearbook ... 2007*, vol. II (Part Two), chap. V, paragraphs 160–177.

of the role of the affected State as a general principle and the subsidiary character of all other measures taken under the umbrella of international cooperation and solidarity. The existence of an independent right of initiative was not supported either by the literature or by State practice. The experience of Sri Lanka in the wake of the tsunami, when non-State actors had allegedly engaged in activities extraneous to their relief and rehabilitation mandate, including forced religious conversions, strongly militated against according a "right of initiative" relating to the provision of assistance outside the regulatory framework of the affected State.

68. With regard to the action of non-State actors in the wake of the tsunami in Sri Lanka, he emphasized the critical role played by local NGOs, which had provided immediate relief well before international assistance had arrived.

69. Turning to the scope of the topic *ratione temporis*, he emphasized that the response phase should be given priority and remain the central focus of the study.

70. Lastly, on the question of the final form of the outcome of the Commission's work, he felt that guidelines or draft principles would be a more prudent and realistic option than a convention.

71. Mr. HASSOUNA said that the subject under consideration was highly topical since disasters were a global phenomenon calling for a global response. As the Special Rapporteur had noted, the aim of the preliminary report on the topic was to identify issues and stimulate debate in the Commission in order to provide him with the requisite guidance. The Special Rapporteur proposed adopting a rights-based approach. He noted that different views on the matter had been expressed during the debate: mention had also been made of a problem-based approach, an operation-based approach and an obligation-based approach. All those approaches were valid since they were interrelated and dealt with the issues from different perspectives. A more holistic approach might therefore be appropriate. It was first necessary to define the problems, formulate principles and establish the necessary procedures and institutions. To ensure balance, the rights and obligations of all parties concerned should be recognized. The individual's right to protection, the right of a State whose territory had been devastated to seek assistance, and the rights and obligations of third States and the international community should all be taken into consideration. The aim in all cases should be to protect individuals and the society in which they lived and to preserve the stability of the affected State so that it could surmount the crisis.

72. With regard to sources, situations of armed conflict were often closely related to disasters. Indeed, conflicts often led to disasters and *vice versa*. Although there was a large body of law concerning assistance in conflict situations, there was none applicable to the topic under consideration, so that a set of legal rules governing the protection of persons in the event of disasters would usefully complement existing provisions. Internally displaced persons were entitled to better protection than that which they currently enjoyed, in the absence of legally binding

rules, under the Guiding Principles on Internal Displacement developed by the Representative of the Secretary-General.²¹⁰ That was therefore an area in which the Commission could make a useful contribution. With regard to the legal instruments applicable to disasters, he emphasized the importance, among the abundant bilateral and multilateral treaties, of regional agreements and mechanisms based on solidarity and cooperation between States in the same region. They benefited from geographical proximity and from cultural and other affinities, and they did not, of course, rule out support from the international community. In the Arab States region, an agreement for cooperation in disaster relief operations had been in force since 1990. The Summit of the League of Arab States held in Algeria in March 2005 had decided to create a mechanism for coordination among Arab bodies dealing with natural disasters and emergency situations.²¹¹

73. With regard to the scope of the topic *ratione materiae*, he agreed with the Special Rapporteur that, for the reasons set out in the report, the study should cover all disasters and not just natural disasters. Protection of property and the environment should be covered only when a close relationship with the protection of persons could be demonstrated.

74. The potential existence of a right to humanitarian assistance and the emerging concept of a responsibility to protect had been debated at length at previous meetings, and the same differences of opinion had been discernible in the Commission as in the other main bodies of the United Nations. In the absence of a consensus, the Commission should tackle those issues with great caution on the basis of objective legal criteria and ensuring full respect for the principles set out in the Charter of the United Nations. Emphasis should be placed not only on the rights of the parties, but also on the obligation to cooperate through legal or diplomatic channels, which had often proved to be effective. In any event, he was convinced that the issues fell within the Commission's mandate and that it should deal with them in spite of their political ramifications.

75. With regard to the scope of the topic *ratione personae*, the multiplicity of actors sometimes gave rise to controversy, especially with regard to the role of NGOs, some of which played a positive and constructive role, while others were perceived to be lacking in transparency and accountability. He therefore supported the idea of setting up a specialized United Nations agency that would be mandated to provide humanitarian assistance in the event of disasters and which, by virtue of its neutrality, could become a supreme coordinator of all humanitarian assistance efforts, a role that OCHA often found it difficult to perform for a variety of reasons, including lack of funds.

76. With regard to the scope of the topic *ratione temporis*, while the three phases of prevention, response and

²¹⁰ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Human Rights Commission resolution 1997/39 (E/CN.4/1998/53/Add.2), annex.

²¹¹ See the letter dated 18 April 2005 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council (S/2005/274), annex, resolution 17/319 of 23 March 2005.

rehabilitation should be covered, precedence should be given to the response phase in order to meet the most urgent needs of victims.

77. With regard to the final form of the outcome of the Commission's work, it would be appropriate to begin with the preparation of draft articles and to proceed, in the light of progress achieved and State reactions, with the drafting of a framework convention on the subject.

The meeting rose at 1 p.m.

2982nd MEETING

Tuesday, 22 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Mellescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

1. The CHAIRPERSON welcomed Judge Rosalyn Higgins, President of the International Court of Justice, who, following long-established practice, was to address the Commission under the item "Cooperation with other bodies".

Protection of persons in the event of disasters (concluded) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (concluded)

2. Mr. OJO congratulated the Special Rapporteur on his comprehensive and illuminating report (A/CN.4/598) on a challenging emerging area of international law and commended the Secretariat for its seminal background work on the topic. The debate on the report had been robust, giving the necessary impetus for the Commission to move forward in its consideration of the topic.

3. No State chose to have a natural disaster take place within its borders. Natural disasters could occur at any time and anywhere, as an abundance of recent examples showed: Hurricane Katrina in New Orleans, the earthquake and tsunami in parts of Asia, the more recent earthquake in Sichuan Province of China, and the cyclone in Myanmar in which over 80,000 lives had been lost. Recent man-made disasters included the Chernobyl nuclear accident in Ukraine, ethnic cleansing in Bosnia and Herzegovina, Rwanda and Darfur, and the disaster waiting to happen in Zimbabwe if the current political crisis was not resolved.

4. He agreed with Ms. Escameia that a broad approach should be adopted in dealing with both natural and man-made disasters. The latter sometimes overlapped with the former, and drawing a strict dividing line between them would not serve any useful purpose. He found it difficult to agree with Mr. Nolte's suggestion that the scope of the topic should extend to man-made disasters only if they acquired the characteristics of natural disasters. Who would make that determination, and what would be the parameters: the number of lives lost or properties destroyed? He agreed with Mr. Dugard's earlier intervention on that point.

5. Article 2, paragraph 7 of the Charter of the United Nations enshrined the fundamental principle of international law that no State should interfere in the internal affairs of another State. As Mr. Vasciannie had pointed out, the consequence of not adhering to that principle when providing assistance in the event of a disaster could be that a stronger State might overthrow the Government of another State: the victim State must unequivocally consent to such assistance before it was provided. Yet what would happen if citizens of a country were clearly in need of aid and would perish if none was forthcoming, yet the Government refused to allow aid to enter the country? A not dissimilar situation had arisen recently in Myanmar.

6. While excesses could be perpetrated in the name of humanitarian assistance, as in Mr. Brownlie's example of the intervention in relation to Kosovo, in the name of which bridges had been blown up and properties destroyed, the way to prevent such excesses had been ably propounded by Mr. McRae: rules of conduct or guidelines to facilitate cooperation and implementation should be fashioned. In other words, a balance should be struck between the principles of sovereignty and non-intervention on the one hand, and the reality of a disaster on the other. Dwelling too much on the theoretical and conceptual aspects of the topic at the initial stage would unduly limit the Commission's scope for action. It must not shy away from recommending changes in existing principles and norms in order to satisfy the international community's aspirations concerning emerging areas of international law. Providing ground rules for a *modus operandi* for international assistance in the event of a disaster was the way forward. It was incumbent on the Commission to provide the guidance that the Special Rapporteur had requested, rather than taking refuge in the principles of sovereignty and non-intervention.

7. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent preliminary report and the Secretariat for its memorandum (A/CN.4/590 and Add.1–3), which contained extensive and useful information and helpful suggestions on aspects of the topic that could be taken up by the Commission.

8. The report set out to provide the Commission with the necessary guidance to enable it to delimit the scope of the topic. It would be immensely useful, however, if, in his analysis of international norms and structures, the Special Rapporteur would consider briefly discussing the coordinating role played by the United Nations and its specialized agencies, particularly through the Under-Secretary-General for Humanitarian Affairs and

Emergency Relief Coordinator, OCHA and the Inter-Agency Standing Committee on Post-War and Disaster Reconstruction and Rehabilitation, in which non-State actors such as the ICRC and NGOs participated alongside United Nations agencies. Of particular interest would be information on the problems such bodies faced in practice, to enable the Commission to consider mechanisms for resolving them. Members' views on what should be included in the Commission's project should also be sought. It would also be possible to evaluate the possibility of strengthening that international organizational apparatus.

9. Numerous international instruments, both binding and non-binding, covered disasters and, in particular, disaster response. They had many limitations, however, including their disparate natures, their solely regional or bilateral scope, the relatively small number of States parties in the case of conventions, and their focus on specific types of disasters or single sectors of assistance. There was presently no broad universal instrument covering disasters, hence the need for a broad perspective to be provided by the Commission's exercise in codification and progressive development of that important area of law, to cover all phases of disasters.

10. Every year, millions throughout the world were affected by natural and man-made disasters and urgently required assistance in meeting their basic needs. That was why, with respect to the scope *ratione materiae*, disaster should be construed broadly to include both natural and man-made disasters. The Commission's product would need to be of use to all who urgently required assistance, irrespective of the origin or category of the disaster. The definition of disaster in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations served as a good starting point. Furthermore, the fact that it was often impossible to distinguish between natural and man-made disasters argued in favour of addressing them both.

11. Global warming demonstrated that human activity played a major role in climate change, whose long-term effects, for example higher sea levels, threatened the very existence of certain small island developing States. In a recent report, the Under-Secretary-General for Humanitarian Affairs stated that one of the main reasons why more people needed more assistance than in the past was that natural disasters, especially those associated with climate change, appeared to be occurring more often and having a greater impact.²¹² As had been pointed out by UNESCO, natural disasters themselves were not entirely "natural", since human action, too, could provoke disasters: the most severe floods were triggered by deforestation.²¹³ Bad development choices were also responsible for higher risks, for example when towns were built on flood plains, on known fault lines or in areas lacking adequate regional planning schemes. In these situations, even a minor earthquake could have devastating consequences.

²¹² United Nations, Office for the Coordination of Humanitarian Affairs, *OCHA in 2008: Activities and Extrabudgetary Funding Requirements*, p. 6, available from: www.unocha.org/about-us/publications/flagship-publications/*78 (accessed 19 December 2012).

²¹³ See J. Barry, *Disaster Preparedness and Mitigation: UNESCO's Role*, UNESCO, Paris, 2007, p. 13 (<http://unesdoc.unesco.org/images/0015/001504/150435e.pdf>, accessed 18 June 2014).

Risk reduction or prevention could be facilitated through means such as international scientific and technological cooperation, information exchange and early warning systems. Accordingly, he agreed with the Special Rapporteur's view, regarding the scope *ratione temporis*, that a broad approach was indicated concerning the phases which should be covered, including not only disaster response but also the pre-disaster and post-disaster phases, involving prevention, mitigation and rehabilitation. With regard to the scope *ratione materiae*, he agreed on the need to construe the concept of protection broadly as encompassing the more specific areas of response, relief and assistance, and also prevention and rehabilitation.

12. At a later stage, as the Special Rapporteur had pointed out, it would be necessary to define the rights and obligations that entered into play in disaster situations and the consequences that might flow from them. That would require approaching the topic from the standpoint of the victims of disasters and the right to humanitarian assistance, and of the nature and scope of that right. *Prima facie*, it could be seen as a human right, or perhaps as an emerging human right. Although more thorough analysis was needed, he did not think that viewing the right to humanitarian assistance as a human right would create tensions with the basic principles of sovereignty and non-intervention, since it would be implemented in the same way as any other human right. In addition, respect for the right to humanitarian assistance would promote the realization of the human rights affected during a disaster, such as the rights to life, health and physical integrity and dignity; rights relating to fulfilment of basic human needs such as the availability of water, food, sanitation and shelter; and rights that were important in post-disaster situations, such as the rights to education, freedom of expression, work and housing.

13. Yet international human rights law was only one of the sources for the right to protection of persons in the event of disasters. International humanitarian law was also significant, and its rules and principles could be used as inspiration or applied by analogy, as the Special Rapporteur suggested. However, humanitarian assistance to the civilian population in armed conflict should not be included in the scope of the topic, as it was already covered by international humanitarian law, an extensive body of codified international law.

14. He did not consider as applicable to the topic the concept of the "responsibility to protect" outlined in the 2005 World Summit Outcome document. In that document, Heads of State and of Government cited the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity and referred to the responsibility of the international community, through the United Nations, to take action in accordance with Chapters VI and VIII of the Charter of the United Nations and even to take collective action in accordance with Chapter VII.²¹⁴ The concept was used there in connection with the commission of the most serious crimes of concern to the international community as a whole, and could not be extrapolated to the very different context of the protection of persons in the event of disasters.

²¹⁴ General Assembly resolution 60/1, paras. 138–139.

15. Emphasis must be placed on the basic principles of sovereignty and non-intervention, whereby the State that had suffered the disaster must give its consent and a third State could not impose assistance upon it. It was obvious that the affected State had primary responsibility for protecting the population in its territory and that the victims had the right to receive humanitarian assistance. If, however, the affected or territorial State failed to discharge that responsibility for arbitrary reasons, it would be violating its obligations regarding the protection and enjoyment of the human rights of the population affected by the disaster, such as the right to life, food and health, and the victims' right to receive assistance.

16. Numerous instruments on assistance in disaster situations emphasized the principles of territorial sovereignty and consent of the affected State to the provision of humanitarian assistance by a third State; the latter had been included as one of the guiding principles in General Assembly resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations and reiterated in General Assembly resolution 57/150 of 16 December 2002 on strengthening the effectiveness and coordination of international urban search and rescue assistance. Those resolutions also referred to important principles applicable to the provision of humanitarian assistance such as neutrality, humanity and impartiality. Other important applicable principles set out in the relevant international instruments were non-discrimination and cooperation. As pointed out in the Secretariat memorandum, a review of the drafting history of pertinent General Assembly resolutions revealed that the principle of non-intervention had routinely been raised by States, which had typically expressly linked their support for General Assembly resolutions to the understanding that such resolutions were not to be interpreted as creating a duty or right to interfere in the domestic affairs of another State.

17. With respect to the Special Rapporteur's question on whether to address the protection of property and of the environment, he believed they should be included in the topic, since their protection influenced, to a greater or lesser degree, the protection of persons. Regarding the final form to be taken by the Commission's work, the best approach would be to adopt draft articles with a view to proposing a framework convention. The adoption of guidelines or some other soft law instrument to be added to those already existing did not seem a useful exercise or one that would represent a substantive contribution by the Commission. Lastly, thanks to the rich debate in plenary, the Special Rapporteur's next report would help the Commission move ahead in the right direction, and he therefore saw no need to establish a working group at the current initial stage of its consideration of the topic.

18. Mr. SINGH commended the Special Rapporteur for his comprehensive, thought-provoking report on a topic of great contemporary relevance and thanked the Secretariat for providing a thoroughly researched memorandum on the subject.

19. According to the Special Rapporteur, the title of the topic suggested a "rights-based" approach, the essence of which was the identification of a specific standard of

treatment to which the individual, the victim of a disaster, was entitled. However, the two international human rights instruments that were expressly applicable in the event of disasters seemed to set public order standards for States that were informed by the principle of humanity rather than that of individual rights. The Guiding Principles on Internal Displacement,²¹⁵ which provided for the protection, *inter alia*, of those displaced by a natural or man-made disaster, expressly stated that the primary responsibility for protection and assistance lay with the national authorities and that internally displaced persons had the right to request and to receive protection and assistance from them (Principle 3). In that context, the problem-based approach suggested by Mr. Brownlie was relevant, as it could focus on the immediate needs of the victims of disaster, leaving aside the issue of rights and obligations.

20. On the categories of disasters to be included within the scope of the topic, while noting that the initial Secretariat study had originally suggested that the topic be limited initially to natural disasters,²¹⁶ based on a perceived more immediate need, the Special Rapporteur was of the view that the title suggested a broader scope covering both natural and man-made disasters, and considered that such an approach would seem best for achieving the underlying objective, namely, fashioning rules for the protection of persons. However, he excluded armed conflicts, as international humanitarian law dealt with that aspect of the matter in great detail.

21. In his own view, the Commission should focus initially on natural disasters, as there were specific legal regimes for dealing with environmental damage from oil spills and nuclear accidents. Preventive action and identification of the root causes of so-called "slow onset" or "creeping" disasters was an area where the Commission must tread carefully, as it might fall within the mandate of other bodies and require specialized responses. That was especially true in the case of nuclear accidents, on which two Conventions had already been adopted by the International Atomic Energy Agency.

22. While the Special Rapporteur had rightly taken a cautious approach to the issue, some members had stressed the relevance of the "responsibility to protect", namely the right of the international community to intervene in a country where a crisis situation demanded drastic action. That raised several fundamental questions. Who would decide on the gravity of the situation, who would determine what was best suited to that country's problem, and how would the intervening country ensure proper functioning within the country concerned if the decision to intervene was a unilateral one? Those were difficult and sensitive questions that could not be dismissed simply by arguing that crises demanded innovative solutions.

23. In several resolutions reaffirming the sovereignty of States, the General Assembly had recognized the primary role of the affected States in the initiation, organization, coordination and implementation of humanitarian

²¹⁵ See footnote 210 above.

²¹⁶ *Yearbook ... 2006*, vol. II (Part Two), annex III, pp. 206 and 210–211, paras. 1, 2 and 26.

assistance within their respective territories. The Secretariat memorandum detailed the strong views expressed by a large number of States on that issue. He supported those members of the Commission who considered that the concept was not appropriate for inclusion within the scope of the topic, as the primary responsibility for the protection of persons in its territory or within its jurisdiction lay with the State concerned.

24. In paragraph 52 of his report, the Special Rapporteur pertinently noted that the areas of law applicable to the protection of persons in the event of disasters underscored the "essential universality of humanitarian principles" and were based on such principles as humanity, impartiality, neutrality, non-discrimination, solidarity and non-intervention.

25. On the question raised in paragraph 53, whether in addition to protection of persons, the topic should also extend to protection of property and the environment, it was his view that the primary focus should remain that of protection of persons, but that in certain situations, protection of property might be necessary to ensure the protection of persons affected by the disaster.

26. Addressing the scope of the topic *ratione personae*, the Special Rapporteur recognized the need to take account of the role of a multiplicity of actors, including international and non-governmental organizations and non-State actors as well as State actors, and raised the question whether there existed a right of initiative in offering assistance. Again, it was essential to emphasize the primary role of the affected State, since international assistance to persons within its territory, as part of international solidarity and cooperation, took place with its consent and under its supervision.

27. Finally, while a final decision on the form of the work should await its completion, it might be more realistic to prepare guidelines rather than a convention. As to the proposal to establish a working group to examine the issues raised, it would be best to wait until further reports on the topic had been submitted.

28. Mr. YAMADA commended the Special Rapporteur on his excellent preliminary report and welcomed the useful study by the Secretariat. The scope of the topic seemed very broad. He supported Mr. Perera's earlier suggestion of adopting a step-by-step approach, beginning with natural disasters. Thereafter, the Commission could proceed to consider man-made disasters, mainly involving various industrial accidents. It should exclude cases of armed conflict from the scope of the study, even though some natural and industrial disasters might be triggered by armed conflicts.

29. The key to solving the problem of disasters lay in international cooperation. The Commission would have to work out the principles governing the procedures and mechanisms for such cooperation. At the same time, it must formulate the basic legal principles of the rights and obligations of persons and States. The central principle was the right of persons in distress to appropriate relief. The State where the person resided had the obligation to provide appropriate and timely relief and, when it was not

capable of doing so by itself, it must have the obligation to seek outside assistance. The question of sovereignty should not be a taboo subject. The Commission must also formulate the rights and obligations of States and their personnel who were engaging in assistance. In particular, they must be held harmless unless there was gross negligence on their part.

30. He hoped that the Special Rapporteur would propose a comprehensive list of those rights and obligations in his next report and, as the Commission was to work out legal norms, that he would formulate his proposals as draft articles, without prejudice to the final form of the product.

31. The CHAIRPERSON, speaking as a member of the Commission, said that the debate on the topic had got off to a very successful start, thanks to the Secretariat's outstanding memorandum, the Special Rapporteur's excellent report and the seminal statements and briefer substantive interventions made by members.

32. The majority view within the Commission appeared to be that the concept of disasters as it related to the topic should be interpreted broadly, to include both natural and man-made disasters. However, it might be advisable, as pointed out by Mr. Yamada, for the Commission initially to turn its attention to natural disasters and to deal with man-made disasters only at a later stage. There was no call for it to consider armed conflict *per se*, an area already covered by a substantial body of international humanitarian law.

33. With regard to the sources of international disaster protection and assistance, the Special Rapporteur's suggested approach of drawing upon all available sources seemed appropriate; however, given that the main concern was to ensure the protection of persons, special emphasis should be placed on international humanitarian law and international human rights law, without, however, precluding the possibility of recourse to international law on refugees and internally displaced persons and the few applicable instruments that related specifically to assistance in the event of disasters.

34. In its consideration of the topic, the Commission should bear in mind the interdisciplinary nature of the topic by drawing on the contributions that could be made by other institutions and relying on a wide variety of legal precedents. The Commission had already done that successfully in its consideration of the topic of shared natural resources. He commended the Special Rapporteur for the considerable efforts he had made to establish contacts with numerous institutions involved in providing disaster relief to persons, and urged him to maintain those contacts in researching further information pertinent to the topic. The Commission might even wish to consider inviting certain bodies to participate in plenary meetings or meetings of the Drafting Committee. IFRC exemplified the kind of institution that had a vital contribution to make to the Commission's work in that area.

35. The topic clearly had both *lex lata* and *de lege ferenda* components, though, owing to its nature, there were fewer of the former, which should be retained. He

saw no difficulty in progressively developing norms of international law if in so doing the Commission was able to fill gaps in the law. While the Commission was not a legislative body, it was a subsidiary body of the General Assembly and could submit to it draft articles to enable it subsequently to decide on the final form that those draft articles would take. In that regard, the main challenge facing the Commission was to reconcile the norms derived from the Charter of the United Nations or from resolutions interpreting them (such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625/XXV, which referred to such fundamental principles as non-intervention or the prohibition of the threat or use of force) with norms relating to respect for the rights of persons to protection and assistance in the event of disasters. The Commission's efforts in terms of codification and progressive development should cover the three phases of disaster situations: pre-disaster to regulate preventive measures, the disaster proper, and post-disaster to regulate the relief and assistance to be provided.

36. It did not seem either useful or necessary for the Commission to decide immediately on the methods of work it would use to develop the draft articles. The most appropriate approach would become clearer as the draft articles were submitted to the Commission for its consideration. While the possibility of establishing *ad hoc* groups remained an option, the matter did not have to be decided during the current session. With Mr. Valencia-Ospina as Special Rapporteur, the Commission was in good hands, and its main task would be to support him in his work. The essential objective was to produce a set of draft articles that provided effective protection to persons in the event of disasters, as a right, not as an act of charity, and that made it possible for international assistance to be governed and protected by international law.

37. He invited the Special Rapporteur to sum up the debate and present his conclusions thereon.

38. Mr. VALENCIA-OSPINA (Special Rapporteur) said he was pleased to have been given the opportunity to sum up the debate in the presence of the President of the International Court of Justice, Judge Rosalyn Higgins. He had had the honour, when serving as Registrar to the world's highest judicial body, of sharing many memorable experiences with Judge Higgins in the tasks involved in the administration of international justice. Her presence indeed augured well for his challenging mission as Special Rapporteur.

39. He was grateful to the members of the Commission for the generous welcome they had given to his preliminary report. He was gratified to note that the report had achieved its desired result, namely to stimulate an initial general debate in plenary that would make it possible to delimit the scope of the topic and define its basic concepts and principles, thereby providing guidance to him for his continued study of the subject. More than three quarters of the Commission's full membership had made formal statements or briefer interventions in a lively and scholarly debate, offering valuable contributions in the areas

of law and policy that deserved further consideration. In such a climate of genuine interest and cordial understanding, he himself and the Commission as a whole would surely succeed in accomplishing the difficult task they had undertaken.

40. He did not intend to engage in a detailed analytical summary of the various views expressed on the questions raised in his preliminary report. Such a summary would be included in the relevant chapter of the report of the Commission on the work of its sixtieth session to be submitted to the General Assembly. He would therefore merely highlight the main points that had emerged from the debate, which would assist him in narrowing the focus of the study for the purposes of preparing his next report.

41. In the first place, there was a general feeling among members that, in keeping with its usual practice and working methods, the Commission should proceed to prepare draft articles that might serve as the basis for the adoption of a multilateral convention, possibly in the form of a framework convention, or failing that, of a declaration that included a model instrument or guidelines. In that connection, one member had requested clarification as to the exact nature of a framework convention. An excellent description of a framework convention was to be found in the Secretariat's initial memorandum, which was reproduced in annex III of the report of the Commission on the work of its fifty-eighth session. The Secretariat had proposed the formulation of a framework convention in paragraph 24 of annex III, which read:

The objective of the proposal would be the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities ... creating a legal "space" in which such disaster relief work could take place on a secure footing. A possible model would be the 1946 Convention on the Privileges and Immunities of the United Nations which, on the narrow aspect of privileges and immunities, serves as the basic reference point for the prevailing legal position, and which is routinely incorporated by reference into agreements between the United Nations and States and other entities. Similarly, the envisaged text regulating disaster relief could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.²¹⁷

42. In addition to the above-mentioned model, he would propose to add a reference to a treaty that had been concluded more recently and was more pertinent to the topic in question: the Framework Convention on civil defence assistance of 22 May 2000.

43. With regard to the scope of the concept of disaster to be covered in the draft articles, the title adopted by the Commission for the topic referred simply to "disasters", without qualifying them any further. However, during its fifty-ninth session, when the Commission had requested the Secretariat to prepare a background study on the topic, it had explicitly stated that the study should initially be limited to natural disasters.²¹⁸ In doing so, it had endorsed the approach taken by the Secretariat in its original proposal, as described in paragraphs 1 and 2 of annex III of the Secretariat's initial memorandum:

²¹⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 210.

²¹⁸ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

1. ...The focus of the topic would, at the initial stage, be placed on the protection of persons in the context of natural disasters or natural disaster components of broader emergencies

2. Natural disasters are, however, a subset of a broader range of types of disasters, which include man-made and other technological disasters. ... Furthermore, it is appreciated that such a distinction between natural and other types of disasters, such as technological disasters, is not always maintained in existing legal and other texts dealing with disasters, nor that it is always possible to sustain a clear delineation. Accordingly, while it is proposed that the more immediate need may be for a consideration of the activities undertaken in the context of a natural disaster, this would be without prejudice to the possible inclusion of the consideration of the international principles and rules governing actions undertaken in the context of other types of disasters.²¹⁹

44. From the debate just closed, it could be concluded that the Commission wished to maintain the position it had adopted initially, namely that, although the topic itself encompassed a broad range of disasters, it was understood that the study of such phenomena would initially focus on natural disasters and on others, which, irrespective of their causes, took the form of or had effects comparable to those of natural disasters. With regard to the scope of the term "disaster", reference had been made in the debate to the definition contained in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. Broadly speaking, the Commission's position was to exclude armed conflicts *per se*, although for some members, certain aspects of the relationship between armed conflicts and natural disasters should be given further consideration.

45. The various elements comprising the concept of protection depended to a considerable extent on the branch of law and the context in which the concept was used. When referring to disasters, protection in the broad sense related to aspects such as response, relief, assistance, prevention, mitigation, preparation and rehabilitation. Their applicability depended on where in the three successive phases of a disaster situation they might be situated, regardless of whether that phase was considered in isolation or as partially overlapping with another phase. The approach taken by the Secretariat in its initial study and in its memorandums, which was the same as that taken by IFRC, focused on the law applicable to the aspect of response, although that did not imply that it either ignored or dismissed the increasing importance attached to prevention, mitigation, preparation and rehabilitation. It could be deduced from the debate that members, too, believed that the study should focus initially on the law applicable to the aspect of response, dealing thereafter with those of prevention, mitigation and preparation, and possibly at a later stage, with certain elements of rehabilitation, especially those following in the immediate wake of a disaster.

46. Protection in the event of disasters referred to the protection of persons from the specific standpoint of those persons who were victims of a disaster. That suggested an approach which, if not rights-based, would at the very least take rights into account. Such an approach was implied in the narrower definition of protection. A distinction had been drawn between the broader and narrower definitions of protection simply for interpretative reasons, not as a means of differentiating legal consequences in the context of disasters. However, since certain members

had expressed a desire for greater clarification, he could hardly improve on the comment by another member that protection *stricto sensu* corresponded to a rights-based approach, whereas the *lato sensu* approach relied more closely on other notions, in particular, assistance.

47. Since, as had been stressed by many speakers, the purpose of the Commission's study of protection of persons in the event of disasters was the progressive development and codification of the international law applicable in that field, an approach that focused on victims' rights was perhaps the most solid legal foundation on which to base such protection. The enforceable nature of those rights would entail the corresponding obligation or duty of States and intergovernmental actors, without prejudice to their own rights in their capacity as States or international organizations. The corpus of law underlying the protection of persons in the event of disasters presupposed the unconditional application of the fundamental rules and principles of international law, both conventional and customary. That body of law was based on the recognition of national sovereignty and was reflected in the Charter of the United Nations, international humanitarian law, international human rights law and international law on refugees and internally displaced persons. It followed from the guiding principle of State sovereignty that it was the State that was primarily responsible for affording protection to victims of disasters that affected its territory or to persons living under its jurisdiction or control. From that basic principle it could be deduced that humanitarian assistance could be provided only if the State directly affected by the disaster had consented to such assistance. Essential principles of international law, such as the prohibition of the threat or use of force, non-intervention and international cooperation, which had been codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, were at the very top of the list of applicable principles, as were the principles of solidarity, humanity, neutrality, impartiality and non-discrimination and international human rights norms, which included the rights and freedoms enjoyed by a person under international law. Legal regimes that more directly governed the protection of persons were guided by the same basic objective: to provide protection to persons in all circumstances.

48. The body of law he had referred to previously was the backdrop against which specific problems that emerged in providing humanitarian assistance in specific disasters should be seen. A rights-based approach, in other words a legal approach, and a problem-based approach, in other words an operational approach, were not to be seen as opposite, but instead as complementary approaches.

49. Concerning the protection of property and the environment, the view had been expressed that if a disaster affected or threatened the life, physical integrity and basic needs of a person, the Commission's study should not omit those two aspects of protection. If, on the other hand, only their degree of affluence, or the environment in general, was affected, the protection of property and the environment should not fall within the scope of the study.

²¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 206.

50. Lastly, while the main actors assisting victims of a disaster were States and intergovernmental bodies, the Commission's study should also take into account the often irreplaceable humanitarian assistance provided by such entities as IFRC and NGOs, and also by enterprises and individuals, in keeping with the principle of subsidiarity.

51. The Commission had clearly demonstrated that it could respond in a constructive and effective way to the invitation he had extended to it in his preliminary report, by providing him with specific guidance that would further his study of the topic when preparing his next report.

Immunity of State officials from foreign criminal jurisdiction²²⁰ (A/CN.4/596 and Corr.1,²²¹ A/CN.4/601²²²)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPOREUR

52. Mr. KOLODKIN (Special Rapporteur), introducing his preliminary report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601), apologized for its length and, with all due respect to its translators for their excellent work, for some discrepancies with the original Russian text. He thanked the Secretariat for a highly informative memorandum (A/CN.4/596) that gave a good idea of the wealth of material on the topic and also his assistants Ms. Sarenkova, Ms. Shatalova and Ms. Tezikova, without whom he would have had difficulty in sifting through the vast volume of sources used in the report.

53. The text reproduced in annex I to the Commission's report on the work of its fifty-eighth session²²³ had shown the extreme topicality of the issue, a state of affairs that had not changed in the two years since then. New decisions had been handed down by national courts and new scholarly works published. As recently as 4 June 2008, the ICJ had issued a decision in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* in which the topic occupied a prominent place. While that decision was not covered in the report, which had made use only of those materials available at the time of writing, it was taken into account in the latest version of the Secretariat memorandum.

54. As he saw it, the purpose of the preliminary report was, first, to briefly describe the history of the consideration of various relevant issues by the Commission and the Institute of International Law. The Commission was not starting from scratch: it had already discussed the concepts of "immunity", "jurisdiction" and "immunity from jurisdiction" and the question of who could be

considered as a high-ranking official with immunity from foreign jurisdiction, together with a number of other relevant issues. The work of the Institute on the resolution adopted in 2001, entitled "Immunities from jurisdiction and execution of Heads of State and of Government in international law",²²⁴ was also of undoubted interest.

55. Next—and that was the main purpose of the preliminary report—he had attempted to give a rough outline, first, of the issues which should in principle be analysed by the Commission as part of its consideration of the topic; and secondly, of the issues that should probably be addressed by the Commission in formulating an instrument as a result of its consideration of the topic.

56. There was much material of relevance to the topic: State practice, national legislation, the decisions of domestic courts, the case law of international courts and tribunals and, in particular, of the ICJ, including two of its recent decisions, and a massive body of legal literature, especially in the wake of the *Pinochet* case. He had chiefly drawn on materials in English, French and Russian, the languages in which he was well versed, and any gaps were at least partially filled by the Secretariat memorandum.

57. In discussing the various issues in the report, he had tried to represent the different viewpoints, sometimes expressing his own, despite his lack of familiarity with some of the issues. Furthermore, although there were a good many footnotes to the report, he had by no means exhausted the sources on the topic.

58. The report before the Commission, although sizeable, was only part of the preliminary report. It drew attention to some preliminary issues and initiated the consideration of issues directly concerning the scope of the topic, including which State officials should be covered. It did not address the scope of the immunity enjoyed by the State officials to be covered or the so-called "procedural" aspects, for example the waiver of the immunity of a State official. It was his intention to address those two extremely important aspects of the topic in a preliminary manner the following year, in the remainder of his preliminary report.

59. The very title of the topic established its boundaries in the most general terms. First, it concerned only immunity of State officials from foreign criminal jurisdiction. The words "foreign" and "criminal" were important in that they signified that the matters to be studied were not immunity from international criminal jurisdiction or from national civil or national administrative jurisdiction as such, although material relating to the consideration of such issues could be useful in the work on the topic. Secondly, the topic concerned immunity of the officials of one State from the jurisdiction of another State: in other words, the intention was not to consider *per se* questions of immunity of officials from the jurisdiction of their own State. Lastly, the topic covered immunity grounded in international law. Immunity could be granted to officials of another State on the basis of domestic law as well, but such cases were of interest for the purposes of the present

²²⁰ The Commission included the topic in its long-term programme of work at its fifty-eighth session (2006), *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257 and annex I. The Commission decided to include the topic in its programme of work in 2007 and appointed Mr. Roman Kolodkin as Special Rapporteur for the topic, *Yearbook ... 2007*, vol. II (Part Two), para. 376.

²²¹ Mimeographed; available on the Commission's website.

²²² Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²²³ *Yearbook ... 2006*, vol. II (Part Two), p. 191.

²²⁴ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.*

topic only in that the corresponding provisions of domestic law could be seen as constituting evidence of the existence of customary international law in that sphere.

60. Turning to the so-called “preliminary” issues, he said that in his study of the materials pertaining to the topic, he had searched for evidence that the source of immunity was above all the law, and specifically, international law. Admittedly, in some cases courts considered the question on the basis either of domestic law alone or of domestic law and international comity, but not from the standpoint of international law. In the literature, too, the view was sometimes expressed that the immunity of State officials from foreign jurisdiction was more a matter of international comity, or a manifestation of the goodwill of one State towards another State and its officials than one of international law. However, the immunity of State officials from foreign jurisdiction was a matter of intergovernmental relations. He had needed to be convinced that the predominant position in State practice, the literature and the decisions of the ICJ was that the source of the immunity of State officials from foreign criminal jurisdiction was international law, or more specifically, customary international law. In his view, there was sufficient evidence to show that there was indeed customary international law in that area. That did not mean that international law was the sole source of immunity: questions of immunity could, in addition, be resolved by the rules of domestic law and of international comity, but international law was the primary basic source in that domain.

61. The report described the concepts of “immunity”, “jurisdiction”, “criminal jurisdiction” and “immunity from jurisdiction” as being related but different. For the purposes of the topic, it was important that criminal jurisdiction, as opposed to civil jurisdiction, not be equated with judicial jurisdiction. Criminal jurisdiction often came into play long before the actual trial phase of the legal proceedings, and the question of the immunity of officials from foreign criminal jurisdiction generally arose well before the case went to court. The question was often resolved at the pretrial stage through diplomatic channels as a result of the actions of the executive branch, not of the court. One might speculate that many cases in which States raised the question of the immunity of officials with one another were not made known to the public.

62. In contrast to civil jurisdiction, criminal jurisdiction was exercised solely in respect of individuals, and not of States, yet it could affect the interests and intervene in the affairs of foreign States, albeit indirectly, to a much greater extent than could civil jurisdiction. As it often entailed criminal investigation of high-ranking officials, the exercise of criminal jurisdiction could affect vital areas of State sovereignty and security. That was why the immunity of State officials from foreign criminal jurisdiction was of such crucial importance for intergovernmental relations.

63. The issue of immunity from foreign criminal jurisdiction arose in connection with the exercise of various types of jurisdiction: territorial, extraterritorial and universal, *inter alia*, but it would seem that issues of jurisdiction should be considered solely in preliminary terms and that there was no need for the Commission to formulate draft provisions on jurisdiction.

64. As for immunity, or immunity from jurisdiction, the materials studied confirmed that a legal rule or principle was involved. The rule, and the legal relations to which it gave rise, was a combination of a right, and a corresponding obligation: on the one hand, the right for the foreign State’s criminal jurisdiction not to be exercised over the official who enjoyed immunity, and, on the other, the obligation of the State that had jurisdiction not to exercise it. A further question concerned the precise nature of the obligation of the foreign State that had jurisdiction: was it the so-called “negative obligation” not to exercise jurisdiction, or also the so-called “positive obligation” to take steps to prevent violations of immunity?

65. The following should also be borne in mind. First, according to what seemed to him to be the predominant view, which he shared, immunity did not denote exemption from legislative or prescriptive criminal jurisdiction. In other words, the immunity of State officials did not exempt them from the application of the rules of substantive foreign law, nor, consequently, from the substantive conditions of criminal responsibility. Immunity from foreign criminal jurisdiction consisted solely of immunity from procedural or procedural and judicial jurisdiction (depending on the type of jurisdiction involved). In other words, the immunity of State officials from foreign criminal jurisdiction was immunity from criminal process, from law enforcement actions, but not from the law of the State exercising jurisdiction. Such was the procedural nature of the rules on immunity, although the report noted that there was another viewpoint whereby immunity was not only procedural but also substantive. Immunity was merely a procedural obstacle to the invocation of criminal responsibility. It sufficed for the State to waive the immunity of its official, and of course for the necessary material conditions to apply, and criminal responsibility could then be invoked against that official by and under the law of the foreign State.

66. Secondly, even at the current stage of consideration of the topic, he had the impression that the very way in which the question of immunity from foreign jurisdiction was posed was not very well grounded. It was actually a question, not of immunity from criminal jurisdiction, but of immunity from certain criminal procedural actions, from criminal prosecution by the foreign State. However, clarity on the question of precisely which of those actions were covered by immunity could be provided only after the question of the extent of immunity had been analysed. In that regard, the decision of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* was exceptionally interesting.

67. The report raised the question whether, in formulating draft provisions on immunity, the Commission should try to define the concept of “immunity” for the purposes of the topic. He had no ready reply to that question and wished only to point out that in its work on the topic of jurisdictional immunities of States,²²⁵ the Commission had refrained from doing so.

²²⁵ Draft articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), pp. 13 *et seq.* The General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and their Property in its resolution 59/38 of 2 December 2004.

68. The report reviewed the well-known division of the immunity of State officials into immunity *ratione personae* and *ratione materiae*. He had the impression that the categorization was widely used for analytical purposes but virtually never in formulating normative provisions. Moreover, despite the differences between those types of immunity, they had much in common. In the final analysis, it was the State that stood behind all types of immunity. Only the State had the right to waive the immunity of its serving or former officials, diplomatic agents, consular officials and members of special missions. The waiver of immunity would be analysed in detail in his next report.

69. The current report also considered the question of the rationale for the immunity of State officials, a question that had a bearing on the determination of which individuals enjoyed immunity and the extent of immunity. Notwithstanding a certain tendency, including in the literature, to give immunity an exclusively functional rationale, he had the impression that the immediate basis was both functional and representative in nature. That immediate rationale was in turn based on more fundamental political and legal grounds. Immunity flowed from the international legal principles of State sovereignty and non-intervention in the internal affairs of States, and, on the political level, from the need to maintain stable and predictable relations among States. All the rationales adduced for immunity were interrelated.

70. A summary of the section of the report dealing with preliminary issues was to be found in paragraph 102.

71. The following points could be made with regard to the scope of the topic. The title referred simply to State officials. An easier approach would have been to narrow the scope to cover only Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission had done precisely that, for example, in its draft articles on special missions.²²⁶ The Institute of International Law in its 2001 resolution had chosen to confine itself to Heads of State and Heads of Government. Nevertheless, the report proposed that all State officials be dealt with, in full accordance with the title of the topic. It was generally acknowledged that all State officials enjoyed immunity from foreign jurisdiction in relation to actions taken in their official capacity, in other words, immunity *ratione materiae*. Such an approach would be pragmatic, since, in practice, States encountered the issue of the immunity from foreign criminal jurisdiction with respect to various categories of their officials.

72. The term “State official” was widely used in practice and in the literature, but remained undefined, at least in universal international treaties. If the Commission was to formulate draft articles, then a definition or at least a description of the term would have to be given. Perhaps the approach used in drafting article 4, paragraph 2, of the draft articles on responsibility of States,²²⁷ in which an organ of the State was defined, might be useful.

73. A very small circle of officials enjoyed immunity from foreign criminal jurisdiction during their time in office in relation to all acts, irrespective of whether they were committed in a personal or official capacity; in other words, they enjoyed personal immunity or immunity *ratione personae*. However, who precisely fell within that circle of officials was far from clear. Since the recent decision of the ICJ in the *Arrest Warrant* case, it was obvious that the group included Heads of State, Heads of Government and Ministers for Foreign Affairs, but even so, one could not affirm that it was confined to those three categories of high-ranking official.

74. The Commission had already wrestled with the problem of defining the circle of high-ranking State officials enjoying a special status under international law during the preparation of its sets of draft articles on special missions, on representation of States in their relations with international organizations²²⁸ and on the prevention and punishment of crimes against internationally protected persons.²²⁹ It had at that time been unable and unwilling to resolve the problem, and it was unlikely to be solved now by drawing up a list of the officials concerned. In general, such a determination belonged to the realm of States’ domestic law. It would appear to require the definition of criteria which, if met by a State official, gave him or her personal immunity, and in the absence of which that official did not enjoy such immunity. It was his understanding that France, and Mr. Pellet, had referred to such criteria during the oral pleadings in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case, when it had been submitted that personal immunity could be enjoyed only by those high-ranking State officials an essential and predominant part of whose functions was representation of their Government in international relations. The question arose, however, whether that was the sole precondition required to enable such an official to enjoy personal immunity. He was not convinced that it was. For example, representation of the Government in international relations was hardly an essential and predominant part of the functions of a minister of defence. Although, in the modern world, ministers of defence often participated actively in international affairs, their basic function, and that of certain other high-ranking officials who also periodically represented their Government in international relations, was participation in decisions directly relating State sovereignty and security.

75. In the Russian Federation, for example, the First Deputy Head of Government dealt with foreign economic and policy matters along with the President, the Head of Government and the Minister for Foreign Affairs. That was a higher and more important position within the Government than that of Minister for Foreign Affairs. In many instances he represented the Government in the international arena and gave instructions to the Minister for Foreign Affairs, even though foreign policy matters could not be said to predominate among his concerns. Would it not be strange to affirm that the Minister for Foreign Affairs of the Russian Federation enjoyed personal immunity, whereas the First Deputy Head of Government did not? The question arose whether the importance of the functions carried out by a high-ranking official in terms of

²²⁶ *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.2, p. 361.

²²⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

²²⁸ *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284.

²²⁹ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 341.

safeguarding State sovereignty should not also be a criterion, in addition to representation of the Government in international relations, for the inclusion of such an official among those who enjoyed personal immunity.

76. Another aspect of the scope of the topic was the temporal factor. The topic should encompass both the immunity of incumbent officials and that of former officials.

77. One of two questions that were at the margins of the topic and could be included if the Commission so desired was that of recognition. It was of some importance to the topic and was sometimes touched on, both in the literature and in practice, in the consideration of the immunity of State officials. One might cite the United States court decisions in the *United States v. Noriega and Others* and *Lafontant v. Aristide* cases in that connection. The issue of recognition arose primarily when there was some doubt to the status of the individual whose criminal prosecution was involved, in other words some doubt, first, as to whether the entity that the individual served was a Government and, secondly, whether the individual was the Head of State. In the context of the topic, the question of recognition arose mainly in exceptional situations. The Institute of International Law had been wise to leave the question to one side, simply incorporating a “without prejudice” clause in article 12 of its 2001 resolution.

78. The second question that sometimes arose in practice and in the literature related to the immunity of members of the families of officials, though it usually concerned the families of high-ranking officials. While he personally did not see that question as falling within the scope of the topic, members of the Commission might take a different view.

79. A summary of that part of the report was contained in paragraph 130.

80. In conclusion, he first reiterated that the Commission did not yet have before it the full preliminary report: the sections on the extent of immunity and procedural aspects, including waiver of immunity, were still lacking. Those key components would be presented at the next session. Secondly, certain political issues and the interrelationship between political and legal interests that formed the backdrop to the topic and made it of such topical interest had not been touched upon. They were discussed in the annex to the Commission’s report on the work of its fifty-eighth session, which showed the immense relevance of the topic; in actual fact, they were most pertinent to the issue of the extent of immunity. Lastly, many members of the Commission themselves had personal experience of the topic in the context of their professional concerns and activities.

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

81. The CHAIRPERSON said that each year the Commission had the honour and privilege to receive a visit

from the President of the International Court of Justice, whose presence was of great significance for the Commission. He invited Judge Rosalyn Higgins to address the Commission.

82. Judge Rosalyn HIGGINS (President of the International Court of Justice) said that she was delighted to address the International Law Commission once again after having spoken at its sixtieth anniversary celebrations two months previously. She extended warm greetings to the Chairperson and to all the members of the Commission. She was especially glad to have been present during the presentations given by Mr. Kolodkin and Mr. Valencia-Ospina, each of which she had found to be of the greatest interest. As she had done for the past two years, she would report on the judgments rendered by the ICJ over the past year, drawing special attention to those aspects that had a particular relevance to the work of the Commission. Since her address to the Commission at its fifty-ninth session, the Court had rendered five decisions: three judgments on the merits, a judgment on preliminary objections and an order regarding provisional measures. The five cases had involved States of Africa, Asia, Europe, Latin America and North America, and the subject matter had ranged from the delimitation of maritime zones, to the determination of sovereignty over maritime features and mutual assistance in criminal matters, and the interpretation of an earlier judgment.

83. She would begin with the judgment on the merits in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, which the Court had delivered on 8 October 2007. Nicaragua had asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea.

84. In that case, Nicaragua had maintained that the maritime boundary had never yet been delimited, while Honduras had contended that there already existed a traditionally recognized *uti possidetis* boundary running along the 15th parallel. Honduras had argued in the alternative that the 15th parallel had been tacitly agreed between the parties to serve as their maritime boundary. During the oral proceedings, Nicaragua had made a specific request for the Court to pronounce also on sovereignty over cays located in the disputed area north of the 15th parallel. Although that claim was formally a new one, the Court had considered it to be admissible because it was inherent in the original claim. Given the tenet that “the land dominates the sea”, in order to plot the maritime boundary, the Court would first have to decide which State had sovereignty over the islands and rocks in the disputed area—a finding that necessarily had territorial implications.

85. In respect of sovereignty over those four cays, Honduras had relied on the principle of *uti possidetis juris* as the basis of sovereignty. The Court had observed that *uti possidetis juris* might, in principle, indeed apply to offshore possessions and maritime spaces. However, it had to be shown in the present case that the Spanish Crown had allocated the disputed islands to one or the other of its colonial provinces. As the parties had neither provided

* Resumed from the 2978th meeting.

evidence clearly showing whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence, nor persuaded the Court of the existence of colonial *effectivités*, the Court had concluded that it had not been established that either Honduras or Nicaragua had title to those islands by virtue of *uti possidetis*. After examining the evidence, the Court had concluded that Honduras had sovereignty over the four islands on the basis of post-colonial *effectivités*.

86. As for the delimitation of the maritime areas between the two States, the Court had considered the arguments of Honduras of an *uti possidetis juris* line and tacit agreement. The Court had rejected the *uti possidetis* argument, finding that the *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, which was indeed based on the *uti possidetis juris* principle, did not deal at all with the maritime delimitation between Nicaragua and Honduras. As to the argument of tacit agreement, the Court had carefully considered the evidence produced by Honduras, which did include relevant evidence, such as sworn statements by a number of fishermen attesting to their belief that the 15th parallel was understood by all to represent an international boundary. That had given the Court the opportunity, as it had done on previous occasions, as in its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, to continue to build up the body of its jurisprudence on evidence. The Court had noted in paragraph 244 of the judgment rendered in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case:

... that witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said.

87. Although there was patchy evidence of some agreements on conduct, in the event the Court had concluded that there was no tacit agreement in effect between the parties of a nature to establish a legally binding maritime boundary. Therefore, the Court had had to proceed to draw the boundary itself. In attempting to do so as succinctly as possible, it certainly would have preferred to use the equidistance method with regard to the territorial seas. Given its recent case law, particularly in the 2001 judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and the 2002 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court would have preferred to continue to use that method even beyond the territorial seas, where the formulae of articles 74 and 83 of the United Nations Convention on the Law of the Sea were, of course, much more ambiguous. The Court had, however, essentially been precluded from using that method by the geography and the topography in

question. Cape Gracias a Dios, where the Nicaraguan land boundary ended, was a sharply convex territorial projection, and as if that were not enough, it had concave areas on both sides. That had limited the choice of basepoints that the Court could use, and any variation or error in situating those points would have become disproportionately magnified in any resulting equidistance line. Moreover, the mouth of the Coco River, which joined the sea at Cape Gracias a Dios, was constantly changing its shape, with unstable islands forming and moving and sometimes even disappearing over time. Taking all those factors into account, the Court had found that it could not use the preferred practice of establishing an equidistance line. Thus, as far as the territorial sea was concerned, the Court had found itself in the “special circumstances” referred to in article 15 of the United Nations Convention on the Law of the Sea as an example of when equidistance might perhaps not be used.

88. The Court had thus decided to construct a bisector line, finding that the method would give the delimitation line greater stability as it would be less affected by instability around the area of Cape Gracias a Dios and would also greatly reduce the risk of error. The Court had used the bisector method for the entire boundary. That line had then been adjusted to take into account the territorial seas around the four cays—an adjustment that had been interesting exercise in itself.

89. In her view, one of the most interesting sections of the judgment concerned how to identify the relevant coasts for the drawing of the bisector line. Honduras had suggested very narrow sectors of coast, whereas Nicaragua had contended that the entire coasts of each State facing the Caribbean Sea should be used as the reference point. Ultimately, the Court had focused on selecting coastal fronts that would avoid the problem of “cutting off” Honduran territory while at the same time provide a façade of sufficient length to account properly for the coastal configuration in the disputed area.

90. Two months later, on 13 December 2007, the Court had issued a judgment on preliminary objections in another case brought by Nicaragua, namely in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The underlying dispute concerned sovereignty over islands and cays in the western Caribbean and the course of the single maritime boundary between areas of continental shelf and exclusive economic zones. Colombia had raised two preliminary objections based on the American Treaty on Pacific Settlement (Pact of Bogota) and on Article 36, paragraph 2, of the Statute of the International Court of Justice, the “optional clause”. Given the limited amount of time available, she would focus on some of the more interesting aspects of that case.

91. First, the Court had had to decide what the subject matter of the dispute was. That process had entailed some debate between the parties as to what was already “legally determined” (and therefore could not be the subject of a dispute *de novo* before the Court) and what still remained unsettled. Colombia had claimed that the matters raised by Nicaragua had already been settled by the 1928 Treaty concerning Territorial Questions at issue between the two States and its 1930 Protocol of

Exchange of Ratifications.²³⁰ Nicaragua had replied that the question whether the 1928 Treaty had settled all issues between the parties was “the very object of the dispute” and “the substance of the case”. The Court had considered that the question whether the 1928 Treaty and 1930 Protocol settled certain matters did not form the very subject matter of the dispute between the parties and that, in the circumstances of the case, that question was therefore to be seen as a preliminary one. Rather, the questions that formed the subject matter of the dispute were, first, sovereignty over territory (namely islands and other maritime features claimed by the parties) and, secondly, the course of the maritime boundary between the parties.

92. Having clarified those issues, the Court had proceeded to examine Colombia’s first preliminary objection that, pursuant to articles VI and XXXIV of the American Treaty on Pacific Settlement (Pact of Bogota), the Court was without jurisdiction to hear the controversy submitted to it by Nicaragua under article XXXI of the Pact. Article VI of the Pact provided that the dispute settlement procedures in the Pact “may not be applied to matters already settled by arrangement between the parties”.

93. Colombia was thus arguing that the 1928 Treaty and 1930 Protocol had settled matters between the parties at the date of the conclusion of the Pact in 1948, while Nicaragua contended that the 1928 Treaty was invalid, or had been terminated, and that, even if that were not the case, it did not cover all the matters in dispute between the parties.

94. The Court had held that the 1928 Treaty had still been valid and in force at the date of the conclusion of the Pact of Bogota in 1948. It had then been able to proceed to decide what, if anything, had been settled by the 1928 Treaty. It had found that sovereignty over three named islands, San Andrés, Providencia and Santa Catalina, had been settled by the Treaty. However, various other questions before the Court—the scope and composition of the San Andrés Archipelago, sovereignty over certain cays and the issue of maritime delimitation—had not been settled by the 1928 Treaty and the Court would therefore have jurisdiction to decide them at the merits stage of proceedings.

95. A second key issue in that case, concerning what might be decided at which stage, had been the relationship between two titles of jurisdiction, one based on the Statute of the International Court of Justice and the other based on a treaty. The issue had arisen because Nicaragua had argued that jurisdiction was based on both the Pact of Bogota and the optional clause of the Statute of the International Court of Justice. The Court had concluded that, when it was faced with two titles, it could not deal with them simultaneously and would therefore proceed from the particular to the more general. However, it had clearly and deliberately stopped short of implying that the Pact prevailed over and excluded the optional clause. The

provisions of the Pact and the declarations made under the optional clause represented two distinct bases of the Court’s jurisdiction which were not mutually exclusive.

96. The Court was now moving on to the examination of the merits in that case and had fixed November 2008 as the time limit for the filing of the counter-memorial of Colombia. The Court had three other pending cases on its docket that invoked the Pact of Bogota as a basis of jurisdiction, namely the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; the *Maritime Dispute (Peru v. Chile)* and the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case. Throughout the hearings, the Great Hall of Justice had been filled with Latin American ambassadors, who had followed those cases avidly.

97. After that line of cases involving Latin American States, the Court had issued a judgment in May 2008 on the merits in a case between two Asian States, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, which had been submitted to the Court jointly by Malaysia and Singapore by special agreement between the parties. As she had previously advised one of the parties at an earlier stage in her legal career, she had recused herself from the case and it had been presided over by the Vice-President, Judge Al-Khasawneh. The dispute had once again involved sovereignty over maritime features and had been fact-heavy, with some 4,000 pages of pleadings, many of which had related to diplomatic history.

98. Malaysia’s contention that it possessed original title to Pedra Branca/Pulau Batu Puteh, which dated back from the time of its predecessor, the Sultanate of Johor, had been upheld by the Court, which had found that the Sultanate of Johor had held original title there. It had next studied developments between 1824 and the 1840s, and had concluded that none of those developments had brought any change to the original title.

99. The Court had then examined all the subsequent events between the 1840s and 1952, but had found that none of them affected the original title. The Court had, however, placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor, in which the Colonial Secretary of Singapore had asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the “colony’s territorial waters”. In a letter dated 21 September 1953, the Acting State Secretary of Johor had replied that “the Johore Government [did] not claim ownership” of the island. The Court had found that the reply had shown that, as of 1953, Johor had understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

100. Lastly, the Court had examined the conduct of the parties after 1953 with respect to the island. It had found considerable evidence of conduct *à titre de souverain* on the part of Singapore after that date. The Court had been able to conclude that, by 1980 (the date when the dispute had crystallized), sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

²³⁰ Treaty concerning Territorial Questions at issue between the two States (Managua, 24 March 1928) and Protocol of Exchange of Ratifications (Managua, 5 May 1930), League of Nations, *Recueil des Traités*, vol. CV, No. 2426, p. 337.

101. As for Middle Rocks, the Court had observed that the particular circumstances that had led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Singapore did not apply to Middle Rocks and that original title remained with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court had noted that the low-tide elevation fell within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and Middle Rocks. As the Court had not been mandated by the parties to draw the line of delimitation with respect to their territorial waters, it had concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it was located.

102. After that series of territorial and maritime disputes, in June 2008 the Court had delivered a judgment in a very different type of case, that concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, which had raised a number of legal issues that the members of the Commission might find to be pertinent to their work. The Court had found the area of immunity from criminal jurisdiction to be underdeveloped, and it therefore greatly welcomed the fact that it was receiving the Commission's serious attention.

103. Forming a backdrop to the case had been the death of Judge Bernard Borrel, a French national who had been seconded as technical adviser to the Ministry of Justice of Djibouti. On 19 October 1995, the body of Judge Borrel had been discovered 80 kilometres from the city of Djibouti. Various judicial investigations to determine the cause of his death had been opened in Djibouti and France. The case in France had been known as the *Case against X for the murder of Bernard Borrel*. Both parties had concurred that it was not for the ICJ to determine the circumstances in which Judge Borrel had met his death. Rather, the dispute before the Court concerned the resort to bilateral treaty mechanisms that existed between the parties for mutual assistance in criminal matters.

104. On 9 January 2006, Djibouti had filed an application against France in respect of a dispute concerning the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the *Case against X for the murder of Bernard Borrel*, in violation, it was said, of two bilateral treaties, the Convention concerning judicial assistance in criminal matters of 27 September 1986²³¹ and the Treaty of friendship and co-operation of 27 June 1977.²³²

105. The application had further referred to the issuing, by the French judicial authorities, of witness summonses to the Djibouti Head of State and senior Djibouti officials, allegedly in breach of, among other things, the principles and rules governing diplomatic privileges and immunities.

106. By a letter dated 25 July 2006, the French Minister for Foreign Affairs had informed the Court that

France consented to the Court's jurisdiction to entertain the application on the basis of article 38, paragraph 5, of the Rules of the Court, i.e. *forum prorogatum*, while specifying that the consent was "valid only ... in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti.

107. That had been the first time that it had fallen to the Court to decide on the merits of a dispute brought before it on the basis of *forum prorogatum*. Rather as it had done in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, because that procedure was not likely to be used very frequently, the Court had taken the opportunity to fill out as much relevant detail as seemed appropriate in order to provide guidance in the future. The judgment therefore contained some rather detailed paragraphs on points relating to *forum prorogatum* which were relevant to deciding what was, and what was not, on the basis of the way that France had formulated its acceptance in the light of the application, within the Court's jurisdiction.

108. On the merits, the case had raised a number of interesting legal issues, including the role of the internal law of a State when there was a dispute as to compliance with a treaty which itself made reference to internal law; the duty to give reasons for refusal to cooperate as envisaged in a treaty; and the immunities of State officials from foreign criminal jurisdiction.

109. Article 3 of the 1986 Convention concerning judicial assistance in criminal matters provided that a State to which a request for mutual assistance had been made "shall, in accordance with its legislation, cause to be executed letters rogatory relating to a criminal case which are forwarded to it by the judicial authorities of the requesting State". Djibouti had argued that that article created an obligation of result and that the requirement for a State to execute letters rogatory "in accordance with its legislation" merely indicated the procedure to be followed in the performance thereof. According to Djibouti, that interpretation was consonant with article 27 of the 1969 Vienna Convention, which stipulated that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". There were many echoes of that position in the even more recent *Avena* case. France had countered that article 3 of the 1986 Convention in fact constituted a direct reference to the internal law of the requested State and that accordingly, the means would determine the outcome. Put another way, France considered that, provided that the correct internal procedure of a State was followed, the obligation to execute "in accordance with its legislation" under article 3 would be properly met.

110. On that point, the Court had held in paragraph 123 of its judgment that:

the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory.

²³¹ United Nations, *Treaty Series*, vol. 1695, No. 29220, p. 297.

²³² *Ibid.*, vol. 1482, No. 25292, p. 193.

111. The Court had seen no reason why article 27 of the 1969 Vienna Convention would be applicable in that instance, because the requested State, France, was invoking its internal law not to justify an alleged failure to perform its international obligations under the 1986 Convention concerning judicial assistance in criminal matters, but, on the contrary, to apply them according to the very terms of that Convention.

112. The Court had then considered the nature of the duty to give reasons for a refusal of mutual assistance. It had been unable to accept France's contention that the fact that the reasons had come within the knowledge of Djibouti during the proceedings meant that there had been no violation of the duty. A legal obligation to notify reasons for refusing to execute a letter rogatory had not been fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some months later. It had added that the bare reference to the exception contained in the Convention did not satisfy the duty to give reasons; some brief further explanation was called for. That was not only a matter of courtesy, but also served the purpose of allowing the requested State to substantiate its good faith in refusing the request. Conversely, it might also enable the requesting State to see whether its letter rogatory could be modified so as to produce a better outcome, were it to try again.

113. The Court had thus found that France's reasons for refusing to transfer the record of the investigation in the *Borrel* case to the Djiboutian authorities had been in good faith and fell within the provisions of the 1986 Convention concerning judicial assistance in criminal matters, even though those reasons had not been shared with Djibouti. So, on the one hand, France's refusal was within the terms of the Convention but, on the other, France had violated its obligation under the Convention to give reasons for its refusal to execute the letter rogatory.

114. In addition to the claims regarding the letter rogatory, the Court had had to consider Djibouti's claims that the immunities of its Head of State and two senior State officials had been violated by France through the issuance of witness summonses. That was another element which had to be examined in order to determine what amounted to an infringement of immunity, once it had been decided that in principle there were persons who might be entitled to immunity. The immunity of State officials from foreign criminal jurisdiction was a complex matter and the facts in that case had not allowed the Court to enter into a detailed examination of the topic. She hoped that its limited legal findings would, however, be pertinent for the Commission's consideration of that important and difficult issue.

115. With regard to the Head of State, Djibouti had referred to two witness summonses issued by a French investigating judge to President Guelleh on 17 May 2005 and 14 February 2007. As each differed in form, the Court had considered them separately. The 17 May 2005 summons had been issued during President Guelleh's official visit to the President of the French Republic in Paris. The summons inviting President Guelleh to attend in person at the investigating judge's office at 9.30 a.m. the following day had been sent by the judge by facsimile to

the Embassy of Djibouti in France. Djibouti had argued that the summons contained an element of constraint, citing various provisions of the French Code of Criminal Procedure. France had replied that President Guelleh had been summoned as an ordinary witness and not as a "*témoign assisté*"—a person against whom there was evidence that he or she could have participated as the perpetrator or accomplice in the offence in question. France had admitted that the summons had been issued with procedural defects, but had claimed that it was purely an invitation which imposed no obligation on President Guelleh.

116. The Court had recalled its statement in paragraph 51 of its judgment in the *Arrest Warrant* case "that in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal", and that a Head of State enjoyed in particular "full immunity from criminal jurisdiction and inviolability" [see paragraph 54]. The Court had recalled in paragraph 174 of the judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case that "the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State". The Court had relied on that Convention in order to make that point because of the way in which the case had been pleaded, one party in particular having cited a number of conventions.

117. The Court had found that the summons of 17 May 2005 had not been associated with the measures of constraint provided for in the French Code of Criminal Procedure; it had merely been an invitation to testify, which the Head of State could freely accept or decline. Consequently, there had been no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State. The Court had nonetheless noted—albeit in the text, not in the *dispositif*, of the judgment—that the summons had not been issued in a manner consistent with the courtesies due to a foreign Head of State and for that "an apology would have been due".

118. The 14 February 2007 invitation to testify had been issued in accordance with French law. The investigating judge had not approached President Guelleh directly, but had sent a letter to the French Ministry of Justice, expressing the wish to obtain the President's written testimony and asking the Minister to make contact with the Minister for Foreign Affairs of Djibouti. The Court had held that, there again, that invitation to testify could not have infringed the immunities from jurisdiction enjoyed by the Head of State of Djibouti. Again there had been no element of constraint.

119. The leaking of information to the French media regarding the summonses had been raised by Djibouti. For instance, the facsimile containing the 17 May 2005 summons had been sent at 3.51 p.m. and had been publicly reported by Agence France-Presse at 4.12 p.m. on the same day. The Court had observed that if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could have constituted not only a violation of French law, but also a violation by France

of its international obligations. However, there had been suggestions that the leak had come from another source.

120. As for the immunities of State officials, Djibouti had claimed that the issuing of summonses as *témoins assistés* to the *Procureur de la République* of Djibouti and the Head of National Security had violated their immunities. The summonses related to allegations of subornation of perjury. Djibouti had initially contended that the *Procureur de la République* and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability. In that regard, the Court had noted in paragraph 194 of the judgment that:

there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.

121. During the oral proceedings, Djibouti had reformulated its claims and had asserted that the *Procureur de la République* and the Head of National Security were entitled to functional immunities. It had therefore requested the Court to acknowledge that “a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ.” In essence, that had been a claim of immunity for the State of Djibouti, from which the *Procureur de la République* and the Head of National Security would be said to benefit.

122. France had replied that such a claim would need to be decided on a case-by-case basis by national judges. One could imagine that there would be much interesting debate on that particular issue, where there were widely diverging national points of view as to how immunity from criminal jurisdiction was to be dealt with, in comparison with a large area of consensus so far as civil cases were concerned. As functional immunities were not absolute, France had taken the view that it was for the justice system of each country to assess, when criminal proceedings were instituted against an individual, whether, in view of the acts of public authority performed in the context of his or her duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that was granted to foreign States. Since the two senior officials had never availed themselves before the French criminal courts of the immunities which Djibouti was claiming on their behalf before the ICJ, France had argued that the Court did not have sufficient evidence available to it to make a decision. The Court had observed that it had never been verified before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of the officials’ duties as organs of State. In paragraph 195 of the judgment, it had added that those “various claims regarding immunity [had not] been made known to France, whether through diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question”. At no stage had the French courts (before which the challenge to jurisdiction would

normally be expected to be made), or indeed the ICJ, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *Procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying out those acts. The Court had observed in paragraph 196 of the judgment that:

[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.

123. It was therefore important for a State to indicate that the acts in question were its acts.

124. Lastly, the previous week, the Court had issued an order on provisional measures in response to Mexico’s *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. That request had related to paragraph 153 (9) of that judgment, which laid down the remedial obligations incumbent upon the United States, namely “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of each of the named Mexican nationals. Mexico asserted that, since the rendering of the judgment, requests for such review and reconsideration had been repeatedly denied. The case had become urgent because the execution date had been set for one of the named persons. In the meantime, a United States Supreme Court judgement had held that the order of President Bush instructing the State’s courts to comply with the judgment of the ICJ was unconstitutional, although it had recognized the obligation of the United States to comply with the judgment under international law. Against that rather uncertain background, the authorities of the state of Texas had indicated that the execution was to proceed.

125. In the proceedings before the ICJ, the United States had argued that the application of Mexico, which was based upon Article 60 of the Statute of the International Court of Justice, should be dismissed, given that there was no “dispute” between the parties as to the scope and meaning of paragraph 153 (9) of the judgment within the meaning of that article. In its order, the Court had pointed out that the word “dispute” as used in English in Article 60 did not have quite the same force as the same word as used in Article 36 of its Statute: in the latter Article, the French term was *différend*, whereas in the former it was *contestation*, a considerably softer term that referred to a difference of opinion. The Court’s view had been that while both parties agreed as to the existence of an obligation of result, there did seem to be some difference of perception, with Mexico on the one hand insisting that the obligation fell upon each and every element of governmental authority individually and the United States expressing the opinion that it fell upon the federal Government of the United States alone. By early September 2008, the Court would receive the comments of the United States in response to the application of Mexico. In all probability, that matter of interpretation would be dealt with in written form.

126. As to the Court's pending cases, it had concluded hearings on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. During the oral proceedings, the parties had made extensive references to the Commission's articles on responsibility of States.²³³ The judgment, which was rather complex, was under preparation. At the beginning of September, the Court would also be hearing arguments on the merits in a case concerning *Maritime Delimitation in the Black Sea*.

127. Three new contentious cases having been filed with the Court in the past year, including the *Maritime Dispute (Peru v. Chile)* and *Aerial Herbicide Spraying (Ecuador v. Colombia)* cases that she had already mentioned in passing. The Court's current docket therefore stood at 12 cases.

128. In closing, speaking on behalf of the entire Court, she wished the Commission every success in its work in the coming weeks.

129. The CHAIRPERSON thanked Judge Higgins, on behalf of the Commission, for her very interesting statement and for the invaluable information she had supplied on cases currently before the Court.

The meeting rose at 1.05 p.m.

2983rd MEETING

Wednesday, 23 July 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.

2. Mr. PELLET said that he had learned of the existence of a memorandum by the Secretariat on immunity of State officials from criminal jurisdiction. Mr. Kolodkin's report was, in his view, both questionable and well drafted. It was of excellent quality, but he also found it to be extremely questionable, both in terms of points that were addressed and in terms of one very important point that was omitted. The general tone of the report was also problematic. Without wishing to judge the Special Rapporteur on his alleged motives, he had the impression throughout that the author of the report was favourably predisposed to the idea of immunity of State officials from jurisdiction, a feeling that he did not share, although he admitted that such immunity was a necessary evil and he had no intention of mounting a crusade against the principle.

3. With regard to methodology, the Special Rapporteur had rightly restricted his presentation of the issues to an overview of existing practice. By adopting a deductive approach, he had avoided engaging in empty speculation and had instead provided a rigorous outline of the issues to be addressed, although one—in his view, essential—issue had been forgotten. Moreover, he was not convinced that there was a fundamental difference between the “preliminary issues” addressed in paragraphs 27 to 102 and the “issues to be considered when defining the scope of the topic” laid out in paragraphs 103 to 130. It was to be hoped that, contrary to the reservation expressed by the Special Rapporteur in presenting his preliminary report, his future reports would be equally learned and well documented.

4. The Special Rapporteur had drawn a number of conclusions from the impressive body of clearly and rigorously presented information, some of which must be deemed irrefutable. First, while courtesy certainly played a role, particularly where immunities were accorded to the entourage of a Head of State, recognition of such immunities fell primarily within the domain of legal obligations—two concepts that were not necessarily irreconcilable. Next, leaving aside existing treaties that had some degree of relevance, the area was largely governed by customary international law, which offered scope for codification and progressive development, since the Commission could draw support from a reasonably solid legal base, which was not the case with regard to, for example, the protection of persons in the event of disasters. He also agreed without hesitation that jurisdiction preceded immunity, that the question of immunity arose only where a court had jurisdiction, that immunity could prevent such a court from exercising its jurisdiction and that the foregoing constituted a preliminary issue, probably of admissibility, although he personally found the distinction between admissibility and jurisdiction to be of little consequence. In that connection, he noted on a point of translation that the concept of “jurisdiction” in French did not mean exactly the same thing as “jurisdiction” in English, and that the terms “jurisdiction législative” and “jurisdiction exécutive” in paragraph 45 of the French version were virtually meaningless and should in fact read: “compétence législative” and “compétence exécutive”. Similarly, the French translation of the term “act of State” in the passage beginning with paragraph 71 by “acte de gouvernement” was unsatisfactory because that concept, which existed in French administrative law, should not be confused with the “act of State” doctrine as applied in the

²³³ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., para. 76.

United States; moreover, the idea of an “*acte de gouvernement*” in French law was more likely to be associated with non-justiciability.

5. On the substance, he agreed with the Special Rapporteur that the concept of immunity from jurisdiction constituted a procedural rule, also in the case of personal immunity, rather than a substantive rule. While immunity could prevent a particular court from ruling on a leader’s responsibility, it in no way exonerated the leader under international law—a further reason why the Special Rapporteur was well advised to confine himself to what he termed judicial jurisdiction since, as he stated in paragraph 47, “for the purpose of the articles, the concept of jurisdiction covers the entire spectrum of procedural actions”. That being the case, the Special Rapporteur’s decision to include what he termed “executive jurisdiction” in the topic was difficult to understand. Perhaps he was referring to enforcement measures, which should certainly be included, but if his impression was correct and the scope of the reference was broader, he failed to see why the topic could not be restricted to judicial jurisdiction. In particular, he was unable to understand why the Special Rapporteur proposed to exclude interim measures from the study or why he seemed, in paragraph 55, to contemplate including practice in relation to foreign civil jurisdiction. While a study of such practice might be useful for comparative purposes, it had no bearing on the topic of immunity of State officials from foreign criminal jurisdiction. Lastly, he agreed with the Special Rapporteur that a distinction should be made between the personal immunity (immunity *ratione personae*) of the State official in question and functional immunity (immunity *ratione materiae*), which related only to certain acts. He preferred to refer to it as functional immunity, since the granting or denial of immunity depended on the nature of the acts performed in discharging an office or function.

6. He would be unhappy if the Special Rapporteur were to act on his apparent intention to omit from the study questions of immunity for the family and entourage of State officials, since the issue, though subsidiary, was related to the topic. He would be even unhappier if the Special Rapporteur failed to consider the impact of recognition or non-recognition of the State that persons invoking immunity represented. The question of recognition was perhaps one of the core issues to be addressed, and the Commission would have to determine whether non-recognition of a State had an impact on the immunity of its officials. For his part, as a staunch supporter of the declarative theory of recognition, he considered that non-recognition should have little or no bearing on the question of immunity.

7. The Special Rapporteur was endeavouring unduly, in his view, to broaden the scope of personal immunity as opposed to functional immunity. It was normal for the threesome or “troika” composed of the incumbent Head of State, Head of Government and Minister for Foreign Affairs to enjoy “absolute” immunity. However, aside from the fact that personal immunity ceased when an official left office, subject to diplomatic and consular immunities that should, incidentally, be excluded from the scope of the topic, such immunity could not be extended beyond the threesome in question. In its disastrous judgment in the

Arrest Warrant case, the ICJ had stated that the issue of the Belgian arrest warrant was in itself liable to affect the conduct by the Democratic Republic of the Congo of its international relations. He was firmly convinced that therein lay the reason for granting personal immunities: it was because a State’s international relations might be affected by the judgement of a foreign criminal court that such personal immunities were granted. Notwithstanding the Special Rapporteur’s hesitations, it was quite clearly because the Minister for Foreign Affairs in the case in point, Mr. Yerodia, was primarily responsible for conducting the State’s international relations that he enjoyed personal immunity, in other words general immunity from criminal jurisdiction in respect of all his acts. And it was because the same applied to Prime Ministers, Heads of Government and Heads of State that they were the only senior officials, as noted in paragraph 111 of the report, authorized to represent the State in general, and *ipso facto* in international relations, for instance by signing international treaties without the need to produce full powers. It was for that reason alone, whatever the Special Rapporteur might be inclined to suggest, that such broad immunity was accorded to them. The same was true, subject to certain conditions, of heads of diplomatic missions and consular officials. He submitted, however, that the threesome and the category of ambassadors and consuls were the only officials referred to in paragraph 51 of the *Arrest Warrant* judgment in the somewhat awkwardly worded phrase “certain holders of high-ranking office in a State”. Apart from the threesome, no general immunity from criminal jurisdiction and no personal immunity existed, which did not mean that other government or State officials could not be covered in some cases by very broad immunities. In such cases, however, it was not their office or function in general that was covered, but specific acts that they performed in discharging their official functions. It followed that all State officials other than the Head of State, the Head of Government and the Minister for Foreign Affairs enjoyed functional and not personal immunities.

8. There were a number of reasons why such a solution seemed appropriate—reasons of a practical nature to begin with. If one moved beyond the threesome, whose representative functions at the international level constituted a well-defined criterion for separating them from other categories of State officials, where should the line be drawn? Should one include the minister of defence, who performed certain duties of international representation, albeit in a less prominent capacity than the Minister for Foreign Affairs since they were not his or her core duties nor were they generally recognized under international law? Or should one include the national security chief, who seemed to have been denied any personal immunity by the ICJ in the recent case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, although the reasons for that position were unclear? There was nothing improper about granting immunity if one held that the law should be grounded on a certain moral decency. When such persons—a minister of defence, a national security chief or a State’s attorney general—were performing official duties at the international level, they unquestionably enjoyed functional immunities, which constituted the necessary and sufficient condition for the effective discharge of their functions, while the impunity that might result from an unduly broad interpretation of their immunities was restricted.

9. As noted by the ICJ in paragraph 194 of its judgment in *Certain Questions of Mutual Assistance in Criminal Matters* regarding the Head of National Security and *Procureur général* of Djibouti, “there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities”. He fully agreed with the argument put forward by a counsel for Djibouti in the case and which the Court endorsed in paragraph 190 of its judgment:

As for officials, either they act in their official capacity, in which case their personal criminal liability cannot be invoked, or they act in a private capacity, in which case no functional immunity can operate to their benefit. In this instance too there is really no place for the least presumption which might *a priori* and in the abstract tilt the scales one way or another. The issue is not to presume anything whatsoever, but to verify concretely the acts in question, when of course the issue of immunity has been raised.

In that context, “verify concretely” meant that such persons did not enjoy personal immunity but functional immunity. He was therefore unable to agree with the Special Rapporteur when he sought to extend the circle of authorities enjoying personal immunity beyond the members of the threesome or diplomats and members of special missions. As the law of diplomatic and consular immunity, including with respect to special missions, was well established, that aspect of the topic must be formally excluded from the scope of the Special Rapporteur’s study. On reading paragraphs 98 to 101, however, he was unsure of the Special Rapporteur’s intentions in that regard.

10. At the same time, he was by no means suggesting that the Commission should limit its study to the criminal immunity enjoyed by an incumbent Head of State, Head of Government or Minister for Foreign Affairs. His point was that, on the one hand, diplomatic and consular immunity, including for special missions, should be excluded without hesitation from the study and, on the other, that the three authorities mentioned, and they alone, enjoyed personal immunity—which, in his view, ceased when they left office since the source of their immunity disappeared when they no longer represented the State. The foregoing in no way implied that the study should not deal with the functional immunity enjoyed, subject to certain conditions, by all State officials.

11. The second point on which he took issue with the Special Rapporteur concerned what he held to be a serious omission from the report, apart from the question of the impact of immunity which the Special Rapporteur intended to address in a subsequent report. He was unable to share the Special Rapporteur’s reverential respect for the stance of the ICJ in the *Arrest Warrant* case. While the Court generally applied existing law, it was quite prepared, when it felt that the circumstances so required, to interfere in the process of elaboration of the law, by supplementing it, shifting its direction or, less felicitously, seeking to prevent or curb current trends. In the *Arrest Warrant* case in particular, its eminently overcautious response to a clearly discernible trend towards withholding criminal immunity from political leaders in the case of particularly heinous crimes had needlessly (since the Congolese application could have been taken up elsewhere) curbed a promising trend.

12. While it was appropriate for the Commission to pay close attention to the positions adopted by the ICJ, it was

not necessarily bound by them, and the Court’s far too conservative position in its 2002 judgment in the *Arrest Warrant* case, which ran counter to the general trend at the time towards the communal development of international law, should not unduly intimidate the Commission. He willingly conceded that the immunity of Heads of State or Government or of Ministers for Foreign Affairs should be linked to their persons and not just to the acts they performed. He was also willing to concede, albeit with deep regret, that such immunity was extremely extensive and that it could be argued, *de lege lata*, that it was absolute. Thus, however open to criticism it might be, the Court’s position was not necessarily untenable *de lege lata*. But *de lege ferenda*, from the standpoint of the progressive development of international law, it was certainly open to severe criticism: the large-scale and systematic perpetration of genocide, crimes against humanity, aggression and war crimes should entail total transparency on the part of the State and should bar it from invoking immunity from jurisdiction. The trend had been clearly discernible until the Court’s attempt to apply the brakes to it in 2002, and it would redound to the Commission’s credit if it were to reinforce the trend towards restricting, or even barring, procedural immunity for all State officials in the case of the most heinous international crimes. The joint separate opinion appended by three judges of the Court (Judges Higgins, Kooijmans and Buergenthal) to the 2002 judgment constituted an interesting first step in that direction, especially paragraphs 74 and 75, but the Commission could go a great deal further.

13. In conclusion, he found it regrettable that the Special Rapporteur had not encouraged reflection in the Commission along those lines and had not even included among the issues to be considered the question of whether the immunity of State officials constituted an undifferentiated whole or whether it could be adjusted or modified in terms of the nature of the crimes with which they were charged. If immunity were to thwart the exercise of criminal jurisdiction, crimes of an international character should in turn thwart the enjoyment of immunity, and it was to be hoped that the Special Rapporteur would include that vital aspect of the topic in his future studies.

14. Mr. KOLODKIN (Special Rapporteur) said that he had unfortunately omitted to state in his preliminary report that the points raised by Mr. Pellet in the latter part of his statement would be considered in his next report, when he would address the question of the extent of the immunity enjoyed by State officials from foreign criminal jurisdiction.

15. Mr. DUGARD congratulated the Special Rapporteur on his excellent report and complimented the Secretariat on its memorandum. While the Special Rapporteur’s report was thorough, it avoided some of the issues and he would focus his statement on those omissions. For instance, it was essential to address the question of derogations from the principle of absolute immunity of incumbent or former State officials from foreign criminal jurisdiction in subsequent reports. He trusted that the Special Rapporteur would do so, but he still had serious doubts inasmuch as the Special Rapporteur had not raised the question when presenting his preliminary report and had also overlooked the matter when dealing with the immunity of incumbent or former

State officials. He was inclined to agree with Mr. Pellet that the Special Rapporteur strongly favoured the idea that due account should be taken of the important role played by immunity in ensuring stable relations among States. As a result, he apparently wished to remain content with the current state of immunity law and to accept that State officials enjoyed absolute immunity. He set out the two basic theories underlying that approach in paragraph 87 of his report and noted that that such immunity was further warranted by the principles of the sovereign equality of States and non-intervention. It was, to say the least, surprising that it was only in response to Mr. Pellet's remarks that the Special Rapporteur had stated his intention to address the question of derogations from the principle of absolute immunity for incumbent or former State officials in the case of international crimes. When touching on the question of international crimes, the Special Rapporteur had failed to mention the issue of derogations.

16. It was important to consider whether there was an exception to the principle of immunity for State officials in the case of international crimes in order to determine whether the law was evolving in the direction of restricting that principle. The President of the International Court of Justice had raised that key question at the previous meeting when she had drawn attention to the tension arising from inconsistency between traditional rules on immunity and respect for human rights. The existence of such tensions had been noted by the Commission, which had stated on several occasions that immunity should not be granted to State officials alleged to have been involved in international crimes. For instance, in paragraph 6 of its commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind, the Commission stated: "It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."²³⁴ The Special Rapporteur could therefore invoke a precedent in support of the existence of a derogation from immunity for current or former State officials. In 1999, the Working Group on jurisdictional immunities of States and their property had also discussed the question of whether there should be a derogation from the principle of immunity in the case of international crimes.²³⁵ Furthermore, the Institute of International Law was currently undertaking a study on the fundamental rights of the person and immunity from jurisdiction in international law and would submit its final report on the subject in 2009. It followed that the Special Rapporteur had every reason to address the issue of derogations from the principle of immunity for State officials; he should also discuss the extent of the immunity enjoyed by former Heads of State, which was referred to in paragraph 4 of the report but not thoroughly examined.

17. He agreed wholeheartedly with Mr. Pellet's comments on the *Arrest Warrant* case. The Special Rapporteur had studied the judgment in detail but had simply dismissed the dissenting opinions of Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert on the grounds that the overwhelming majority of judges had supported the contrary

position. According to Judge *ad hoc* Van den Wyngaert, "[t]here is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international obligation" [see paragraph 1 of the dissenting opinion of Judge *ad hoc* Van den Wyngaert]. He shared Mr. Pellet's view that the judgment in the *Arrest Warrant* case was "disastrous". The Commission was under no obligation to follow the Court's decisions blindly, especially since the judgment had been handed down before the Court's acceptance of the notion of *jus cogens*. Were the same case before it today, the Court might well adopt a different position. It should also be stressed that the Court had not had any basis at the time for finding in its judgment that there was a customary rule establishing immunity for Ministers for Foreign Affairs. The Court had simply found that, given his status as Minister for Foreign Affairs, the issue against Mr. Yerodia of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs enjoyed under international law. The Court had thus simply stated that the function of a Minister for Foreign Affairs was to do business abroad, so that Mr. Yerodia should enjoy absolute immunity even if he was guilty, as alleged, of incitement to genocide. As the judgment was thus not based on any rule, the Special Rapporteur should examine the question of its legal basis more thoroughly in due course. He should also consider whether the situation had evolved since 2002, when the judgment had been handed down.

18. Many States had had the opportunity to pronounce on the correctness of the judgment in the *Arrest Warrant* case when incorporating the Rome Statute of the International Criminal Court in their domestic law. While some States, such as the Netherlands, had indicated their approval of the judgment and that they would grant immunity to foreign Heads of State and Government, even where they had allegedly committed an international crime, others had adopted a radically different position. For instance, South Africa had enacted legislation that would authorize the courts to try foreign Heads of State for international crimes without their being able to raise the plea of immunity. Other countries such as Croatia, Germany and New Zealand had enacted statutes contemplating the possibility of allowing national courts to exercise jurisdiction over senior State officials. It was therefore important for the Special Rapporteur to examine States' national legislation to determine their position on the matter. He should also study the Rome Statute of the International Criminal Court, the Statute of the International Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda, which expressly excluded immunity for Heads of State or Government. The Special Rapporteur considered that those instruments had no bearing on the topic under consideration because they dealt with international rather than national jurisdiction. He submitted, however, that the Commission could not draw such a sharp distinction. It had not done so, moreover, when elaborating the draft code of crimes against the peace and security of mankind.

²³⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 27.

²³⁵ *Yearbook ... 1999*, vol. II (Part Two), annex, p. 149.

19. With regard to the immunity of former Heads of State, it was unclear whether the Special Rapporteur intended to deal with the matter in his subsequent reports and it was regrettable that his preliminary report had contained no real discussion of the *Pinochet* case. In that connection, he referred to paragraph 61 of the judgment of the ICJ in the *Arrest Warrant* case, in which it stated that the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs did not represent a bar to criminal prosecution in certain circumstances. It further stated that, “[p]rovided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”. He suggested that the Special Rapporteur should consider in detail in his subsequent reports what was meant by acts committed “in a private capacity”, particularly whether genocide, war crimes or crimes against humanity committed by a senior State official in pursuance of government policy should be treated as official acts or acts committed in a private capacity. For example, in the *Pinochet* case a judge of the House of Lords had noted that the reasoning of the divisional court led to the conclusion that Hitler’s order regarding the “final solution” had constituted an official act.²³⁶ Did that mean that the perpetrator would have been entitled to immunity pursuant to the decision taken by the ICJ in the *Arrest Warrant* case? As the Special Rapporteur recognized that the question of which acts should be considered as having been performed “in an official capacity” was of paramount importance for determining the extent and limits of immunity, he trusted that it would be discussed in great detail in his subsequent reports.

20. The Special Rapporteur considered that the distinction between immunity *ratione personae* and immunity *ratione materiae* was of only minor importance in the case of senior State officials. His own view was that the distinction was of crucial importance when it came to deciding on the immunity of former Heads of State, as illustrated by the *Pinochet* case, which made it clear that former State officials enjoyed immunity only *ratione materiae*. The majority of judges in the *Pinochet* case had held that the acts of torture attributed to the accused could not be deemed to have official status because, on the one hand, they could not be considered as an official act of State and, on the other, because they violated peremptory norms of international law.

21. On the question of which officials should be covered, he agreed with Mr. Pellet that immunity should not extend beyond the triumvirate of the incumbent Head of State, Head of Government and Minister for Foreign Affairs for the reasons advanced by Mr. Pellet. Moreover, there was little State practice to support such an extension. The Special Rapporteur cited an English district court ruling in support of extending immunity to other State officials, but the citation represented only the opinion of a minor court. There were also strong policy reasons against such an extension, inasmuch as ministers of defence or ministers of the interior were actually the persons most likely to be

involved in international crimes. Lastly, he did not think it was appropriate to extend immunity to the members of the family of a State official, and he considered that the Commission should undertake a direct study of the question of recognition.

22. In conclusion, he said that the question of immunity of State officials from foreign criminal jurisdiction was one of the most important and exciting topics facing contemporary international law. The key question was whether Heads of State, Heads of Government, Ministers for Foreign Affairs and senior State officials should be granted immunity in respect of international crimes. That was really the only issue that the Commission needed to discuss for the time being. The other issues were peripheral and covered by traditional rules of international law.

23. The CHAIRPERSON, speaking as a member of the Commission, said that he fully agreed with Mr. Dugard, especially his statement regarding the crucial importance of the *Pinochet* case for the topic under consideration. However, he drew the attention of Commission members to the need to be more precise when referring to the case, which had been considered by a number of different English judicial bodies. The most important decision was, in his view, the judgement handed down by the second panel of the House of Lords.

24. Mr. PELLET said that he was unfortunately unable to agree with Mr. Dugard on the points he had raised with regard to the question of *jus cogens*. If one accepted that immunity issues arose only at the jurisdiction stage, the *jus cogens* status of a rule had no bearing on a court’s jurisdiction, as stated on several occasions by the ICJ, particularly in the *Armed Activities on the Territory of the Congo (New Application: Democratic Republic of the Congo v. Rwanda)* case. It was unwise to confuse issues of jurisdiction with issues of *jus cogens*. A link could indeed be forged between immunity or lack of immunity and *jus cogens*, but it was inappropriate to link *jus cogens* and jurisdiction because of the danger of undermining the principle that rules of jurisdiction were not altered by the nature of the rule breached. Otherwise, the ICJ would have jurisdiction over everything that could be characterized as *jus cogens*.

25. Mr. HMOUD said that he had two comments on Mr. Dugard’s statement. First, with regard to the distinction between functional immunity and personal immunity in respect of certain crimes, which was a highly contentious issue, the same question arose in the context of diplomatic and consular immunities. It was difficult to draw the line between acts performed in an official capacity and those performed in a personal capacity. Secondly, while he agreed that one could not say that international crimes were committed by the State, he submitted that there was one exception, namely acts of aggression, which could be characterized as State acts. He hoped that the Special Rapporteur would consider whether that question merited special attention in the context of the topic under consideration.

26. Mr. BROWNLIE, referring to the Chairperson’s comment on the *Pinochet* case, said that the decision by the first panel of the House of Lords, which was of great

²³⁶ *Pinochet (No. 1)*, 25 November 1998, ILR, vol. 119 (2002), p. 104.

interest and contained a remarkable statement by Lord Steyn that had been mentioned by Mr. Dugard, had not been annulled on the basis of its substance but on the basis of the apparent bias of one judge. When the new panel was constituted, the first panel's decision had been cited during the arguments both by counsel and by the judges on account of its quality. It was therefore unrealistic to argue that the first decision did not count. The real problem was that other municipal courts had failed to act on the case law it established.

27. Mr. GAJA said that the Special Rapporteur had produced a well-researched and clearly argued preliminary report. It not only reviewed practice and doctrine, but also indicated the general approach to the topic that the Special Rapporteur intended to adopt. The Commission had also been provided with an outstanding memorandum by the Secretariat, which even covered the recent judgment of the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case. In this context, he wondered whether it might not be preferable for the Commission to have before it a single report by the Special Rapporteur instead of two overlapping studies, leaving it to the Special Rapporteur to acknowledge, where appropriate, the Secretariat's contribution. Should the need arise for an analysis of specific aspects of the subject, the Secretariat could undertake one or more additional studies in its own name.

28. The preliminary report already covered a substantial portion of the topic, but it would be premature to comment on the various questions raised and their possible solutions or indeed on questions that had not been raised. He would nonetheless offer a few comments that the Special Rapporteur might find helpful in the further pursuit of his study.

29. His first comment concerned a point already raised by two previous speakers. The Special Rapporteur, citing the judgment of the ICJ in the *Arrest Warrant* case, held that certain holders of high-ranking office such as the Head of State, the Head of Government or the Minister for Foreign Affairs enjoyed personal immunity. The Court seemed to have adopted a more restrictive approach in its judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case already cited by Mr. Pellet. A thorough analysis of State practice and a discussion of relevant policy considerations should be undertaken. In terms of both practice and policy, the criterion proposed by the Special Rapporteur in paragraph 121 of his report for determining which State officials enjoyed personal immunity, namely "the importance of the functions", seemed far too broad. When ministers travelled on official business, they might fall into the category of members of a special mission and enjoy personal immunity in that capacity alone.

30. His second comment concerned terminology. Functional immunity, or immunity *ratione materiae*, was sometimes referred to, for instance by the ICJ, as State immunity. The report contained similar wording, for instance in paragraph 88. In his view, it would be preferable to avoid such terminology because a State official's functional immunity did not necessarily coincide with State immunity. There might be limits to functional immunity from the criminal jurisdiction of a foreign State, but a

State itself could never be subject to criminal jurisdiction. In the case of civil jurisdiction, on the other hand, a State official might enjoy immunity while the State itself might not: for instance, when an official purchased property abroad for the State, the official would enjoy functional immunity, while the State would be subject to civil jurisdiction if a dispute arose regarding the sale.

31. Furthermore, it might have been justifiable, in view of the preliminary nature of the report, to refrain from considering certain exceptions to the functional immunity of State officials. However, a reference to the possible existence of certain exceptions would have been useful, if only to indicate that, in the Special Rapporteur's view, their existence was indeed arguable.

32. The first exception—which was discussed in paragraphs 180 to 207 of the Secretariat's memorandum—concerned the commission by a State official of an international crime, or at least of specific international crimes. As a great number of such crimes could hardly be committed by someone who was not a State official, they would only be prosecuted, in the absence of an exception to immunity, in the unlikely event of such action being taken by the State of which the official was a national.

33. The second exception—briefly covered in paragraphs 162 to 165 of the Secretariat's memorandum—concerned conduct by a State official abroad that was not authorized by the territorial State. Typically, spies did not enjoy functional immunity, and the same applied to certain acts by consular officials, for instance the act of killing a local police officer on instructions from the sending State. In such cases, there should be no immunity. He noted that the ICJ, in a passage in its judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, did not seem to reject the idea that State authorization was a precondition for immunity. However, in paragraph 191 of the judgment, the Court based its conclusion that immunity should be denied on a different argument, namely that it had not been "concretely verified" that "the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State". The Court's finding that the acts in question were not official rendered it unnecessary to establish whether the lack of authorization by the territorial State affected the officials' immunity.

34. Although he was impressed by the scale of the research conducted both by the Special Rapporteur in his preliminary report and by the Secretariat in its memorandum, he was surprised that issues relating to military forces stationed abroad in peacetime had not been addressed. The immunity of troops was often regulated by multilateral or bilateral agreements, but issues of immunity sometimes arose under general international law. Moreover, in most cases the agreements in question only covered relations between the sending and receiving States, whereas the question of immunity might arise with respect to a third State. For instance, the Italian Court of Cassation had found that a soldier from the United States of America who had shot dead an Italian agent at a checkpoint near Baghdad in Iraq enjoyed immunity from jurisdiction [*Lozano v. Italy*].

35. The question of immunity with respect to third States arose not only in the case of members of foreign military forces and should be duly analysed. Immunity might stem from the functions that an official exercised in a particular State. For instance, a diplomatic agent enjoyed personal immunity because of the functions he or she exercised in the receiving State, but one might ask what kind of immunity—personal or functional—the agent enjoyed in a State other than the receiving or transit State. This type of question had not been addressed either in the preliminary report or in the Secretariat's memorandum, and he hoped that the Special Rapporteur would take up the issue of the situation in third States in a subsequent report.

36. Mr. CAFLISCH said that the topic under consideration was, in principle, well grounded in *lex lata*, as had been shown in the thorough, clear and analytical report before the Commission, for which he thanked the author. The report would greatly facilitate the Commission's work, especially the conclusions set out in paragraphs 102 and 130, particularly regarding the following points.

37. First, the question of immunity must be distinguished from that of jurisdiction. Secondly, criminal immunity must be distinguished from civil immunity and, as shown by the *Timoschenko* case²³⁷ mentioned in paragraph 113 of the report, it must begin to operate in the pre-trial phase. Thirdly, immunity was granted, at least in criminal matters, in respect of procedural measures. It was subdivided into immunity *ratione materiae*, which covered acts of State, both current and future acts, and immunity *ratione personae*, which protected limited categories of persons who, by virtue of their functions, personified the State in its relations with other States, and which ceased when the individuals in question no longer formed part of the group of exempted persons. Fourthly, immunity from criminal jurisdiction should be considered solely in terms of foreign criminal jurisdiction and not in terms of an official's immunity from domestic jurisdiction or *vis-à-vis* international courts and tribunals. Fifthly, immunity *ratione personae* was enjoyed basically by Heads of State, Heads of Government and Ministers for Foreign Affairs, referred to as the "threesome", but criteria could and should be established if immunity *ratione personae* were to be extended, where appropriate, to other high-ranking officials. And sixthly, it was unnecessary to consider the question of the recognition of States and governments or that of the immunity of family members of officials enjoying immunity *ratione personae*.

²³⁷ In 2005, in connection with a planned visit to the Russian Federation by Prime Minister Yulia Timoshenko of Ukraine, against whom criminal proceedings had been instituted in the Russian Federation long before her appointment to the post, the official position on the question of her immunity from criminal jurisdiction in the Russian Federation was publicly formulated by the Prosecutor-General of the Russian Federation. In particular, he pointed out that Prime Minister Yulia Timoshenko of Ukraine would have no problem if she wished to visit the Russian Federation, since senior State leaders—including Heads of Government—enjoy immunity. At the same time, he added that the criminal proceedings against Ms. Timoshenko would be extended (www.newsru.com/russia/15feb2005, accessed 2 January 2012). It was only on 26 December 2006 that the Main Military Prosecution of the Russian Federation announced the closing of the criminal case against the former Prime Minister of Ukraine because of the expiration of the statute of limitations.

38. In addition, there seemed to be four core issues to be studied. First, the distinction between civil and criminal immunity, an issue which could cause problems, as shown by practice relating to article 6 of the European Convention on Human Rights, and which could also entail different consequences, especially during the pretrial phase. Second, the distinction between immunity *ratione materiae*, in respect of the act, which was continuous and which existed for all persons who had performed an act on behalf of the State, and immunity *ratione personae*, which was enjoyed by certain high-ranking officials who personified the State's activity in the area of foreign relations. Third, a problem arose when it came to identifying the beneficiaries of immunity *ratione personae*, not in the case of the "threesome"—the Head of State, the Head of Government and the Minister for Foreign Affairs—but in the case of other high-ranking officials. The practice cited in paragraphs 117 to 123 of the report was somewhat porous and inconclusive. It seemed clear that immunity *ratione personae* should be enjoyed only by persons of high rank and not, for example, by a head of a department or division of the ministry of defence. A second criterion was doubtless the degree of involvement of the persons concerned in running the country's foreign affairs; a high degree of involvement would certainly be required. The Commission would have to consider whether such immunity really existed in the case of other high-ranking officials and, if so, on what other criteria it was based. In his view, that issue, as well as the question of international crimes, constituted the most difficult aspects of the topic under consideration. He now wished to comment briefly on a number of points in the Special Rapporteur's preliminary report.

39. The existence of a problem of terminology had not escaped the Special Rapporteur's attention: when referring to the person who had performed the act of State, should one use the term "State representative", "State agent" or "State organ" (para. 108 of the preliminary report) or should one use the term "official" or "high-ranking official", as the Special Rapporteur occasionally did himself (paras. 111, 120 and 121)? He proposed, by a process of elimination, the use of the terms State "agent" or "representative": the person performing the act did not always belong to a permanent State "organ", and the "threesome", as well as other ministers, were not "officials" or "high-ranking officials".

40. Under the heading "Immunity and jurisdiction", the Special Rapporteur rightly drew a distinction between the two concepts, a distinction that was also reflected in the relevant jurisprudence. The Swiss Federal Court, for instance, sought to establish, when considering the question of jurisdiction, whether there was a sufficiently close link between the legal relationship in question and the national territory; then it considered whether immunity was invoked advisedly. Although the courts did not always adopt a clear-cut approach to the matter, it seemed clear that the question of immunity arose only where jurisdiction had been established.

41. In paragraph 54 of his report, the Special Rapporteur noted that criminal and civil jurisdiction were not so easily distinguished, but in paragraph 55 he stated that the two types of jurisdiction had "enough features in common

for consideration of the topic to take into account existing practice in relation to immunity". Personally, he was unsure whether that was the case, given the uncertainty surrounding the question of civil immunity in general.

42. Immunity from criminal jurisdiction was procedural rather than substantive, as noted by the Special Rapporteur in paragraphs 64 to 66 of his report, which meant that while criminal prosecution might be suspended, the possibility of criminal responsibility did not disappear. That was not necessarily the case for civil matters. In some cases involving immunity or an act of State, a breach of the substance of the law in question had been found (for instance in the judgements handed down by the European Court of Human Rights in *Z. and Others v. the United Kingdom* on 10 May 2001 and in *Marković and Others v. Italy* on 14 December 2006).

43. Framing his final comment in terms of a question, he asked why was it advisable, as suggested by the Special Rapporteur in paragraph 70 of his report, to leave aside the question of immunity from interim measures of protection or measures of execution.

44. Lastly, he emphasized that his comments and questions were attributable to the stimulating content of the preliminary report and he commended the Special Rapporteur on his fine work.

45. Mr. PETRIČ thanked the Special Rapporteur for his preliminary report and the Secretariat for its memorandum, which would certainly stimulate an interesting and productive debate in the Commission. There was no doubt in his mind that the Special Rapporteur would address the question of international crimes in due course, since the fact that immunity should not be enjoyed by the perpetrators of certain categories of crimes, known as "crimes under international law", was a core issue. He took it that there had been some form of misunderstanding between the Special Rapporteur and the members who had commented on the subject.

46. A number of trends were discernible in the area covered by the topic. One was a clear tendency to restrict immunity in the case of international crimes. It was illustrated, *inter alia*, by the activities of the International Criminal Court. There was also a tendency to broaden the categories of persons entitled to enjoy immunity *ratione personae*, which reflected a more functional approach to the question. A third trend consisted in placing emphasis on the functional aspects of immunity.

47. In view of the preliminary nature of the Special Rapporteur's report, he would comment on the ideas it contained without dwelling on the wording used. In paragraphs 6 to 26, the Special Rapporteur presented an accurate and precise review of the consideration by the Commission and the Institute of International Law of the question of immunity of State officials from foreign jurisdiction, to which he had nothing to add. In paragraphs 27 to 42, the Special Rapporteur analysed the sources and rightly concluded that "[i]nternational custom is the basic source of international law in this sphere", citing national and international doctrine and jurisprudence in support of that conclusion. The Special

Rapporteur rejected the view that immunity from jurisdiction was granted not as a matter of right, but as a matter of international comity. While he agreed with the Special Rapporteur, he noted that circumstances might differ in the case of former Heads of State or ministers. A State could, of course, grant immunity to officials of another State as a matter of goodwill, exercising its sovereign authority, but the Commission's work should focus on immunity as a right.

48. Mr. Petrič fully supported the Special Rapporteur's reasoning, based on meticulous research, regarding the distinction between civil jurisdiction, administrative jurisdiction and criminal jurisdiction, and his conclusion that only the latter fell within the scope of the topic under consideration. It was also correct that immunity from criminal jurisdiction could already be asserted in the pre-trial phase.

49. As noted by the Special Rapporteur, there was no definition of immunity in general international law. Mr. Petrič fully agreed with the statement in paragraph 58 that "on the one hand there is a right for the State's jurisdiction not to be exercised over the person enjoying immunity, while on the other hand there is a duty of the State that has jurisdiction not to exercise it over the person enjoying immunity". He also agreed that an attempt should perhaps be made to develop a definition of "immunity" and "immunity from foreign criminal jurisdiction" in the context of drafting future draft articles or other normative provisions (para. 60 of the report). The lack of a clear definition of such a core concept would weaken the impact of the product of the Commission's work. In that connection, he fully supported the reasoning in paragraph 63 of the report as well as the reasoning and conclusions regarding the procedural character of immunity from criminal jurisdiction. Immunity protected persons only from criminal prosecution and from the enforcement of criminal law in the State from whose jurisdiction they were exempt, but they were not exempted from respecting the law of that State. He also agreed with the Special Rapporteur's conclusion that, "[a]t this stage at least, it seems advisable simply to address immunity of State officials from foreign criminal jurisdiction, without dealing with the question of immunity from interim measures of protection or measures of execution".

50. With regard to the reasoning and conclusions set out in paragraphs 78 to 82 of the report concerning the immunity of officials *ratione personae* and *ratione materiae*, it was clear that, in principle, immunity *ratione materiae* extended to all persons performing official functions on behalf of the State but only in respect of acts performed in an official capacity. It was equally clear that immunity *ratione personae* encompassed immunity *ratione materiae*. The distinction between the two established by the Special Rapporteur was of great methodological value. For the time being, it was for him to decide how far that distinction should be taken.

51. Mr. Petrič would refrain from commenting on paragraphs 84 to 97 of the report since he agreed with their content. He also shared the views set forth in paragraphs 98 and 99 concerning diplomatic and consular immunities, namely, as also noted by another member of

the Commission, that such immunities were so well established in international law that it was unnecessary to deal with them, save perhaps in the commentary. As indicated in the last footnote to paragraph 101, “the immunity of the State itself was behind all the immunities of all State officials from foreign jurisdiction”.

52. He agreed with the content of the summary contained in paragraph 102 of the report but pointed out, in connection with a question he had broached earlier in his statement, that the Special Rapporteur should carefully reconsider whether the question of the immunity of State officials from foreign jurisdiction in the pretrial phase should be addressed, given its particularly sensitive nature.

53. With regard to the second part of the preliminary report (paras. 103 to 130), he broadly agreed with the Special Rapporteur’s comments regarding the boundaries of the topic. With regard to the definition of the concept of a “State official”, he concurred with the views expressed in paragraph 107 but felt that the Special Rapporteur, when elaborating draft articles, should consider whether it was necessary to draw a distinction between incumbent and former State officials. In paragraph 108, the Special Rapporteur mentioned terms other than “State official” that were used in various instruments. In his view, the Commission should employ only the latter term, which was used in the title of the topic, although the question, which was not just one of terminology, merited further examination.

54. In paragraphs 109 to 121, the Special Rapporteur addressed one of the main issues, namely which State officials enjoyed immunity *ratione personae*. It seemed easy to conclude that they were the Head of State, the Head of Government and the Minister for Foreign Affairs—the so-called “classic threesome”. The Special Rapporteur was inclined to broaden the circle, and he agreed with him on that point. The Special Rapporteur mentioned the minister of defence and other ministers in that connection, but one might also add, for instance, the Vice-President or the President of a country’s Parliament, depending on the constitutional order of the State concerned. Account should also be taken, at least in the commentary, of the situation in federal States.

55. The question of recognition (paras. 122 to 124) and that of family members (paras. 125 to 129) were somewhat controversial. Where there was mutual recognition between two States, there was no major problem, even if one of them was recognized by only a limited number of other States. In other cases, it should be borne in mind that States must respect general international law in their relations. Heads of unrecognized States performed the same functions as those of recognized States, personifying the sovereignty of the State concerned, and simply denying them immunity could prove problematic. In any event, the question merited further consideration. Self-proclaimed States were, of course, another matter. He pointed out that if the Commission were to take up the matter of recognition, it would have to engage in discussions of the impact of recognition and its declaratory or constitutional character, subjects that were perhaps best avoided. He was unsure, however, whether the whole

question of recognition could be ignored. It was clear, on the other hand, that the question of immunity for the family members of a head of State fell outside the scope of the topic, as indicated by the Special Rapporteur in paragraph 129 of his report.

56. Lastly, he agreed with the conclusions set out in paragraph 130 of the Special Rapporteur’s preliminary report, subject to the minor reservations that he had mentioned.

The meeting rose at 1 p.m.

2984th MEETING

Thursday, 24 July 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his report—the fruit of enormous research—and the Secretariat on its memorandum (A/CN.4/596)—a substantial work of reference of such substance as to merit publication. Although she felt somewhat overwhelmed by the enormous volume of material and by other members’ profound knowledge of the topic, she nonetheless hoped that her comments would provide useful guidance for the Special Rapporteur in his future work. She would divide her presentation into three parts, dealing respectively with areas of agreement, hypotheses she believed to have been made too readily in the report and which possibly required further consideration, and aspects that had been overlooked.

3. She agreed, first, on the importance of having a definition of “immunity from criminal jurisdiction”, in particular so as to establish to what acts in the criminal procedure immunity applied—an issue raised in the case

concerning *Certain Questions of Mutual Assistance in Criminal Matters*. Secondly, she agreed that immunities did not prevent the applicability, but merely the enforcement of existing law.

4. Thirdly, she agreed that the foundations of immunity were a combination of the theory of representation and the functional theory, and that some entities, such as Heads of State, performed a largely representative or even purely symbolic function. Thus the question of immunities was closely bound up with the theory of representation. However, in the case of other high-ranking State officials, a combination of the theory of representation and the theory of function might be involved—a point to which she would revert later, since it could have been developed more thoroughly in the report.

5. Fourthly, she agreed that the starting point for the study should not be immunity *ratione personae* and *ratione materiae*, but instead the distinction between acts performed by State officials in their personal and in their official capacities. That was an important point which, although alluded to in the report, was not clearly spelled out.

6. Fifthly, as Mr. Petrič and other speakers had observed, it was important to study the question of immunity as applicable to the pretrial phase, since so many problems relating to immunity arose at that stage.

7. Lastly, at least in the initial stages of the study, it seemed advisable not to consider the questions of recognition and of the immunity of members of the families of State officials. She would very much like to see an article drafted excluding immunity for family members—possibly with the exception of consorts of monarchs, since they too embodied the State—and another excluding immunity for officials of non-recognized States or Governments. Perhaps such matters could be taken up at a later stage.

8. Turning to hypotheses that had been made too readily, she had two basic points. First, the Special Rapporteur tended to assume that the immunities of just three categories of official would be covered by the topic. Yet, the title implied that the immunities of persons other than Heads of State, Heads of Government and Ministers for Foreign Affairs would be covered. If the Commission had had in mind that very limited category of officials, it would perhaps have referred in the title to “State representatives”, rather than to “State officials”. Like some other speakers, she was in favour of a broader definition of persons to be covered by the topic, namely all incumbent and former State officials, a possibility referred to in paragraph 106 of the report.

9. That pointed to a problem implicit in the functional theory approach. If that approach was adopted as the basis for granting immunity, it would be virtually impossible to identify any State official who did not enjoy immunity. Almost anyone who performed any State function whatsoever would be entitled to claim immunity, including civil servants and teachers in the State education system. In a globalized world, all members of Governments and core technical personnel had to travel abroad constantly to perform State functions. Accordingly, the concept of

immunity should be restricted so as to cover only persons who performed essential State functions or functions that could not be performed in the absence of such immunity. Several States currently adopted an approach along those lines, a case in point being Spain, where a number of high-ranking Rwandan military and other officials had been brought to trial because the Spanish courts had found that they did not have immunity.

10. In her view, the true basis for immunity was representation. Only those who embodied the State truly had grounds for claiming immunity. Heads of State and possibly Heads of Government fell into that category, whereas Ministers for Foreign Affairs enjoyed immunity more as a consequence of the fact that the diplomats with whom they liaised enjoyed it. If the Commission went beyond those categories, the functional theory would come into play, and it would need to be considered what threshold should be placed on it.

11. With regard to the second hypothesis with which she took issue, the Special Rapporteur assumed that there were no exceptions to immunities in the case of crimes under international law. She endorsed Mr. Dugard’s comment to the effect that the gravity of the crimes varied greatly and that the Commission must look carefully at the different categories concerned. The Special Rapporteur had made it clear that the matter would be taken up in the second part of his preliminary report, to be issued at the next session, but he had also said that the remainder of the report would deal with procedural matters, including the question of waiver of immunities. She had understood that it would deal with them along the lines set out in the Secretariat memorandum. However, she was concerned that if exceptions to immunities were included in that category, they would acquire a procedural dimension, when in fact they were substantive matters, since the commission of such crimes precluded immunity. She requested clarification as to how such exceptions would be qualified.

12. She believed that there should be no immunity in cases of the most serious crimes of concern to the international community as a whole, for several reasons: the *jus cogens* nature of the norms concerned, to which Judge Al-Khasawneh had referred in the *Arrest Warrant* case; the need to protect the fundamental interests of the international community as a whole (as referred to in the literature by Professor Bianchi *et al.*); or because they were not functions of the State (as in the *Pinochet* case). Furthermore, although the judgment of the ICJ in the *Arrest Warrant* case had frequently been invoked, the Commission should also take into account rulings made in other cases, such as the *Pinochet* case and certain cases of the Spanish Audiencia Nacional.²³⁸ Of particular note, however, was the judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case, referred to in footnote 148 of the Secretariat memorandum, since it gave a different ruling on the matter. According to

²³⁸ *Juzgado Central de Instrucción No. 4*, Audiencia Nacional, *Sumario 3/2.008--D* (arrest warrant against 40 Rwandan citizens, some of whom were current or former State officials, for crimes against humanity).

paragraph 41 of that judgement, persons responsible for war crimes, crimes against humanity and genocide could not invoke immunity from national or international jurisdiction, even if they had perpetrated such crimes while acting in their official capacity. So, although that judgement was fairly categorical on the matter, there were still diverging views among the different courts.

13. Mr. Dugard had also raised an important point concerning a situation that would increasingly arise as a result of the application of the principle of complementarity under the Rome Statute of the International Criminal Court. As States incorporated the Statute in their national legislation, they would have to surrender persons for trial in the International Criminal Court for very serious crimes, with no scope for immunity. Since it was likely that those States would not wish to create disparities between their domestic and international courts on the question of immunity, that problem was likely to come to a head.

14. On the issues that, in her view, had been somewhat overlooked in the report, she believed that more emphasis should have been placed on the time dimension, which permeated the whole topic and required further study. For instance, could a State official be tried for acts committed prior to his or her taking office? To what extent could officials be held responsible for acts committed during their term of office once they no longer held office?

15. In conclusion, she said that what the Commission decided on the topic was of great importance, given its evolving nature. The decision in the *Arrest Warrant* case had put a brake on parallel developments in many national courts. Several national legislations that allowed fairly broad scope for universal jurisdiction dealt with the question of immunities simply by reference to “international law”. Unfortunately, which norms of international law were applicable was rarely specified. For example, the Spanish Organic Law of the Judicial Branch²³⁹—one of the most progressive in that field—recognized jurisdiction except in situations where there was immunity from jurisdiction as established by the norms of public international law. Accordingly, the Audiencia Nacional had declined jurisdiction over Paul Kagame, the Head of State and Commander of Armed Forces of Rwanda, on the ground that he had immunity under international law. The Commission’s decisions were thus influential, and the establishment of clear rules would have an important impact.

16. Mr. McRAE congratulated the Special Rapporteur on the thorough analysis contained in his preliminary report, which evidenced comprehensive research on a difficult topic. The careful treatment of sources, of the relationship between immunity, and jurisdiction and of the nature of immunity provided an excellent basis for the Commission’s work, and the conclusions set out in paragraph 102 were warranted. The Secretariat was also to be congratulated on its detailed and comprehensive memorandum on the subject.

17. The Commission needed to reflect further on some important questions arising from the report, the first of which concerned the nature of the exercise. Should the Commission be trying to identify the state of customary international law and codify it, perhaps with some marginal progressive development on the side, or to engage more boldly in progressive development, in order to adapt the immunity of State officials to contemporary society? The Special Rapporteur seemed to favour the former approach, whereas some members of the Commission seemed to prefer an emphasis on the latter. He himself thought that progressive development was indicated in some areas but not in others.

18. The approach adopted would make a difference in a number of areas. First, the category of officials who were entitled to full immunity in both their personal and official capacities was difficult to determine, but, under existing law, it was probably limited to officials holding high-level functions, including at least Heads of State, Prime Ministers and Ministers for Foreign Affairs. If the rationale for immunity was that it ensured that officials could carry out the activities of State without the threat of prosecution, then that triumvirate was neither an accurate nor a sufficient list of those who in fact carried out such activities. In some countries, Heads of State now had only symbolic functions and Ministers for Foreign Affairs no longer had a monopoly over the conduct of foreign relations. Many government ministers in such fields as the environment, trade, health and defence represented their countries internationally. It would be difficult to make distinctions on the basis of the criterion that representing their country was an indispensable part of their functions; practice would vary from country to country.

19. If immunity from jurisdiction was essential for the proper discharge of the international relations functions of the State, then why should individuals who conducted a large part of the foreign relations of a State not have the same protection as the triumvirate? Recognition of the reality of the way States operated today would militate in favour of broadening the range of those entitled to the immunity held by the protected three. However, one must consider whether the Commission should really be engaged in expanding the institution of immunity, particularly the broad immunities in respect of both personal and official capacities.

20. That led to the second important question: what justified granting to any of those officials immunity from prosecution for actions performed in their personal capacity? It was true that the personal and the public were frequently indistinguishable, but there were still certain instances where the separation could be made. Could there still be any rationale for immunity from criminal jurisdiction in respect of personal violence or sexual violence? As lower-level officials who had only functional immunity were subject to such criminal prosecution, why should higher-level officials not have the same functional immunity? Would susceptibility to such prosecution seriously impede them from carrying out their State functions? Certainly, the prolongation of such immunity after the official had left office could hardly be justified.

²³⁹ *Ley orgánica 6/1985 del Poder judicial*, 1 July 1985, *Boletín oficial del Estado* (BOE) No. 157, p. 20632 (www.boe.es/buscar/act.php?id=BOE-A-1985-12666).

21. Taking away the immunity of Heads of State, Prime Ministers and Ministers for Foreign Affairs in their personal capacity might be much more progressive development than States were prepared to contemplate, but if the immunity of State officials was to be brought more closely into line with contemporary expectations of behaviour, then it was a step that had to be considered. At the very least, the Commission should not expand that somewhat anachronistic list of officials who had absolute personal and official immunity so as to grant immunity to other categories of officials for acts performed in their personal capacity, unless there was a very clear basis in customary international law for doing so. If the range of officials was to be expanded, the Commission should think in terms of something less than full immunity. Mr. McRae agreed with Ms. Escameia's remarks about the difficulties of functional immunity and the need for a definition thereof.

22. It remained to be seen how the Special Rapporteur would deal with the question of exceptions to immunity. In the discussion so far, two almost diametrically opposed positions seemed to have emerged: immunity with no exceptions and immunity that would be waived in the event of prosecution for certain international crimes. By opting for the latter position, the Commission would be distancing itself from the decision of the ICJ in the *Arrest Warrant* case. It would be an act of progressive development—and, to be frank, one as unacceptable to some States as a rule of immunity with no exceptions would be for other States.

23. In the light of those seemingly polar opposites, it was worth reflecting on the precise nature of the topic. As the Special Rapporteur had made clear, the topic dealt with the immunity of State officials from criminal jurisdiction in the domestic courts of a foreign State, not immunity from international criminal jurisdiction, or from the jurisdiction of the domestic courts of State officials' own States. Yet the various forms of immunity could not be completely divorced. The reason for claiming that prosecution for international crimes in domestic courts might be justified was that there was as yet no adequate international criminal jurisdiction. Prosecution in the domestic courts of a foreign country was what might be called a "second-best" solution. It was needed in the absence of a fully functioning international criminal jurisdiction. However, the prospect of the prosecutorial authorities of any State being able to commence proceedings for alleged international crimes against high officials of any State was hardly a reassuring thought.

24. If, then, the "first-best" option for dealing with international crimes was international criminal jurisdiction, the Special Rapporteur might perhaps like to think about ways in which exceptions to immunities, if there were to be any, could be structured to support international criminal jurisdiction. One possibility might be that if a State accepted the jurisdiction of the International Criminal Court, its officials could have complete immunity from criminal jurisdiction in foreign courts, whereas if it did not, then its officials would not be immune from such jurisdiction in the event of international crimes. Perhaps, too, there should be a stronger focus on the circumstances in which immunity from criminal jurisdiction arose. For example, if

a State whose official was being prosecuted wanted to assert his or her immunity in the event of an international crime, it might have to do so in a more affirmative, direct way.

25. Those were simply some suggestions as to how the Special Rapporteur might steer a course between the two poles of immunity without exceptions and exceptions in the case of international crimes, neither of which positions was likely in absolute form to find ready and universal acceptance by States. That brought him back to the basic question of whether the Commission was involved in progressive development, or simply trying to codify the existing customary international law.

26. Mr. MELESCANU thanked the Special Rapporteur for his excellent preliminary report on a topic whose inclusion on the Commission's programme of work he had personally supported. He likewise commended the Secretariat's memorandum, which constituted an excellent compendium of information on a subject that was both of practical importance and of great intellectual and theoretical interest.

27. Although the Special Rapporteur considered that his report fell into two parts, he personally was of the opinion that it comprised three separate sections. The purpose of the initial section was to trace the history of the study by the Commission and the Institute of International Law of the question of the immunity of State officials from foreign criminal jurisdiction, with a view to elucidating it further against the backdrop of the development of public international law. He concurred with Mr. McRae that the Commission must not place too much emphasis on codifying customary law, but should incline more towards the progressive development of international law on the topic. Although all members agreed with that approach in principle, when it came to putting it into practice, it was unfortunately proving very difficult to reach consensus on what actually constituted progressive development and what direction it should take.

28. He was of the view that the Commission should take a bold and innovative tack on the institution of immunity. Such a course of action would not be easy, however, because there was a general inclination to draw parallels and to use notions and rules from the realm of diplomatic and consular immunities, an institution that had been recognized by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. There were a number of dangers inherent in that approach. First, that institution was well established in customary law and exhaustively codified in those Conventions. Secondly, parallels could not really be drawn, since diplomatic immunity and the immunity of State officials were not entirely comparable.

29. The first part of the report, above all paragraphs 1 to 26, was drafted in an extremely intelligent manner. However, while it offered the Special Rapporteur a balanced and objective basis for enlarging upon the subject, it contained an awkward contradiction, encapsulated in the words, "[e]very State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by

international law” (drawn from article 2 of the draft Declaration on the Rights and Duties of States, adopted by the Commission at its first session in 1949)²⁴⁰ and “[t]he fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code” (drawn from article 3 of the draft code of offences against the peace and security of mankind of 1954).²⁴¹ Those two quotations, which were to be found in paragraphs 7 and 9 of the report, also set some parameters for the Commission’s activities.

30. The second part of the report contained in paragraphs 27 to 102, on preliminary issues, provided a detailed presentation of the sources of law on immunity, in other words international treaties, international custom—which the Special Rapporteur rightly considered to be the basic source of general international law and of the rules on immunity in particular—and international comity, an interesting subject, but one that, in his own view, should not be codified by the Commission. He endorsed the view of the Special Rapporteur and Ms. Escameia regarding the importance of other sources such as State practice, decisions of international criminal tribunals and the material of the Commission and the Institute of International Law. It would be vital to define the term “jurisdiction” and, in doing so, to stress that the Commission was concerned solely with immunity from criminal jurisdiction, the procedural nature of such immunity and the difference between immunity *ratione personae* and immunity *ratione materiae*, even though it was perhaps premature to tackle that rather sensitive matter.

31. The most significant issue was the scope of the topic, on which he wished to make a few preliminary comments. First, it must be noted that the immunity of State officials from foreign criminal jurisdiction was an institution recognized by public international law, even though it had been codified principally with diplomatic and consular officials in mind. The modern foundations of that institution had been laid by Vattel in the eighteenth century, with his functional necessity theory that a diplomatic representative could not freely exercise his functions unless he was protected by such immunity.²⁴² That rationale applied increasingly in the contemporary world to the activities of Heads of State and Heads of Government. To judge by what was happening in Europe at least, their frequent forays into *ad hoc* diplomacy suggested that they should have the same protection as that enjoyed by professional diplomats. The functional necessity principle therefore seemed to be the fundamental objective criterion on which further consideration of the topic could be based.

32. The term “State officials” covered two categories of persons. The first category, diplomatic and consular officials, was fairly well-defined by very clear rules of customary international law and the provisions

of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. While the Commission could draw upon that source, it would be advisable to leave aside that category, which might give rise to difficulties. In any case, States had means for dealing with a diplomat who overstepped the mark by declaring him or her *persona non grata* or by refusing their accreditation.

33. The second well-established category was that of Heads of State, Heads of Government and Ministers for Foreign Affairs. It was clear, *inter alia* from article 7 of the 1969 Vienna Convention, that this trio of high-ranking State officials did not have to produce full powers in order to enter into a commitment on behalf of their country. Furthermore, many countries, including his own, had adopted domestic legislation on that matter and, to the best of his knowledge, virtually all such legislation clearly specified that the Head of State, the Head of Government and the Minister for Foreign Affairs did not need to be given full powers in order to sign international treaties or to enter into a commitment on behalf of their country.

34. Accordingly, it would be safer to leave that category aside and to deal with a third, “open” category in which other types of official could be included, beginning with ministers of defence. However, the first difficulty lay in the fact that the responsibilities of a first deputy prime minister or of deputy ministers and secretaries of State were not identical in all States. The only solution would be to employ the functional necessity principle. If clear criteria could be found for applying it to members of the Government, it would then be possible to determine the scope of the term “State official”.

35. The second difficulty was that of deciding whether only members of the executive branch could be described as State officials; almost all speakers had referred to the possibility of widening the scope to take in other ministers, such as the First Deputy Prime Minister of the Russian Federation, who also had wide powers. Furthermore, in many conventions the term “State” covered the executive, the legislature and the judiciary. Should functional immunity be extended to, for instance, the Presidents of Parliaments? In Portugal and in Romania, for example, the President of the Parliament and of the Senate respectively acted as substitute for the President of the Republic, i.e. the Head of State. Should Supreme Court judges likewise benefit from immunity from foreign criminal jurisdiction? All those questions required careful examination.

36. A third point requiring clarification was that of the relationship between central government and other branches of government. While it was quite acceptable that members of the executive above a certain level, or who held certain powers, should have immunity, what was the position with regard to federations, or countries such as Romania, where the presidents of regions were more powerful than ministers? What was the position with regard to members of local government?

37. In his view, Heads of State, Heads of Government and Ministers for Foreign Affairs should have immunity from foreign criminal jurisdiction, provided that the State

²⁴⁰ *Yearbook ... 1949*, p. 287; the draft was also annexed to General Assembly resolution 375 (IV) of 6 December 1949.

²⁴¹ *Yearbook ... 1954*, vol. II, p. 152.

²⁴² E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), English translation by C. G. Fenwick, Washington D.C., Carnegie Institution, 1916, vol. II, book IV, chap. VII, p. 371.

in question was a State Member of the United Nations or had been recognized by most members of the international community. Persons from certain entities that, for one reason or another had not been recognized by other States, and who styled themselves “prime minister” or “president”, should not enjoy such immunity.

38. As for exceptions to and restrictions upon immunity, it was obvious that there were two quite different approaches to the question. While the majority favoured codification of the subject, he agreed with Mr. McRae that codification without substantial progressive development would leave the institution of immunity ill-adapted to contemporary realities. The best way forward would be to codify the institution of immunity, while allowing for numerous exceptions so as to avoid any suggestion that the Commission might be seeking to establish absolute impunity for high-ranking State officials. That was a danger that should not be underestimated.

39. The first vital restriction was temporal. If the basic principle adopted was that of functional immunity, then immunity would apply as long as the persons in question were in office. Once they had left office, it was hard to see how their immunity could be maintained. The second restriction was substantive: immunity was unacceptable in the case of such crimes as aggression, genocide, war crimes and crimes against peace and humanity.

40. Thirdly, he accepted the restriction proposed by the Special Rapporteur in paragraph 130 of his report, that State officials should be immune from the criminal but not the civil jurisdiction of another State, and that they should not be immune from the jurisdiction of international tribunals or the national jurisdiction of their own State.

41. If the Commission were to agree to an approach involving the codification and progressive development of the topic, focusing on the two questions of determining which officials should benefit from immunity and which express restrictions must be imposed, progress could undoubtedly be achieved. He therefore looked forward to the second part of the preliminary report on the topic.

42. Mr. BROWNLIE welcomed the Special Rapporteur’s preliminary report and also the Secretariat’s memorandum on immunity of State officials from foreign criminal jurisdiction. The standard of those preparatory materials was very high indeed.

43. One of the problems posed by the topic was that it combined an abundance of material and very diverse views, not least on policy. By way of introduction, he wished to reiterate a view he had already expressed on the policy of progressive development. As was well known, the Commission’s mandate encouraged the progressive development of international law and it was not supposed simply to confine itself to ordinary processes of codification. However, a question arose as to what would be the fate of practice when a policy of progressive development was adopted. What would serve as practice? Was there a body of practice that was *lex ferenda* but nonetheless had some solidity? Many years earlier, in the context of the law of the sea, Manfred Lachs had invented the useful

concept of emergent principles of general international law.²⁴³ The question of practice was especially critical in the context of the topic under consideration, where there was a substantial polarization of opinion. If the Commission was in the business of extending immunity and wished to adopt a liberal approach to the question, it must avoid the danger of reducing the consideration of the topic to a debate about policy and morals. If that were allowed to happen, the Commission would then have the unenviable task of deciding whether simply to jettison the very extensive body of existing practice.

44. A central issue, with which the Special Rapporteur would doubtless deal in his next report, but which was already foreshadowed, was the question of the applicable law. Much of the literature was a curious mix of talk about international crimes and talk about the distinction between immunity *ratione materiae* and immunity *ratione personae*. In the *Pinochet* case, in which he had been involved, having appeared as counsel before both the panels in the case, the applicable law had been public international law in the form of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It had had to take that precise form for a whole range of reasons, having to do not just with the crimes involved, but also with the reconciliation of the court’s powers with the state of English municipal law at the time. That Convention had already been incorporated in English law, albeit only with certain future effects. However, since the standard applied was that of international law, there had been no question of asking whether torture was a State function: it clearly was not, because a State function had to be in accordance with international law.

45. That approach meant that if an international crime were involved, the test would be the standard of international law and there would be no immunity. The basic question put to the first and second panels was whether, when the international community had adopted instruments such as the Convention against Torture, it had also maintained the immunity of leading State officials, who were the very officials most likely in normal circumstances to be involved in organizing the activities that had led to crimes. That argument had weighed quite heavily with the House of Lords. It was a simple argument, which boiled down to the question whether there was any point in having such a convention when existing international law gave immunity to those who would most likely be subject to the criminal law concerned.

46. On the other side, in the first panel especially, some quite intelligent considerations had pointed in the other direction. Lord Goff of Chieveley, for instance, had reversed the question, asking whether it was being suggested that, when the Convention against Torture and similar instruments had been adopted, there had been a waiver of the immunity of Heads of State and other high-ranking State officials by implication. Would not such a waiver have been spelled out? There was something to be said for Lord Goff’s view, from the standpoint of *lex lata*. Were he to speak as the devil’s advocate, he personally

²⁴³ See, *inter alia*, the *North Sea Continental Shelf* case, dissenting opinion of Judge Lachs, pp. 219 *et seq.*, in particular pp. 225–226.

would be inclined to say that it was probably not the case that in signing and ratifying the Convention, States had by inference abandoned the doctrine of immunity as it applied to leading officers of State. Although there had been merit in Lord Goff's argument, the House of Lords had nevertheless gone along with the former policy view with respect to the Convention against Torture. Interestingly, though, since the decision in the *Pinochet* case, leading municipal courts in other States had adopted a series of decisions in which the *Pinochet* reasoning had not been followed.

47. The fact of the matter was that, if the general opinion of liberal lawyers were to be adopted, it would lead to the disappearance of immunity. It would be unrealistic to expect that, given an inch, a mile would not be taken: that the circle of State officials entitled to immunity could be confined to the "trio", as Mr. Pellet had dubbed them. Some difficult dividing lines would have to be drawn. For example, the logic applied to a former Head of State in the *Pinochet* decisions, especially the second, should, in his opinion, also apply to an incumbent Head of State.

48. The Commission was wrestling with difficult policy questions. One that had been ignored in what had otherwise been a very good debate was what he called the question of equality. That question arose when international criminal justice was meted out to certain Heads of State while others, against whom there were equally good grounds for incrimination, were not put to any inconvenience. Some States that committed crimes in the course of suppressing rebellions were dealt with by the application of international criminal law, backed up by the United Nations Security Council, while others did not face those consequences. The occupation of Iraq, for example, had effectively been validated by Security Council resolutions;²⁴⁴ the United Nations had gone out of its way to create a sort of political immunity in that case. Thus, if immunity were done away with, some would pay the price and others not.

49. On a less dramatic note, he did not think it was part of the Commission's remit to tackle the issue of recognition. Similarly, diplomatic and consular immunity were separate categories, and were not part of the topic under consideration. However, decisions on matters relating to diplomatic immunity that were by analogy relevant to the topic should be used as sources.

50. Lastly, attempts to try Heads of State and other senior State officials were linked with the as yet wholly unresolved issue of universal jurisdiction. Many Chileans, both pro- and anti-Pinochet, had held the view that the former Head of State should be tried not in Spain, but in Chile, something that could be considered a reasonable national interest given the nature of the case. Such issues were not on the Commission's current agenda, but stood in the background of the difficult decision on the extent to which it should uphold the immunity of senior officers of State.

²⁴⁴ See, *inter alia*, Security Council resolutions 1483 (2003) of 22 May 2003, 1546 (2004) of 8 June 2004, 1557 (2004) of 12 August 2004, 1619 (2005) of 11 August 2005, 1637 (2005) of 8 November 2005, 1723 (2006) of 28 November 2006 and 1762 (2007) of 29 June 2007.

51. Mr. PETRIČ said he was not sure it was possible to state categorically that the Commission should not deal with the problem of recognition in the specific context of the topic. It was true that to discuss the effects of recognition in general would be absurd. However, as Mr. Melescanu had said, immunity came into play when a majority of States recognized the State in question. Forty-three countries had now recognized Kosovo—not a majority of countries in the world, but a majority of European Union member States. When the President of Kosovo visited Slovenia, which had recognized that country, it had to respect his immunity. In relations between two States that had recognized each other, the immunity of State officials should be respected.

52. Mr. DUGARD noted that Mr. Brownlie had referred to the distinction between *lex lata* and *lex ferenda* and suggested that the Commission should not be unduly bold in the progressive development of the law. In the *Arrest Warrant* case, the ICJ had acknowledged that there had been no State practice. It had argued that because a function of a Minister for Foreign Affairs was to travel and to do business on behalf of a State, he or she should be granted immunity. That, the Court had said, was a rule of customary international law. It had thus seemed to dispense with the requirements of *usus* and *opinio juris*. His question to Mr. Brownlie, one with which the Special Rapporteur would also have to grapple, was what the Commission should do if it wished to expand the "trio" to include ministers of defence or other ministers. Should it argue in accordance with functional necessity, as the Court had done in the *Arrest Warrant* case, or should it say there was no *usus* on the subject and that therefore it should be left alone?

53. Mr. BROWNLIE acknowledged that it was a difficult question. In pointing out the difficulties of venturing onto the thin ice of *lex ferenda*, what he had been hinting at was that there was often half-formed practice, expositions of policy by decision makers with real responsibilities, which could be fed into the debate. Thus there was something in between full-fledged policy statements and areas in which ample State practice was available. The example used by Mr. Dugard was entirely legitimate but not very helpful, because the ICJ had the rather splendid prerogative of making judicial general international law. For example, the United Nations Convention on the Law of the Sea said virtually nothing about the principles of delimitation except that the result should be equitable. It was a series of decisions of the Court, starting essentially with the *Gulf of Maine* and *Continental Shelf* cases, that had built up a corpus of judicially created general international law that was then applied by courts of arbitration in cases of maritime delimitation. In the *Arrest Warrant* case, the Court had had to fill a gap and, being the International Court of Justice, it had had the prerogative—and indeed the duty—not only to apply the law, but also to make the law. The Commission could not generate international law, but it could make some informed choices based on informed discussions of policy. In other words, it had to look for some middle ground between purely abstract discussion of morals and policy and *lex lata*.

54. Mr. KOLODKIN (Special Rapporteur), responding to Mr. Brownlie's comments, said that while he had not been privy to the Court's discussions leading up to its

decision in the *Arrest Warrant* case, he imagined it had had good grounds for concluding that Ministers for Foreign Affairs had immunity under customary international law, or *lex lata*. His report indicated (para. 109) that in the Commission's work on the texts that had subsequently become the draft articles on special missions,²⁴⁵ on representation of States in their relations with international organizations²⁴⁶ and on the prevention and punishment of crimes against internationally protected persons,²⁴⁷ it had discussed the question of the special status under international law of certain categories of persons: Heads of State, Heads of Government and, unless he was mistaken, Ministers for Foreign Affairs. During the discussion, both in the Commission and in the Sixth Committee, it had been recognized that this trio enjoyed special status under international law. He would imagine that that discussion had provided the Court with reasons to characterize the immunity of Ministers for Foreign Affairs as a rule of customary international law. The Court had viewed the immunity of the trio as a rule, a norm, of international law and, in all probability, had not seen any need to seek additional evidence that that was the case. It had said that what needed proving, however, was not the existence of that rule, but the existence of exceptions to that rule.

55. Mr. Dugard had described the ruling in the *General Shaul Mofaz* case adjudicated in a district court of the United Kingdom as a minor decision, not comparable to a decision of the High Court or the *Cour de cassation*. Nevertheless, in that particular case the position of States had also been expressed; the case had raised the issues of State practice and *opinio juris*, since it had concerned a minister of defence. It was not, therefore, merely a district court decision.

The obligation to extradite or prosecute (*aut dedere aut judicare*)²⁴⁸ (A/CN.4/588, sect. F, A/CN.4/599,²⁴⁹ A/CN.4/603²⁵⁰)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

56. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), which was contained in document A/CN.4/603.

57. Mr. GALICKI (Special Rapporteur), introducing his third report on the topic, said that the report continued the process, begun in his earlier reports, of addressing questions to Governments and to members of the Commission

concerning the main aspects of the topic, chief among which was the question whether the obligation *aut dedere aut judicare* existed as a rule of customary international law.

58. His third report consisted of an introduction, a chapter on the follow-up to the second report, a chapter introducing three draft articles and conclusions. The chapter I on the follow-up to the second report (paras. 3–109) comprised the main subject matter for discussion, since he was firmly convinced of the need to continue studying the principal substantive problems raised in his second report.²⁵¹ Accordingly, this chapter was divided into three sections, dealing respectively with consideration of the topic at the fifty-ninth session of the Commission (paras. 7–53); comments and information received from Governments on issues of particular interest to the Commission (paras. 54–93); and the discussion on the topic held in the Sixth Committee during the sixty-second session of the General Assembly (paras. 94–109). The presentation of the matters dealt with in the second and third sections varied with the nature of the information provided by Governments.

59. Section B (paras. 54–93) concerned the comments and information received from Governments in response to questions addressed to them in his preliminary report and repeated in his second report. Governments had been requested to list international treaties by which they were bound, their domestic legal regulations and their judicial practice reflecting the application of the obligation *aut dedere aut judicare* and the principle of universal jurisdiction, together with crimes or offences to which that obligation and the principle of universal jurisdiction were applicable in their legislation and practice.

60. In its report on the work of its fifty-ninth session, the Commission had asked Governments for specific additional information on (a) whether the State had authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality; (b) whether the State had authority to assert jurisdiction over crimes occurring in other States that did not involve one of its nationals; and (c) whether the State considered the obligation to extradite or prosecute as an obligation under customary international law, and, if so, to what extent.²⁵²

61. Regrettably, only 20 Governments had submitted written comments and information²⁵³ in response to the questions formulated in his previous reports and those put by the Commission. Not included in his current report were additional comments and information received since its finalization, including a second set of comments from the Government of Chile and comments from the Governments of Guatemala, Mauritius, the Netherlands and the Russian Federation, all of which were to be found in document A/CN.4/599. While he would take those comments and information into consideration in his next report, he would not rule out the possibility

²⁴⁵ *Yearbook ... 1967*, vol. II (document A/6709/Rev.1 and Rev.1/Corr.1), p. 347 (see footnote 226 above).

²⁴⁶ *Yearbook ... 1971*, vol. II (Part One) (document A/8410/Rev.1), p. 284 (see footnote 228 above).

²⁴⁷ *Yearbook ... 1972*, vol. II (A/8710/Rev.1), p. 312 (see footnote 229 above).

²⁴⁸ For the history of the Commission's work on the topic, see *Yearbook ... 2006*, vol. II (Part Two), chap. XI, p. 172. The first two reports of the Special Rapporteur were reproduced, respectively, in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, and *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585.

²⁴⁹ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²⁵⁰ *Idem*.

²⁵¹ For the Commission's consideration of the second report, see *Yearbook ... 2007*, vol. II (Part Two), chap. IX, paras. 347–368.

²⁵² *Ibid.*, chap. III, paras. 31–33.

²⁵³ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579.

of considering them during the current debate. Even so, the total volume of comments and information received was still insufficient to enable the Commission to reach any clear and compelling conclusions. Consequently, in his view, it should renew its request to Governments to respond to the questions contained in his preliminary and second reports, and also to any further questions that the Commission might wish to formulate at the current session.

62. A different method of presentation had been adopted in section C (paras. 94–109), which followed the layout used in paragraphs 161 to 173 of the topical summary of the discussion held in the Sixth Committee during the sixty-second session of the General Assembly on the report of the Commission on the work of its fifty-ninth session (A/CN.4/588, section F). The consideration of that discussion under eight subheadings allowed for a clearer presentation of the views of Governments.

63. The following chapter II (paras. 110–125) was devoted to the continuation of the main task of the codification process in respect of the topic, namely the formulation of draft rules on the obligation to extradite or prosecute (*aut dedere aut judicare*). That process had been initiated at the previous session, when he had proposed a draft article 1 on the scope of application of the draft articles. That draft article 1, which was reproduced in paragraph 20 of the third report, had generally been well received by members of the Commission and delegates in the Sixth Committee, notwithstanding certain suggestions for its improvement, which were set out in paragraphs 52 and 108 of the report.

64. In the light of opinions expressed in the Commission and in the Sixth Committee, he was prepared to delete the adjective “alternative”, qualifying “obligation”, from the proposed text of draft article 1, even though, as was explained in the footnote to paragraph 49 of the report, that adjective had been used in an authoritative doctrinal description of the obligation to extradite or prosecute.

65. Another aspect of draft article 1 that had stimulated some discussion had been the enumeration of the phases of “establishment, content, operation and effects” involved in the formulation and application of the obligation to extradite or prosecute. He was prepared to engage in further discussion concerning either the total elimination of that enumeration or its replacement with different wording, such as “formulation and application”.

66. Lastly, the phrase “persons under their jurisdiction” had also met with some criticism. Proposals had been made to replace that phrase with another, such as “persons present in the territory of the custodial State” or “persons under the control of the custodial State”. Although there seemed to be a need to discuss the matter further, he personally favoured his original formulation.

67. Taking into account the comments of members of the Commission and delegates in the Sixth Committee, and the views of Governments, he wished to keep the discussion open at the current stage and to propose an alternative version of draft article 1, which was to be found in paragraph 116 of the report, and read:

Article 1. Scope of application

The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of custodial State].

68. It could be seen that he was proposing to replace the controversial term “alternative”, qualifying “obligation”, with the word “legal”, in order to stress the need for the obligation to extradite or prosecute to have a legal basis, rather than treating it as a moral or a political obligation. A further reason for that change was that, while the view that the obligation was essential to the suppression of criminality or to the limitation of power-based diplomacy was justified to some extent, it might also tend to emphasize the moral or political dimension of the obligation to the detriment of its legal force.

69. He had some doubts about the suggestions to delete the list of the various phases (establishment, content, operation and effects) in which the obligation to extradite or prosecute might arise. While it would certainly be possible to replace them with a shorter description, such as “formulation and application”, that might lead to difficulties when the Commission came to formulate more detailed draft rules applicable to those phases. That issue should to be resolved by the Commission as soon as possible, since it was a precondition for further progress in systematizing the draft rules.

70. Draft article 2 was necessary in order to avoid misunderstandings and unnecessary repetition when formulating the draft rules. Although, in his second report, he had made some suggestions concerning terms that might require more detailed definition, there had been little by way of a response to his requests for suggestions regarding the terms to be defined. However, there had been no outright opposition to the article *per se*; on the contrary, members had favoured its inclusion.

71. In his second report, he had proposed the terms “extradition”, “prosecution”, “jurisdiction” and “persons” as candidates for definition. It would perhaps also be useful to include detailed definitions of the terms “crimes” and “offences” as they related to the scope of application of the draft articles. He remained convinced of the need to keep draft article 2 open until the end of the codification exercise, in order to allow for the gradual addition of definitions and descriptions as and when the need arose.

72. In the meantime, he proposed that an embryonic draft article 2, as contained in paragraph 121 of the report, should be worded in the following manner:

Article 2. Use of terms

1. For the purposes of the present draft articles:

- (a) “extradition” means [...];
- (b) “prosecution” means [...];
- (c) “jurisdiction” means [...];
- (d) “persons under jurisdiction” means [...];

2. The provisions of paragraph 1 regarding the use of terms in the present draft articles are without prejudice to the use of those terms or to the meanings which may be given to them [in other international instruments or] in the internal law of any State.

73. He invited members to propose other terms which, in their opinion, should be defined in draft article 2 for the purposes of the draft articles. The bracketed text in paragraph 2 was modelled on similar articles found in international treaties, drafts of which had been elaborated by the Commission. For instance, article 2, paragraph 2, of the 1969 Vienna Convention referred only to “the internal law of any State”, whereas article 2, paragraph 3, of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property referred also to “other international instruments”. In his view, given the large number of international treaties relating to the obligation *aut dedere aut judicare*, draft article 2 should include in its “without prejudice” clause a reference to “other international instruments”, as well as to “the internal law of any State”.

74. Proposed draft article 3 dealt with treaties as a source of the obligation to extradite or prosecute. He had already proposed the drafting of such an article in his second report, and since there had been no opposition to it either in the Commission or in the Sixth Committee, he proposed that the text of draft article 3 should read:

Article 3. Treaty as a source of the obligation to extradite or prosecute

Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

75. It was generally recognized that international treaties were a source of the obligation to extradite or prosecute. The number of international treaties containing the obligation was growing year by year. Although that in itself did not provide a sufficient basis for the codification of a generally binding customary rule, the development of international practice that it demonstrated could serve as a starting point for the formulation of an appropriate customary norm. In that connection, he drew attention to a doctrinal statement, cited in paragraph 125 of the report:

If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.²⁵⁴

76. In addition to treaties, other potential material on which proposals for the formulation of subsequent draft rules could be based was to be found in paragraph (3) of the commentary to article 9 of the 1996 draft code of Crimes against the Peace and Security of Mankind.²⁵⁵ Some of those quasi-rules had already been cited in paragraph 114 of his second report,²⁵⁶ and could serve as *sui generis* directives for the elaboration of additional draft articles, even though they were applicable only to limited categories of crimes.

²⁵⁴ C. Enache-Brown and A. Fried, “Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law”, *McGill Law Journal*, vol. 43 (1997–1998), pp. 613–633, at pp. 628–629.

²⁵⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 31.

²⁵⁶ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585, p. 80.

77. The last chapter of the report was devoted to conclusions. As he had mentioned at the start of his introduction, the third report was closely related to its two predecessors, and a review of all three reports revealed a sequential presentation of problems which would continue to be considered in subsequent reports. Despite the repetition it entailed, that approach seemed well-suited to achieving a final outcome in the form of draft articles that truly reflected the existing legal realities. However, those realities were also changing, as could be seen from developments even over the relatively short period of the Commission’s work on the topic, in the form of a growing number of national legal acts and judicial decisions relating to the obligation *aut dedere aut judicare* that contributed to the establishment and development of legal practice, and thereby to the acceptance of emerging customary norms. Proving the existence of a customary basis for the obligation was the main purpose of the Commission’s endeavours, and the first three years of the exercise seemed to have witnessed an increasing degree of acceptance of those endeavours on the part of States.

78. One of the initial problems still unresolved was the relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. Few States had replied to the questions put, *inter alia* in chapter II of the second report, and the few replies received were so diverse in content as to make it impossible to draw any firm conclusions. While the Commission should not accord undue prominence to problems connected with universal jurisdiction, neither should it underplay the importance of those problems. A compromise solution was needed, although that depended to a large extent on whether a positive reaction on the part of States to the request made by the Commission would be forthcoming.

79. Another important problem still to be resolved concerned the decision he had taken in his second report to refrain from any further examination of the so-called “triple alternative”, whereby the alleged offender might also be surrendered to an international criminal tribunal.²⁵⁷ Although many States had supported his decision, it might be somewhat premature to reject that alternative totally. Laws recently enacted in Argentina, Panama, Peru and Uruguay to implement the Rome Statute of the International Criminal Court also provided for the *aut dedere aut judicare* obligation in the context of the institution of surrender, thus giving the impression that the “triple alternative” was still alive and well, and that it was closely related to the obligation to extradite or prosecute.

80. In closing, he urged the members of the Commission and delegates in the Sixth Committee to reply to all the questions and problems raised in his third report, and to those in his second and preliminary reports that remained unresolved. Their replies would make it possible to continue and complete the work of formulating draft articles on the obligation to extradite or prosecute. As was pointed out in paragraph 131 of his third report, the positive effects of that work were acquiring ever-greater importance for the international community of States as it faced growing threats from national and international crime.

²⁵⁷ *Ibid.*, p. 79, para. 107.

81. Mr. PELLET said he had hesitated a good deal before taking the floor to discuss the Special Rapporteur's third report, and had decided to do so only in order to say a few words on the question of method. To his great disappointment, he had found very little of substance on which to reflect in the third report, which basically recapitulated the second report, which, in turn, did little more than recapitulate the preliminary report. Given such a state of affairs, he could probably limit himself to referring back to what he had said at the previous session, specifically at the Commission's 2945th meeting.²⁵⁸ But that was precisely where the problem lay. Notwithstanding his personal regard for the Special Rapporteur, he found it was time to "put his foot down".

82. Admittedly, he himself was hardly well placed to give lessons on the virtues of speediness in developing a topic, but slowness was one thing and a complete standstill was quite another. And although he was willing to grant—though without much conviction—that at the previous session, which marked the beginning of the new quinquennium, the Special Rapporteur had felt the need to make a fresh start, practically *ab initio*, such an approach seemed hard to defend at the current session.

83. The Special Rapporteur complained about the insufficient number of replies from Governments to the questions that he and the Commission had put to them. There were two comments he would like to make in that regard: the first was that this reluctance or failure to reply was a fact of life, albeit an annoying one, indicating that States were perhaps not enthralled by the subject, or, more likely, tired of being constantly pestered with questionnaires to which they could not respond for lack of resources. Yet that was nothing new: States were generally disinclined to reply to the Commission's questionnaires. In any case, it was a fact of life that must be lived with, and in his view, was less disastrous than the Special Rapporteur made it out to be.

84. The topic with which the Special Rapporteur had been entrusted was not particularly difficult, as had been noted by Mr. Dugard at the previous session,²⁵⁹ even though it was politically sensitive. Moreover, the conventional and judicial practice in that area was not secret; therefore, information concerning it was not particularly hard to obtain.

85. His second comment prompted by the Special Rapporteur's expectations—not to say his "wait and see" attitude—with regard to the assistance to be expected from States, was that he found that expectation to be, at root, not very healthy. He rather had the impression that the Special Rapporteur relied on the well-known principle whereby "As their leader, I follow them". In other words, it was the Special Rapporteur who should provide the impetus, not States, as the Special Rapporteur, wrongly in his own view, seemed to expect.

86. While there was no question that the Commission served the international community made up of States, that did not mean that it should or must wait for instructions or even guidance from them. Once a topic had been

selected and placed on its agenda, it was up to the Commission, at the instance of and under the authority of the Special Rapporteur, to give form to it and to make proposals, taking the reactions of States into account, but without hanging onto their every word. That was why the Commission's work was divided into two major phases. On first reading, it made proposals, attempting to present draft articles that were relevant and coherent but without having to be overly concerned about States' positions on any given problem. In any case, such a precaution would be unnecessary, given that so many of its members were thoroughly imbued with the sensitivities of their respective States. During second reading, the Commission tried to reset its sights, taking into account the criticisms and proposals of States.

87. To return to more specific questions of method, he did not see what was to be gained from recapitulating previous reports, copying out topical summaries of the debate in the Sixth Committee or summarizing the replies of States to questions put by the Commission. That might be justifiable as a means of introducing another subject, but in itself it was not of much interest. All members had the documentation in question, and it was the Special Rapporteur's job to utilize it as support for the draft articles he proposed to the Commission.

88. True, the Commission did have three draft articles to consider; however, with all due respect, draft article 2 on definitions scarcely constituted one: it had no definitions to propose—and rightly so, it might be added, since it was doubtless better to formulate definitions as the work progressed and problems were encountered. As for draft articles 1 and 3, while they did not quite state the obvious, their consideration at the previous session had posed so few problems that there was no reason to raise them again in plenary at the current session.

89. Nevertheless, in order to avoid disappointing the Special Rapporteur unduly, he would reiterate his views in telegraphic style. With regard to draft article 1, first of all, the phrase "the establishment, content, operation and effects" could be dispensed with, since it added little to the text; secondly, he had no objection to—though he saw no advantage in—specifying that the obligation to extradite or prosecute was "legal"; and thirdly, as far as the three phrases in square brackets were concerned, he would actually prefer a fourth, at least in French, that would be borrowed from the European Convention on Human Rights. That was because it was necessary to specify that the obligation to extradite or prosecute, when it existed, applied to persons within the jurisdiction of the State in question. However, he had not ascertained whether that comment had an impact on the English version.

90. Draft article 3, for its part, was once again practically a statement of the obvious. That statement of the obvious needed to be complemented by a further reference, to some as yet unspecified customary rule. But what customary rule? *That was the question*—but the protagonist was no longer Hamlet, as at the previous meeting; instead, the Commission was waiting for Godot. It was to be hoped that, irrespective of the outcome in Beckett's masterpiece, Godot would finally arrive.

²⁵⁸ *Yearbook ... 2007*, vol. I, 2945th meeting, paras. 43–56.

²⁵⁹ *Ibid.*, para. 20.

91. In closing, he said that although he was not particularly enthusiastic about the prospect of adding to the already considerable number of working groups, he wondered whether, given the difficulties encountered by the Special Rapporteur, it might nonetheless be advisable to set up a working group to be chaired by the Special Rapporteur, if he so desired, or by another member of the Commission. Its purpose would be to delimit more precisely the broad outlines of the topic and identify the questions it raised, and to give a rough idea of the possible responses to those questions. If it could do that, the Commission might finally be able to stop waiting for Godot.

Expulsion of aliens (*continued*)*
(A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

REPORT OF THE CHAIRPERSON OF THE WORKING GROUP

92. Mr. McRAE (Chairperson of the Working Group on expulsion of aliens), introducing the recommendations resulting from the Working Group's discussion, said that the Working Group on expulsion of aliens had been established by the Commission at its 2973rd plenary meeting on 6 June 2008, for the purpose of considering issues raised by the expulsion of persons of dual or multiple nationality and by denationalization in relation to expulsion. The Working Group had held one meeting on 14 July 2008, during which it had first considered whether the principle of the non-expulsion of nationals also applied to persons of dual or multiple nationality. While the view had been expressed that the issue of expulsion of nationals fell outside the scope of the topic, members of the Working Group had generally felt that as far as expulsion was concerned, no distinction should be made between the situation of nationals and that of persons with dual or multiple nationality. Having considered various ways of dealing with that situation, the Working Group had come to the conclusion that the commentary to draft article 4 (Non-expulsion by a State of its nationals) or to any other relevant provision should eventually indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals also applied to persons who had legally acquired another nationality or several nationalities.

93. The Working Group had next proceeded to consider whether the draft articles should include a provision prohibiting denationalization for the purposes of expulsion. The issue of principle was whether a State could denationalize a person for the sole purpose of expulsion. Several members of the Working Group had emphasized the difficulty of ascertaining the motivations underlying a decision of denationalization. While it had agreed that that rare situation should not be dealt with in a separate provision, the Working Group had concluded that the commentary should indicate that States should not use denationalization as a means of circumventing their obligations under draft article 4.

94. The Working Group recommended that the plenary should take note of the conclusions it had reached on those two issues and should refer them to the Drafting

Committee to guide it in its further consideration of the relevant draft articles. In the course of its deliberations, the Working Group had had the full and very helpful cooperation of the Special Rapporteur on the topic of expulsion of aliens, Mr. Maurice Kamto.

95. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to take note of the recommendations of the Working Group on expulsion of aliens and to refer them to the Drafting Committee in order to assist it in its deliberations.

It was so decided.

The meeting rose at 12.50 p.m.

2985th MEETING

Friday, 25 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL
RAPPOREUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).

2. Ms. JACOBSSON thanked the Special Rapporteur for his thoughtful and stimulating preliminary report, which was supplemented by an excellent Secretariat memorandum. When Mr. Pellet had commented at a previous meeting that the preliminary report was perhaps "too good", he had perhaps meant that it might be difficult to criticize. She acknowledged herself the perfect clarity of the Special Rapporteur's logic and reasoning. Nevertheless, reasoning could be perfectly valid and yet founded on erroneous premises. She was unable to agree fully with some of the Special Rapporteur's underlying assumptions and was inclined to share the views expressed by Mr. Dugard, Ms. Escameia, Mr. Pellet and other members of the Commission. The report raised a number of interesting legal and policy considerations, and

* Resumed from the 2973rd meeting.

she had been relieved to hear from the President of the International Court of Justice, when she had addressed the Commission (2982nd meeting, above), that the area of immunity from criminal jurisdiction (unlike that of immunity from civil jurisdiction) was a significantly underdeveloped area of international law.

3. She agreed that the important issues for consideration included the sources of the right to immunity, the content of the concepts of immunity and jurisdiction, criminal jurisdiction, immunity from criminal jurisdiction and the relationship between immunity and jurisdiction, as well as the typology of immunity of State officials (*ratione personae* and *ratione materiae*). When determining the scope of the topic, the Commission should also deal with issues such as whether all State officials should be covered by the future draft guidelines or articles, the extent of the immunity enjoyed and the question of waiver of immunity. As noted by the Special Rapporteur in his report, the legal source of immunity of State officials from foreign criminal jurisdiction was international law, in particular customary law. However, State practice could not be disregarded, particularly where it had achieved a certain level of international recognition by, for instance, being quoted as a legal argument in international decisions and judgements. In that connection, she was curious to know whether and to what extent State practice in regions such as Latin America had influenced the decisions of the Inter-American Court of Human Rights. She agreed with the Special Rapporteur that the question of immunity was important during the pre-trial phase and also that the study of immunity should not deal with the substance of jurisdiction. However, the issue of jurisdiction could not be entirely bypassed: as noted by Judges Higgins, Kooijmans and Buergethal in their joint separate opinion in the *Arrest Warrant* case, immunity and jurisdiction were “inextricably linked” and the question whether there was immunity in any given instance would depend “not only upon the status of [the person concerned] but also on what type of jurisdiction, and on what basis, the ... authorities were seeking to assert it” [para. 3]. She also shared the Special Rapporteur’s view that the Commission should consider only the immunity of State officials from national criminal jurisdiction in another State and that the question of immunity of family members should not be addressed.

4. In general, the preliminary report raised two types of concern relating, on the one hand, to the Special Rapporteur’s stated or implied assumptions or purposes and, on the other, to the place of the future draft guiding principles or articles in the consistent system of law that the Commission was seeking to build. In addition, there was a policy dimension resulting from the discernible tension between “the fight against impunity” and what might be termed “the fight for immunity”. The international community seemed to have endorsed the principle that impunity was unacceptable as a legal and policy objective, but there were unfortunate signs at the same time of informal discussions between States aimed at broadening the scope of immunity.

5. The fight against impunity called for a relaxation of legal rules so that the perpetrators of heinous crimes could be brought to trial. Any widening of the circle of persons who enjoyed procedural immunity would be at odds with

that goal. In response to the counterargument that immunity did not mean that the perpetrator would escape trial since there was no immunity from legal proceedings in his or her own country or before an international court, she pointed out that in practice that system did not always work. The responsible State might well be unwilling to prosecute a Prime Minister and might even extend immunity from domestic proceedings to the suspect. The International Criminal Court might lack jurisdiction and the possibility of a referral by the Security Council might be blocked by a veto. As a result, the crime would go unpunished. If it was a grave breach committed in a foreign country and that country stated its intention to prosecute the suspect, but was unable to do so because of the lack of an extradition treaty, there would again be a situation of *de facto* impunity.

6. The wider the circle of persons enjoying immunity, the less effective the fight against immunity would be. A credibility problem would also arise: the perpetrators of “ordinary crimes” or violations of the laws of war that did not amount to grave breaches or serious violations of international law would be punished, while senior officials would escape justice (for instance, in the case of Rwanda, accused persons appearing before the International Tribunal for Rwanda were not liable to the death penalty). What could be done if the responsible State failed to prosecute one of its officials? She suggested that special attention should be given to the question of whether State responsibility could be invoked in connection with such failure to prosecute.

7. The issue of whether there was a derogation from the principle of immunity of State officials from foreign criminal jurisdiction in the case of international crimes should be addressed as well as the question of the definition of international crimes and their possible differentiation. She welcomed the Special Rapporteur’s declared intention to deal with those important aspects of the topic. While she agreed with him that the concept of “State official” did not need to be defined, she stressed that it did not follow that all State officials should enjoy immunity or that all categories of State officials should be treated equally. The crucial question was the extent to which the functional approach should be applied. The existing case law presented the Commission with a challenge. It would be regrettable if it were to build its work on the highly criticized judgment rendered by the ICJ in the *Arrest Warrant* case, but the content of the judgment as well as its implications should nonetheless be discussed. As noted by Mr. Dugard and other members, the Commission should not hesitate to distance itself from the Court’s decision in the case and should examine the dissenting opinions appended by Judge Al-Khasawneh and Judge Van den Wyngaert, which had an important bearing on the topic under consideration. A closer look should also be taken at developments since the *Arrest Warrant* case; the discussions concerning the question of immunity in the *Milošević* and *Charles Taylor* cases were of particular importance in legal terms and should not be dismissed on the ground that they had taken place in the context of international tribunals.

8. With regard to the distinction between official acts and acts committed “in a private capacity”, she agreed with Mr. Gaja that there was a need to discuss acts such

as kidnapping and murder committed by foreign secret service agents, but also illegal intelligence gathering and espionage, since such acts might be performed by State officials who were not diplomats accredited to the targeted State, so that the *persona non grata* option was not available. The issue was briefly addressed in paragraphs 155 to 165 of the Secretariat's memorandum (A/CN.4/596) and merited further, in-depth discussion. There was sometimes a clear relationship between matters pertaining to what was deemed to be an official act, on the one hand, and the non-justiciability rule and the act of State doctrine, on the other. Both concepts should be examined in terms of both scope and substance.

9. For example, in October 1981, a Soviet Whiskey-class submarine U-137 had run aground in a military protected area in Swedish territorial waters.²⁶⁰ The case constituted not only a serious violation of Swedish sovereignty but also a major diplomatic incident. A local prosecutor had proposed prosecuting the submarine's captain since there were reasonable grounds, in his view, for suspecting espionage. The Government of Sweden was not in favour of such a move, considering it to be an international incident rather than a criminal case. The Swedish Criminal Code was nonetheless subsequently amended and now contained a provision requiring the Government or the Office of the Prosecutor-General to take decisions in certain cases authorizing prosecutors to initiate proceedings before a Swedish court. The question of how the non-justiciability rule and the acts of State doctrine functioned as parallel or additional limitations on jurisdiction required further consideration. As rightly noted by the Secretariat in its memorandum, their precise contours and status in international law were unclear. Lastly, she stressed that her comments should not be interpreted as minimizing the importance of the concept of immunity or of its function, which was to guarantee that States were able to act without unwarranted interference. On the contrary, it was because immunity was and should remain an important aspect of inter-State relations that the legal concept had to be developed and interpreted in terms of its "constant evolution" in the light of other norms deemed to be essential by the international community.

10. Mr. FOMBA said that the time was ripe for taking stock of current practice in the area of immunity of State officials from foreign criminal jurisdiction and for elaborating general rules on the subject. Due importance should also be attached to immunity in the interests of stable relations among States. With regard to the purpose of the preliminary report, he considered that the division of issues into two categories—preliminary issues and issues to be considered when defining the scope of the topic—was somewhat odd and artificial. However, the list of key issues to be considered when determining the scope of the topic seemed to be relevant and comprehensive. The distinction made between issues which should, in principle, be analysed and those which should probably be addressed reflected the Special Rapporteur's doubts and convictions. He welcomed the fact that both incumbent and former State officials were mentioned in paragraph 4 of the report.

11. The Special Rapporteur had rightly reviewed the history of the consideration of the question of immunity, a section of the report which was important and helpful. Moreover, referring to the resolution adopted by the Institute of International Law in 2001,²⁶¹ he noted that its scope *ratione materiae* included immunity from jurisdiction and immunity from enforcement and that its scope *ratione personae* was limited to incumbent or former Heads of State and Government. However, article 15 of that resolution also referred to Ministers for Foreign Affairs. He further noted that, on a substantive issue, article 13, paragraph 2, of the resolution addressed the question of immunity with respect to international crimes but referred only to the case of former Heads of State.

12. With regard to the sources of law relating to the immunity of State officials from foreign criminal jurisdiction, he noted that Mr. Verhoeren had adopted a cautious approach to the question of immunity with respect to international crimes. He further noted that, according to the Special Rapporteur, there was no universal treaty fully regulating the question of immunity and that international custom was the basic source of international law in that area, as confirmed by the ICJ and national courts and by States when they substantiated their positions before national and international courts.

13. With regard to international comity, despite the existence of abundant practice in that area, he agreed that it was preferable to adopt a legal approach to immunity because it was a right and was based on an obligation derived from international law. The position adopted by the ICJ in the *Arrest Warrant* case could be cited in support of that approach. With regard to the situation of family members, the report noted that there were more solid grounds for holding that the source of their immunity was international comity, and that was acceptable.

14. With regard to the link between universal jurisdiction and immunity from jurisdiction, the Special Rapporteur drew attention in paragraph 39 of his report to a trend towards refusing immunity to foreign officials over whom the State exercised universal criminal jurisdiction. The report further cited a Belgian law of 1993, amended in 1999, as an example of a case in which the extent of immunity had begun to be defined in international law, which was a good thing. He noted with interest that in paragraph 40 the Special Rapporteur mentioned the main factors that determined the respective roles of international law and domestic law. He also agreed with the statement in paragraph 41 that, since national courts often had difficulty in determining the content of the customary rules of international law that should be applied, the codification of international law in that regard would be most useful. Furthermore, the inventory of sources of information to be taken into account was exhaustive.

15. Turning to the relationship between immunity and jurisdiction and, more specifically, the logical and chronological link between the two concepts, he said that he agreed with the position adopted by the ICJ in its 2002 judgment in the *Arrest Warrant* case, namely

²⁶⁰ See M. Jacobsson, "Sweden and the law of the sea", in T. Treves (ed.), *The Law of the Sea: the European Union and its Member States*, The Hague, Kluwer Law International, 1997, pp. 516–518.

²⁶¹ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 753 (see footnote 224 above).

that jurisdiction preceded immunity. With regard to the scope of immunity *ratione personae*, it was well established that criminal jurisdiction was exercised solely with regard to persons and not with regard to States. He also agreed with the Special Rapporteur that criminal prosecution included a substantial pre-trial phase and that the exercise of criminal jurisdiction might already raise the question of immunity at that stage. That aspect was therefore important and should be taken into consideration. The Special Rapporteur further considered that it would be interesting to examine practice with respect to immunity from foreign civil jurisdiction. While the “different nature” criterion would seem at first glance to constitute a fatal impediment in that regard, he believed that such an approach might nonetheless prove useful. With regard to the concept of immunity, although different interpretations might exist, the basic idea was that it constituted a legal concept that could be expressed in terms of corresponding rights and obligations. He agreed with the Special Rapporteur that it was a derogation from State jurisdiction and an essential aspect of the sovereign equality of States. The Special Rapporteur asked whether an attempt should be made to define the concept of immunity and “immunity from criminal jurisdiction” in the context of the study. Mr. Fomba supported such an approach and considered that the Commission would be derelict in its duty if it failed to do so.

16. With regard to the relationship between immunity and jurisdiction, he supported the position adopted by the ICJ in its judgment in the *Arrest Warrant* case. The Special Rapporteur’s stance in that regard was somewhat contradictory inasmuch as he seemed to say, on the one hand, that it was unnecessary to examine the question of jurisdiction as such and, in particular, the question of extraterritorial and universal jurisdiction, and, on the other hand, that the question should be studied in the context of the scope of immunity in order to determine, for instance, whether there were exceptions to the rule of immunity. Personally, he held that there were exceptions. If there were not, it would mean that the Special Rapporteur accepted the hypothesis of “absolute immunity”. The procedural nature of immunity was crystal clear. However, the Special Rapporteur was being appropriately circumspect when he asked whether it would not be more accurate to speak of “immunity from certain measures of criminal procedure” rather than “immunity of State officials from criminal jurisdiction”, and also when he added that the latter question could not be answered until the question of the extent of immunity had been considered. In paragraph 70, the Special Rapporteur rightly held that the question of immunity from interim measures of protection or measures of execution should not be addressed at that stage. It should be noted, however, that the Institute of International Law dealt with both immunity from jurisdiction and immunity from execution in its 2001 resolution, as reflected in the title.

17. With regard to the distinction between immunity *ratione personae* and immunity *ratione materiae*, he noted that the two concepts overlapped. Immunity *ratione personae* was based on the idea that the beneficiary was invested with sovereignty and was identified with and personified the State; it was thus the source of the absolute immunity of Heads of State. Immunity *ratione*

materiae was clearly enjoyed by State officials regardless of the level of their post by virtue of the fact that they were performing official functions. He agreed with the Special Rapporteur that certain State officials (Heads of State, Heads of Government, Ministers for Foreign Affairs and other high-ranking officials) enjoyed both types of immunity and that all State officials enjoyed immunity *ratione materiae*. In paragraph 83 of his report, the Special Rapporteur raised the question whether and to what extent the distinction between the two was necessary for the purpose of determining the legal regime governing immunity. He did not answer the question directly but seemed to be inclined to argue against making the distinction, noting that the ICJ had used no such categorization in its judgment in the *Arrest Warrant* case and that the same was true of existing conventions. His personal view was that the distinction was helpful and indeed indispensable.

18. Establishing the rationale for immunity was important since it could determine which officials enjoyed immunity and the extent of their immunity. It was a matter of ensuring the free and efficient performance of State functions, as reflected in the judgment of the ICJ in the *Arrest Warrant* case. He accepted that the two basic theories explaining the reasons for granting immunity were the “functional necessity” theory and the “representative character” theory. He also agreed that, in the final analysis, the immunity of officials from foreign jurisdiction belonged to the State itself, so that the State alone was entitled to waive such immunity. The Special Rapporteur rightly noted that the different rationales advanced for immunity were complementary and interrelated. He also agreed that diplomatic and consular immunities had the same basis as the immunity of State officials.

19. With regard to the summary in paragraph 102 of the first part of the report, Mr. Fomba broadly agreed with the conclusions set out under points (a) to (j) and had only a few brief remarks to make. The terminology used in subparagraph (c) was somewhat curious, or at least unusual, and it would have been preferable, for instance, to use the word “*compétence*”. In subparagraph (d) he agreed in particular, subject to a better understanding of the terminology, with the point made in the second sentence, namely that the question of immunity was more important in the pretrial phase. In subparagraph (e), he wondered whether the use of the term “juridical obligation of the foreign State” presupposed the treaty-based nature of the obligation. In subparagraph (f), the same problem of terminology arose but, in terms of substance, the idea contained in the second sentence was of crucial importance. The content of subparagraph (g) seemed to duplicate to some extent that of subparagraph (f).

20. With regard to the second part of the preliminary report and, in particular, the definition of the scope of the topic, the three key ideas set forth by the Special Rapporteur in paragraphs 103 to 105 were relevant and acceptable. On the question of the persons covered and the definition of the concept of “State official”, the Special Rapporteur stated in paragraph 106 that there were three possible options; like the Special Rapporteur, he preferred the third definition, which covered all incumbent and former State officials.

21. Referring to paragraph 117 of the preliminary report, he noted with interest that, aside from the “three-some”, other high-ranking officials might be taken into account, as confirmed by the ICJ in the *Arrest Warrant* case, although the Court failed to identify the officials concerned. With regard to paragraph 119, the debate regarding certain officials such as the state prosecutor or the head of national security (for example in the *Certain Questions of Mutual Assistance in Criminal Matters* case) or the ministers of defence or of foreign trade was stimulating and reflected the difficulties to be addressed in that regard. In paragraph 120, the Special Rapporteur rightly raised the question of whether and to what extent one or more criteria might be invoked in support of the definition. That was, in his view, the crucial question and answering it was not an easy task. With regard to paragraph 121, counsel for France in the *Certain Questions of Mutual Assistance in Criminal Matters* case, Mr. Pellet, had identified as a criterion for the determination and enjoyment of immunity *ratione personae* in the case of other high-ranking State officials that representation of the State in international relations should be an indispensable and primary part of their functions. A difficulty arose in that regard, however, since the process of representation of the State in international relations had, to some extent, been “decentralized”, as noted within brackets at the end of the first sentence of the paragraph. The Special Rapporteur asked at the end of the paragraph whether the importance of the functions performed by high-ranking officials for ensuring the State’s sovereignty was an additional criterion for the enjoyment of immunity *ratione personae*. In his view, it was.

22. With regard to the recognition of States, Heads of State and Heads of Government, he agreed that the substance of the question of recognition should not be considered because it did not form part of the Commission’s mandate with respect to the topic. On the other hand, the subject might be addressed solely from the standpoint of the impact of recognition or non-recognition on the question of immunity. There were two options in that regard: either to draft a provision concerning the role or rather the impact of recognition, or to draft a “without prejudice” clause along the lines of that contained in article 12 of the 2001 resolution of the Institute of International Law; he was in favour of the first option.

23. With regard to the question of family members discussed in paragraphs 125 to 129 of the report, he considered, unlike the Special Rapporteur, that the issue should be addressed. The Institute of International Law did so in article 5 of its 2001 resolution, adopting an interesting approach inasmuch as the article first stated the principle, basing immunity on comity, and then referred to the possibility of an exception based on a separate capacity. Such problems arose quite frequently in international political and diplomatic contexts and the Commission might take the opportunity to seek to clarify the rules of the game in that regard.

24. With regard to the summary of the second part of the report contained in paragraph 130, he agreed with the conclusions set out in subparagraphs (a) to (f). Two options were proposed in subparagraph (c) for the definition of “State officials”. In his view, a generic definition would

be more appropriate. With regard to subparagraph (e), the fundamental difficulty consisted in identifying one or more relevant criteria, but an attempt might be made to find the least common denominator. The question of recognition, referred to in subparagraph (f), should not be dealt with in terms of substance but solely in terms of its impact. Lastly, the immunity of family members should be discussed.

25. Mr. HMOUD said that since the report was comprehensive, there was no need to comment on expository matters, such as the background, sources of law or concepts of criminal jurisdiction and immunity. He would therefore confine his comments to matters that were not settled in international law and on which views diverged, and to questions on which the Special Rapporteur had requested guidance from the members of the Commission.

26. Immunity was indeed procedural in nature and could not offer protection against the substantive law of the State concerned, since that would infringe the State’s right to exercise jurisdiction in criminal matters. Moreover, the Special Rapporteur rightly noted that immunity was a State right with a corresponding obligation on other States to accord immunity from criminal jurisdiction. It was a matter of inter-State relations, sovereign equality and the right of a State not to be subject to the jurisdiction of another State. However, to say that a State was not subject to such jurisdiction was different from saying that a State’s official was not subject to the jurisdiction of another State. The same reasoning could not be used; otherwise, there would be blanket immunities and that could not be the starting point for a study of the topic. Furthermore, while immunity was a right, the exercise of jurisdiction was also a right. What was at issue was the balance between the two rights in inter-State relations. A third point was that, since immunity was a matter of inter-State relations, it could not be enjoyed, whatever its category, by the official in his or her own right.

27. It was important to ensure that the topic encompassed all State officials and hence to define the term, especially where the question of whether the person concerned was a State organ had a possible bearing on the granting of immunity.

28. The immunity of State officials from foreign criminal jurisdiction was based on customary international law. However, it was important to point out that the content, subject, extent and rationale of immunity were interpreted in different ways by national and international courts.

29. The Commission should not content itself with categorizing State officials and defining the types of immunity that they enjoyed. It should examine the various situations in which immunity could arise, the rights and interests involved and how they could be balanced, the possible exceptions to immunity based on a lack of right to immunity or an overwhelming right to exercise jurisdiction, the security of inter-State relations and sovereign equality.

30. While the rationales for immunity of State officials from foreign criminal jurisdiction were perhaps, as the Special Rapporteur put it, complementary and

interrelated, it was important to differentiate such rationales in order to indicate when there was immunity and its extent. National courts frequently referred to the rules of customary international law pertaining to immunity, but they seemed to have conflicting opinions on the existence of such rules and their underlying rationales for immunity.

31. Personal immunity existed under customary international law for certain categories of high-ranking officials. While the rationale for such immunity in the case of Heads of State was that they personified the State, that rationale, which had particular consequences, was not applicable to other senior officials. As stated by Judge Higgins, the rationale for the concept of the immunity available to the Head of State was clear under general international law. But was there anybody else who personified the sovereign State? Representation of the State overlapped with the concept of personification but it was not the same concept. It was necessary to determine whether the representation at issue was related to international relations or whether it constituted representation of sovereign authority. The rationale of representation in international relations was applicable, for example, to the Minister for Foreign Affairs, diplomats and consuls, but it was not applicable to other categories of senior State officials.

32. The judgment in the *Arrest Warrant* case should not be interpreted to mean that the ICJ considered that the immunity enjoyed by high-ranking State officials was equivalent to impunity. According to the Court's reasoning, immunity—in the case before it the immunity of an incumbent Minister for Foreign Affairs—was necessary for the effective performance by such ministers of their functions on behalf of the State. The Court went on to state that such immunity from jurisdiction

does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. ... Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [paras. 60–61]

One such circumstance was where the person concerned was no longer in office. It was therefore the impact of the other State's exercise of jurisdiction *vis-à-vis* the high-ranking official and the effect that it had on the State's ability to conduct its sovereign affairs that was the core rationale underlying the Court's decision, which should be applied as a criterion for determining which categories of senior officials enjoyed immunity. The idea was, of course, to preserve the State's sovereign prerogative in inter-State relations, and that was where the balance should lie in deciding whether a high-ranking official enjoyed immunity from the criminal jurisdiction of another State.

33. Functional immunity, which was the immunity enjoyed by officials for acts performed in their official capacity, was a matter that the Commission should consider in depth. It should be put into perspective in order to prevent abuse. A State acting through its agent enjoyed immunities, but there were certain acts that clearly fell outside the scope of State functions. The commission of

acts constituting crimes under international law was attributable to the individual as the only person who could be held criminally responsible. Although such acts could be attributed to both the individual and the State, criminal responsibility lay with the individual, even though the State could be held responsible for an internationally wrongful act. Thus, if functional immunity was not restricted in the case of certain international crimes, impunity would ensue, a situation which, according to the ICJ in the *Arrest Warrant* case, was unacceptable. There had been instances in which States had claimed responsibility for certain acts before national courts in order to exonerate an individual from criminal responsibility for acts constituting war crimes.

34. A rationale could be invoked for the immunity from foreign criminal jurisdiction of an official of one State who had broken the law of another State in the course of performing his or her functions, and the former State might have an interest in upholding the official's immunity from the latter State's jurisdiction. However, there was a point where a balance must be struck between the various interests and rights involved, and there were also cases where no rule of international law indicated that a State enjoyed immunity for an act committed outside the scope of its functions.

35. The Commission should determine precisely which crimes could not be treated as acts attributable to the State. In the same context, it should consider whether functional immunity existed indefinitely for certain crimes. If the ICJ had not ruled out the possibility of exercising jurisdiction over high-ranking officials after they had left office, there was no reason why that possibility should be ruled out in the case of other categories of officials when they left office. The Court had not recognized any exception to that possibility for acts performed in an official capacity. Furthermore, if immunity was procedural in nature, in other words if the official concerned would continue to be criminally responsible under the relevant law, it followed that limits should be applicable to functional immunity. If such immunity was absolute, it would be substantive and not procedural.

36. The Special Rapporteur had indicated that he would take up the issue of international crimes in his next report, and he mentioned in paragraph 63 and in the footnote to paragraph 80 of his preliminary report that the question of the extent of immunity and possible exceptions thereto would be addressed. Crimes of concern to the international community as a whole challenged the principle of immunity in current inter-State relations. The establishment of international criminal tribunals, such as the International Criminal Court, showed that the international community was determined to fight impunity. While international jurisdiction might be a means of addressing impediments to the exercise of jurisdiction by domestic courts in cases involving international crimes, certain issues that might have a bearing on international jurisdiction needed to be addressed in the context of the Commission's study. How would the principle of immunity be dealt with where a treaty conferred jurisdiction on national courts over certain international crimes even if they were committed by third State nationals or officials? A conflict would arise in

such circumstances between a treaty-based right and duty and customary law immunity.

37. The issue of recognition should be dealt with, if only in the form of a “no prejudice” clause. It was a relevant matter inasmuch as current practice differed from State to State. Some States refused to accord immunity on the premise that they did not recognize the other State or the status of the official concerned. If immunity was a right under international law, it should be granted to the official of any State that was recognized as such under international law. The key condition for recognition was how the State concerned was treated under international law and not whether the national authorities of another State recognized it. The status of an official was a matter to be decided by the State entitled to immunity pursuant to its domestic law and it was not a matter of discretion for the authorities of the State exercising jurisdiction.

38. With regard to family members, although there was extensive practice, it differed from State to State. It would be useful, however, to provide guidance on whether immunity stemmed from customary international law or from international comity.

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

[Agenda item 1]

39. The CHAIRPERSON suspended the meeting so that the Commission could proceed with the official closure of the International Law Seminar.

The meeting was suspended at 11.15 a.m. and resumed at 11.45 a.m.

Cooperation with other bodies (*continued*)**

[Agenda item 12]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

40. The CHAIRPERSON welcomed, on behalf of the Commission, the representatives of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), Sir Michael Wood, Chairperson of CAHDI, and Ms. Albina Ovcearenco, Administrator, CAHDI Public International Law and Anti-Terrorism Division.

41. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that, following the Slovak Chairpersonship of the Committee of Ministers of the Council of Europe from November 2007 to May 2008, Sweden had taken over and would assume the Chairpersonship for six months. Spain was then in line and would take over the Chairpersonship in November 2008. Sweden had announced its priorities for the Council of Europe, which were, of course, closely related to the Council's main objectives, namely the protection of human rights, democracy and the rule of law.

42. During the Swedish Chairpersonship, the question of the rule of law would certainly be given high priority. At the 118th session of the Committee of Ministers on 7 May 2008, the Rapporteur Group on Legal Co-operation (GR-J) of the Committee of Ministers had been requested to examine how full use could be made of the Council of Europe's potential in promoting the rule of law. The Rapporteur Group had already emphasized the close link between human rights, democracy and the rule of law. It was a complex issue, but a strategy for promoting the link as a key concept would have to be developed. The Rapporteur Group would contact other international actors with a view to building cooperation. Its report would be submitted in November 2008 when Sweden would hand over the Chairpersonship of the Committee of Ministers to Spain.

43. Another priority area was promotion of democracy. Support would be provided for the preparation of the Council of Europe Forum for the Future of Democracy to be held in Madrid from 15 to 17 October 2008 under the auspices of the Ministry of Public Administration of Spain. The proposed main theme was “e-Governance”. Furthermore, the Swedish Chairpersonship would give priority to the promotion of relations between the Council of Europe and the European Union as well as other international organizations.

44. There had recently been a marked development in relations with the European Union. On 23 October 2007, a quadripartite meeting had been held between the Council of Europe and the European Union, the first since the signing of the Memorandum of Understanding of 23 May 2007 between the two organizations. The outcome of the meeting reflected a joint determination to increase cooperation on topics of shared interest, especially in the area of human rights. Possible synergies between the Council's activities and those of the European Union Agency for Fundamental Rights had been discussed. As a result, the Council and the Agency had signed a cooperation agreement on 18 June 2008²⁶² aimed at promoting complementarity and avoiding wasteful duplication of activities relating to the safeguarding of human rights in Europe. The question of the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was also regularly discussed with the European Union, since it would greatly enhance consistency in that area of cooperation.

45. The following quadripartite meeting, held on 10 March 2008, had focused on the electoral assistance provided to States, the role of the media in the electoral process and the situation in the Western Balkans. The next quadripartite meeting would be held in autumn 2008. With the same aim of strengthening cooperation between the Council of Europe and the European Union, a cooperation agreement had been signed on 28 November 2007 between the Parliamentary Assembly of the Council of Europe and the European Parliament. It provided for meetings and joint hearings as well as regular contacts between rapporteurs.

* Resumed from the 2979th meeting.

** Resumed from the 2982nd meeting.

²⁶² *Official Journal of the European Union*, 15 July 2008, L. 186, p. 7.

46. Lastly, with regard to cooperation with the United Nations, the Council of Europe had aligned itself with the Organization in accelerating the process of abolition of the death penalty, as advocated in General Assembly resolution 62/149 of 18 December 2007. The abolition of capital punishment had long been a Council of Europe priority, as attested by the adoption of Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. He also noted that a draft United Nations General Assembly resolution on cooperation between the Council of Europe and the United Nations was currently being negotiated. It was expected that the draft resolution would be discussed at the sixty-third session of the General Assembly, scheduled to open on 16 September 2008.

47. With regard to recent legal developments in the Council of Europe, three Council conventions had entered into force in 2008 and two new conventions drafted by the Council had been opened for signature. On 1 January 2008, the European Convention for the protection of the Audiovisual Heritage had entered into force with five ratifications and 14 signatures. The twentieth century had been the first century of the cinema and, with the emergence of television, audiovisual output had grown apace. Unfortunately, a large proportion of the resultant audiovisual heritage had already been lost because of lack of awareness of its museographic interest. Today, multimedia products also formed part of the audiovisual heritage, a huge reserve calling for protection and conservation. On 1 February 2008, the Council of Europe Convention on Action against Trafficking in Human Beings had entered into force with 10 ratifications. Since then, it had secured 17 ratifications and 38 signatures. The Convention was based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The Council of Europe had considered it necessary to draft a specific instrument on trafficking because it acted within a more limited regional context. The Council of Europe Convention on Action against Trafficking in Human Beings also contained more specific and more demanding provisions, going beyond the minimum norms laid down in the universal instruments. For instance, it provided for an independent monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA). The rules of procedure for the election of members of GRETA had been adopted by the Committee of Ministers on 11 June 2008. Pursuant to article 37, paragraph 2, of the Convention, the first meeting of the Committee of the Parties was to be held by 1 February 2009, thus within one year of the entry into force of the Convention, in order to elect the members of GRETA. A question that was currently being discussed was whether the Committee of the Parties should fill all GRETA seats at the first election or whether it would be preferable to review the situation one year after the election in the light of the state of ratifications. States planning to ratify the Convention after the first meeting of the Committee of the Parties pointed

out that they would then have an opportunity to participate rapidly in the GRETA electoral process.

48. On 1 May 2008, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism had entered into force after the deposit of the sixth instrument of ratification. There were now seven ratifications and 29 signatures. The Convention reflected recent developments in the area, particularly the views of the Financial Action Task Force concerning action against the financing of terrorism.

49. The three aforementioned instruments had been opened for signature at the Warsaw Summit in 2005. They were of considerable importance for the activities of the Council of Europe and the achievement of its goals, and were drafted in a spirit of geographical openness, since accession was open to non-member States of the Council, an essential prerequisite for more vigorous action against international networks of organized crime.

50. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse had been adopted and opened for signature at the twenty-eighth Conference of European Ministers of Justice, held in Lanzarote, Spain, on 25 and 26 October 2007. The Convention, which now had 27 signatures, was the first to criminalize sexual abuse; it provided for the prosecution of perpetrators of crimes involving the sexual exploitation of children, while giving priority to the best interests of the child. To ensure its effective implementation, the Convention provided for international cooperation on criminal matters, on the prevention of sexual exploitation and abuse, and on assistance to and protection of victims. More recently, on 7 May 2008, the Committee of Ministers of the Council of Europe had adopted the revised European Convention on the adoption of children, which updated the 1967 European Convention on the adoption of children. The purpose of the revised Convention, which would be opened for signature in November 2008, was to improve national adoption procedures. It supplemented, at the European level, existing international norms such as the 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.

51. The aforementioned instruments were of great importance for the Council of Europe's legal work and would contribute to the implementation of what was known as the "Warsaw Agenda". The Agenda was based on four core Council of Europe projects defined at the third Summit of Heads of State and Government of the Member States of the Council, held in Warsaw in 2005. They focused on reforming the European Court of Human Rights, action against terrorism, action against organized crime and action against racism. The question of reform of the European Court of Human Rights was always a high priority. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, sought to enhance the efficiency of the Court's proceedings. As in 2007, the Protocol currently had 46 ratifications and only one more was required for its entry into force. Furthermore, the Swedish Chairpersonship of the Committee of Ministers wished to give fresh impetus to the incorporation of the European Convention on Human Rights

in the domestic legislation of member States. With that end in view, it had held a colloquy entitled “Towards stronger implementation of the European Convention on Human Rights at national level” on 9 and 10 June 2008 in Stockholm, which had discussed, *inter alia*, the improvement of domestic remedies, the growing importance of the jurisprudence of the European Court of Human Rights and the implementation of the European Convention on Human Rights at the national level.

52. He noted, in connection with action against terrorism and organized crime, that the Council of Europe had pioneered action against Internet crime, specifically through the adoption of the Convention on cybercrime on 23 November 2001. On 1 and 2 April 2008, the Council had convened a conference on cooperation against cybercrime, at the close of which guidelines for cooperation between law enforcers and Internet service providers and on the status and effectiveness of cybercrime legislation had been adopted. They reflected the strategic importance of enhanced cooperation between the public and private sectors and of the promotion of international mutual legal assistance for law enforcement agencies. The Conference had also decided to maintain contacts between the Council of Europe and the G8 Subgroup on High-Tech Crime.

53. In 2008, the Committee of Experts on Terrorism (CODEXTER) had also continued to coordinate the Council of Europe’s action against cyberterrorism. In December 2007, the Council of Europe had published *Cyberterrorism—the Use of the Internet for Terrorist Purposes*,²⁶³ which contained an expert report by Professor Ulrich Sieber and national reports on measures taken against cyberterrorism in 27 member States and two observer States (Mexico and the United States of America). The database on cyberterrorism and the use of the Internet for terrorist purposes had also been advertised on the CODEXTER website. The conference on cooperation against cybercrime and the meetings of CODEXTER provided a platform that would facilitate cooperation against cybercrime and, in particular, cyberterrorism. In keeping with the Council of Europe’s general stance, high priority was accorded to the protection of human rights, which should on no account be sacrificed in the context of action against terrorism and organized crime.

54. With regard to action against racism, the European Commission against Racism and Intolerance regularly drafted general policy recommendations. In 2008, it had adopted a recommendation on racial profiling, abusive police conduct, the role of the police in action against terrorism, and relations between the police and members of minority groups.

55. Although it concerned different issues from those placed on the Warsaw Agenda, it was also worth mentioning the Council of Europe’s work on the law of nationality, a topic that had also been addressed by the International Law Commission. The Commissioner for Human Rights, Thomas Hammarberg, regularly issued “viewpoints” on the current human rights situation in member States of the Council of Europe. In 2008, after assessing the situation of stateless persons in Europe, he had requested member States to take steps to eliminate statelessness in order to

facilitate conflict resolution and promote social cohesion. In that connection, the 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession, which sought to protect everyone’s right to a nationality, had been ratified by two member States (Norway and the Republic of Moldova), so that only one more ratification was required for its entry into force.

56. With regard to constitutional and electoral law, he drew attention to increased interest from the Arab world in the work of the Council of Europe’s European Commission for Democracy through Law (Venice Commission). Its interest had grown as a result of contacts between the Venice Commission and the Union of Arab Constitutional Courts and Councils. In 2007, the Committee of Ministers of the Council of Europe had invited Morocco and Algeria to become members of the Venice Commission, and on 15 May 2008 it had approved Tunisia’s application for membership. It had further granted special cooperation status to the Palestinian National Authority. The seventy-fifth plenary session of the Venice Commission had been held in June 2008. It had discussed, in particular, dual voting rights for persons belonging to national minorities and the *Guidelines on Freedom of Peaceful Assembly* of the Organization for Security and Co-operation in Europe (OSCE).²⁶⁴ The Guidelines had been prepared by an OSCE panel of experts in consultation with the Venice Commission.

57. Lastly, several high-level conferences had been held since the last session of the International Law Commission or would be held in the near future. The European High-level Conference on the Council of Europe Disability Action Plan 2006–2015, held in Zagreb, Croatia, on 20 and 21 September 2007, had brought together more than 150 governmental and non-governmental experts. It had been a landmark event at a time when numerous European States were signing the Convention on the Rights of Persons with Disabilities. The twenty-eighth Conference of European Ministers of Justice had been held in Lanzarote, Spain, on 25 and 26 October 2007. The ministers had discussed emerging problems of access to justice for vulnerable groups (migrants, asylum seekers and children, including delinquent children). A conference of European prosecutors had been held in Saint Petersburg on 2 and 3 July 2008. The conference had discussed the role of prosecution services in the protection of human rights and the public interest outside the criminal law field and had stressed the importance of ensuring that such services respected the principles of the European Convention on Human Rights and the case law of the European Court of Human Rights. Forthcoming high-level conferences included the eighth Council of Europe Conference of Ministers responsible for Migration Affairs, which would be held on 4 and 5 September 2008 in Kyiv, Ukraine. The conference, which would seek to develop an integrated approach to questions of migration, development and social cohesion, would offer member States an opportunity for dialogue aimed at bilateral and multilateral co-operation in the area of migration.

58. Sir Michael WOOD (Chairperson of CAHDI) said that relations between the International Law Commission

²⁶³ Council of Europe, Strasbourg, 2007.

²⁶⁴ OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2007.

and CAHDI had traditionally been close, both personally and in substance, which was not surprising since they were both committed to promoting the rule of public international law in international affairs.

59. CAHDI brought together the chief legal advisers to the Ministries for Foreign Affairs of its 47 member States and a number of observer States and organizations, including Canada, the Holy See, Israel, Japan, Mexico, the United States and the European Union. It covered a very broad range of issues, almost all of which were closely related to the work of the International Law Commission. Each year, at its autumn session, it examined the Commission's report, focusing on issues in respect of which the Commission had sought the views of Governments and on those submitted to the General Assembly. For the 47 member States and eight observer States, the consideration by CAHDI of the Commission's report was an important stage in forming their views on those issues.

60. Dispute settlement had long been a focus of the work of CAHDI. In early July 2008, the Committee of Ministers of the Council of Europe had adopted two recommendations in that regard, both of which had been prepared by CAHDI. The first encouraged States to nominate and keep up-to-date lists of the arbitrators and conciliators provided for in important treaties such as the 1969 Vienna Convention and the United Nations Convention on the Law of the Sea. The second concerned acceptance of the jurisdiction of the ICJ under the "optional clause" and listed some model clauses that States might find helpful. The two recommendations might be seen as a contribution to the implementation of the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1. That would be particularly true if, as he hoped, the recommendations were brought to the attention of the Sixth Committee of the General Assembly and some follow-up action was taken in the United Nations.

61. Another important regular task of CAHDI was to examine reservations to and declarations on treaties, paying particular attention to treaties concerning terrorism. In doing so, it derived considerable assistance from the ongoing work of the International Law Commission, and the Commission's Special Rapporteur on the topic had recently attended a CAHDI meeting.

62. CAHDI was currently working on a report on the legal consequences of the so-called "disconnection clause" which, as the Commission was well aware, had been a contentious issue, both legally and politically, over the years. The authors of the report, which should be available at the next meeting of CAHDI, had drawn heavily on the Commission's 2006 study on the fragmentation of international law.²⁶⁵

63. CAHDI was closely following the development of international justice. It had organized four conferences

to promote the implementation of the Rome Statute of the International Criminal Court and regularly discussed developments in the various international criminal tribunals. A conference entitled "International courts and tribunals—the challenges ahead", to be held in London on 6 and 7 October 2008, would focus on the interface between national Governments (particularly their legal advisers) and international courts. The autumn session of CAHDI would be held immediately after the conference, and he hoped that a representative of the International Law Commission would attend, as was very often the case.

64. Recent domestic cases demonstrated the importance and topicality of the subject of State immunity. CAHDI monitored and encouraged progress towards accession to the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, one of the Commission's most important achievements.

65. From its earliest days, the Commission had been concerned to develop ways and means of making the evidence of customary international law more readily available. As long ago as the 1960s, the Council of Europe had taken the lead by developing a model plan for such publications, which had been updated in the 1990s. Unfortunately, only a minority of States systematically published their practice. He hoped that CAHDI would continue to encourage more States to do so.

66. The Council of Europe's website on public international law (<http://www.coe.int/en/web/cahdi>) contained most CAHDI documents and some useful databases. One database, on the office of Ministry for Foreign Affairs legal adviser, described the current position in most member and observer States. It was a valuable resource, one that could perhaps also be developed within the United Nations.

67. Ms. ESCARAMEIA thanked Mr. Lezertua and Sir Michael Wood for their clear and informative statements. Noting that Mr. Lezertua had mentioned numerous contacts between Council of Europe and European Union bodies, she asked whether the same was true of the two courts, namely the European Court of Human Rights and the Court of Justice of the European Communities. It had recently been claimed that many human rights cases were now brought before the Court of Justice of the European Communities because its proceedings were more rapid and its judgements more directly applicable.

68. With regard to cybercrime, a subject that had been included in the long-term programme of work of the International Law Commission, she noted that the Council of Europe had not shown much enthusiasm in the past for a Commission study and asked how matters now stood.

69. According to Sir Michael Wood, CAHDI discussed the Commission's work at its autumn session each year. Ms. Escarameia asked whether CAHDI might envisage devoting a specific session in the future to one of the topics being dealt with by the Commission.

70. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that relations between the European Court of Human Rights and the Court of

²⁶⁵ "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", Report of the Study Group of the International Law Commission (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed, available on the Commission's website; the final text to be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)). A summary of this report was published in *Yearbook ... 2006*, vol. II (Part Two), pp. 176–184, paras. 241–251.

Justice of the European Communities were neither structured nor systematic. There was no institutional dialogue as such, only spontaneous contacts, for instance at specific events, which enabled the two courts to exchange views. Their proceedings were totally independent.

71. It was true that human rights treaties had become sources of law for the European Communities and that in some cases the Court of Justice of the European Communities was obliged to apply the European Convention on Human Rights and other instruments, including the European Social Charter, in implementing Community law. However, the possibility of raising human rights issues before the Court of Justice was strictly limited to the fields of competence of the institutions of the European Union, so that a far wider range of cases could be brought before the European Court of Human Rights. Despite the limited jurisdiction of the Court of Justice, the two courts sometimes reached divergent conclusions, which was regrettable from the point of view of protection of human rights. They were aware of the problem, which had given rise to a sense of powerlessness, although the Council of Europe strongly believed that the only solution would be for the European Union to accede to the European Convention on Human Rights, if not to the European Social Charter. That possibility was envisaged in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and since the Court of Justice had issued an opinion to the effect that the European Union had no jurisdiction to ratify the Convention, everybody was awaiting the entry into force of the Treaty of Lisbon. In the Council of Europe's view, that was the only development that would enable the European Court of Human Rights to remain the ultimate authority in matters pertaining to the interpretation of the Convention.

72. What role could the International Law Commission play in practice with regard to cybercrime? The Council of Europe Convention on cybercrime was very effective and had aroused the interest of such diverse countries as Brazil, the Dominican Republic, the Republic of Korea and Mexico, which had all applied for accession. The Committee of Ministers was currently considering the possibility of inviting them to do so. The Cybercrime Convention Committee had met once and would meet again shortly. The Convention on cybercrime was of universal relevance and the Council of Europe had reservations about the possibility of drafting a new convention that improved on its content. The Council was convinced that it reflected the state of the art, and its policy was to encourage non-European States to accede to the Convention—with limited success for the time being, but the prospects were good. With regard to the outcome of the Conference on Cooperation against Cybercrime, one of the issues that the International Law Commission might consider was the responsibility of Internet service providers, which was an area in which cooperation between the public and private sectors was extremely important and in which the Council of Europe Convention had not settled all outstanding issues.

73. Sir Michael WOOD (Chairperson of CAHDI) said that CAHDI discussed specific matters on the agenda of the International Law Commission but tended to do so

when they were submitted to Governments for consideration and action. For instance, it had discussed the draft articles on jurisdictional immunities of States and their property²⁶⁶ a year or two before their adoption by the General Assembly and the draft articles on responsibility of States for internationally wrongful acts²⁶⁷ before the General Assembly had taken action. However, it would be useful to discuss certain matters at an earlier stage, while the drafting process was still under way in the Commission, both to draw the attention of legal advisers to particular topics and to promote useful exchanges of views. He suggested that informal contacts might take place between CAHDI and the Commission in the future to determine the most appropriate topics for discussion and that the special rapporteurs responsible for the topics might be invited every one or two years to engage in an in-depth debate.

74. Mr. DUGARD said that national groups established under the Permanent Court of Arbitration seemed to serve two completely different purposes: one was to compile a list of competent arbitrators and the other to compile a list of candidates for election to the ICJ. Some countries included political figures in the national group in order to ensure that persons nominated for election to the ICJ were politically acceptable, but that clearly was not the purpose of national groups, which were supposed to provide competent and independent arbitrators. He wished to know whether CAHDI had examined the qualifications and competence of members of national groups.

75. Sir Michael WOOD (Chairperson of CAHDI) said that the CAHDI recommendation did not focus on the Permanent Court of Arbitration but was of a more general scope. There were some 10 or 20 important treaties that provided for States to nominate arbitrators or conciliators. Even the most efficient parties did not always do so or, if they did, they failed to keep their list up to date. For example, the United Kingdom had recently realized that it had not nominated conciliators under the 1969 Vienna Convention for the past 15 years. States should therefore be encouraged to compile a list of all treaties to which they were parties that provided for the nomination of arbitrators and to keep a note of when their term of office ended, since laxity in that regard seemed to be largely due to bureaucratic inertia. The United Nations Convention on the Law of the Sea was a very good example: the panels of arbitrators established under the Convention played a very important role, since it was compulsory to draw upon their members when establishing an arbitral tribunal. However, the existing lists were very short: of 156 States parties, only about 20 had nominated arbitrators.

76. Mr. GALICKI asked how far the work of CAHDI on the disconnection clause had progressed and what approach it had adopted. It was a subject that the Commission had considered some time ago in the context of its study on the fragmentation of international law. He was particularly interested in the matter because he was

²⁶⁶ *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 28 (see footnote 225 above).

²⁶⁷ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76 (see footnote 12 above).

involved in negotiations on a convention containing such a clause. Noting that the Parliamentary Assembly of the Council of Europe was broadly opposed to such a clause, he asked whether the Committee of Ministers intended to follow the Parliamentary Assembly's line or whether the representatives of the States on the Committee adopted a different approach.

77. Sir Michael WOOD (Chairperson of CAHDI) said he very much hoped that CAHDI would adopt its report on the subject in October 2008 and that the Committee of Ministers would act on it. He doubted that the report would adopt a negative approach and thought that it would acknowledge the important role to be played by disconnection clauses. Nonetheless, such clauses should be used very cautiously; they should only be included in treaties where they were really necessary and should be confined to relevant provisions. Moreover, their impact should be clear to everyone, which was not the case at present. Thus, nobody really knew what impact they had on certain European Union laws. The effects should be clear and transparent for everyone and not just for European Union lawyers.

78. Mr. VASCIANNIE, referring to the fact that the Council of Europe was particularly active in promoting the abolition of the death penalty, noted that although the United Nations General Assembly adopted resolutions on the subject every year, some States were still resisting abolition. Given the experience of the Council in that area, he asked whether either of its representatives thought that the ICJ should deliver an advisory opinion on the status of the death penalty in international law.

79. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that the Council of Europe had succeeded in imposing a moratorium on the death penalty in all its member States so that nobody was executed in those countries, which was a major step forward. It had included such a provision in international instruments so that it would be impossible or at least very difficult to revert to the previous situation. Furthermore, the Council, in cooperation with the European Union, had proclaimed 10 October each year a "European Day against the Death Penalty". He preferred to ask Sir Michael Wood to answer the question regarding a possible advisory opinion of the ICJ.

80. Sir Michael WOOD (Chairperson of CAHDI) said that, personally speaking, he was rarely in favour of seeking an advisory opinion from the ICJ, since the procedure was, in his view, unsatisfactory and rarely produced good results. He feared that the Court might reach a conclusion similar to that on the *Legality of the Threat or Use of Nuclear Weapons*.

81. The CHAIRPERSON, speaking as a member of the Commission, noted that the question of reform of the European Court of Human Rights was again in the news and asked for more background information on Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. With regard to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,

restructuring the control machinery established thereby, which enabled victims to file a complaint with the European Court without first referring the matter, as required by the Convention, to the European Commission on Human Rights, he asked Mr. Lezertua to comment on Europe's experience in that area since complainants in the inter-American system, which was strongly influenced by the European system, still had to pass through the Inter-American Commission on Human Rights to gain access to the Inter-American Court of Human Rights. He also asked him to comment on reports that, following the expansion and reform of the Council of Europe, the number of complaints filed with the European Court had increased to the point where the Court was unable to cope with them.

82. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that Protocol No. 11, which allowed individuals to file complaints directly with the Court, had constituted a major step forward. However, many people felt it had been a mistake, since the Commission had usually processed complaints quite speedily and had only retained those of some importance. The report of the Group of Wise Persons aimed at improving the effectiveness of the system, which had been submitted to the Committee of Ministers in 2007, proposed, *inter alia*, the creation of a chamber composed of a small number of judges who would decide on the admissibility of complaints. It had certainly proved difficult for the European Court to deal with all cases, which now numbered over 100,000, and there was a considerable legal backlog. The Court considered that Protocol No. 14, once it entered into force, would simplify matters. For instance, a single judge could declare an application inadmissible under the Protocol, compared with at least three under the existing system. Moreover, a committee of three judges, compared with seven at present, could declare an application admissible, which meant that more chambers could be set up from among the serving judges. It had been estimated, however, that the new system would enable the Court to handle only 20 to 25 per cent more cases, which was quite inadequate in view of the backlog and the exponential increase in the number of complaints filed. The report of the Group of Wise Persons contained numerous proposals to deal with the problem which the Court would consider at a later stage, since they all dealt with the situation after the entry into force of Protocol No. 14. For example, the Group proposed the establishment of a filtering mechanism which would be attached to the Court itself instead of being a separate body as in the case of the Commission. With a view to preserving the right of individuals to file complaints, a chamber of junior judges could be charged with deciding on the admissibility of applications, which would then be referred for consideration to established judges. There was also a trend towards encouraging States to assume greater responsibility for incorporating the jurisprudence of European Court of Human Rights in their legislation and disseminating relevant information.

The meeting rose at 1 p.m.

2986th MEETING

Tuesday, 29 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PERERA thanked the Special Rapporteur for his thorough and well-researched preliminary report (A/CN.4/601) and the Secretariat for its comprehensive memorandum (A/CN.4/596), both of which would serve as a solid basis for the Commission's work on the topic, which was one of considerable contemporary relevance.

2. In delimiting the scope of the topic, the Special Rapporteur had emphasized that it would be confined to the immunity of State officials from foreign criminal jurisdiction, and would not deal with immunity from international criminal jurisdiction, which was governed by special regimes. That distinction had to be borne in mind when addressing the more complex issues involved in the examination of the topic. Paragraphs 103 to 130 of the report concerned the core issues to be considered when defining the scope of the topic. He would confine his comments to those issues, and in particular, to the issue of persons covered.

3. As the report stated in its paragraph 111, Heads of State, Heads of Government and Ministers for Foreign Affairs constituted the "basic threesome" of State officials who enjoyed personal immunity. Under international law, those three categories of officials were granted special status by virtue of their office and functions. That special status was evidenced by the provisions of key international conventions, including the 1969 Vienna Convention, which accorded such persons, by virtue of their functions, the competence to perform all acts relating to the conclusion of a treaty. The special status of those categories of officials was also confirmed in the Convention on special missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, and the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents. Furthermore, the judgment of

the ICJ in the *Arrest Warrant* case had expressly found that this category of persons enjoyed immunity *ratione personae* from both the civil and criminal jurisdiction of other States.

4. While it must be acknowledged that the joint separate opinion formulated by several judges in that case had cast doubt on the proposition that Ministers for Foreign Affairs were entitled to the same immunities as Heads of State, it was nevertheless important to view that issue, as the majority opinion had done, from the perspective of the pre-eminent role played by Ministers for Foreign Affairs in contemporary international relations, as the principal intermediaries between a sovereign State and the international community of States. The centrality of their role in the conduct of international affairs on behalf of the Head of State would require that Ministers for Foreign Affairs be treated on a par with Heads of State with regard to the scope and extent of the jurisdictional immunities they enjoyed. The basic rationale underlying the granting of jurisdictional immunities to Heads of State would thus apply with equal force to Ministers for Foreign Affairs, given the representative character and functional necessity of their role.

5. It should also be recalled that, when formulating draft articles on diplomatic intercourse and immunities,²⁶⁸ which had subsequently been adopted as the Vienna Convention on Diplomatic Relations, the Commission had been guided by the theory of functional necessity and the representative character of a head of mission.²⁶⁹ The theory of functional necessity and their representative character must therefore be the guiding criteria in according absolute immunity to Ministers for Foreign Affairs under whose authority ambassadors and other diplomatic agents performed their duties.

6. In moving to consider categories of officials other than the well-acknowledged "threesome", the Commission was venturing into somewhat uncharted territory, which called for a cautious approach. It was presented with a situation in which important international conventions, such as the Convention on special missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, acknowledged the existence of a category of "other persons of high rank" but did not specifically define that category. Similarly, the judgment of the ICJ in the *Arrest Warrant* case confirmed the existence of such a category, but went no further.

7. Given that situation, the Special Rapporteur recommended in paragraph 130 (e) of the report that an attempt could be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoyed immunity *ratione personae*, while also noting that it would be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for that category of high-ranking officials could be defined.

²⁶⁸ *Yearbook ... 1958*, vol. II, report of the Commission to the General Assembly, document A/3859, pp. 89 *et seq.*

²⁶⁹ *Ibid.*, p. 95, paras. 2–3 of the general comments on section II of the draft articles.

8. The Commission's approach to that issue should indeed be a criteria-based rather than an enumerative approach. A listing of officials on the basis of their functions or representative character would essentially be determined by the constitutional and other internal arrangements of each State and would thus vary from one State to the next. Consequently, it would be far more productive for the Commission to embark on a process of identifying and defining applicable criteria to be applied in granting jurisdictional immunities to high-ranking officials, while taking due account of the principles of functional necessity and representative character. That process of identifying specific elements would serve as a useful pointer to the other categories of persons who might be covered.

9. In efforts to identify such criteria, pride of place must be given to the notion that the official's representation of the State in international relations must be an indispensable part of his or her functions. It was interesting to note the reference in paragraph 120 of the report to the pleadings of counsel for France in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, in which emphasis had been placed on the representation of the State in international relations being an indispensable and inherent aspect of the functions of officials seeking to enjoy immunity. Mr. Caffisch, too, had stressed that a very high degree of involvement of such officials in the conduct of foreign affairs should be required, in order to avoid too liberal an expansion of the scope of immunity. Those were the primary criteria that should be identified and defined in such a process.

10. The report had cited contemporary social and political changes as objective reasons for the gradual expansion of the categories of officials who enjoyed immunity from jurisdiction. It was from that perspective that the role and function of such officials as trade ministers or defence ministers had to be seen. On the basis of the aforementioned criteria for granting immunity, the representative character and the functions of a trade minister in the context of global trade negotiations in the era of WTO, or those of a defence minister in the context of stationing troops on foreign soil or other activities relating to military alliances, would appear to justify placing those ministers in the category of "other high-ranking officials". It should also be recognized that, in the modern world, States' foreign and defence policies were inextricably linked and not easily separated. As had been noted by Mr. McRae, those developments reflected the reality of how contemporary international relations were conducted, and should be taken into account.

11. That being said, a balance must be struck between the need to expand—albeit cautiously—the categories of officials to be granted jurisdictional immunities *ratione personae* in the light of modern realities, on the one hand, and the risk of too liberal an expansion of such categories, on the other, hence the need for the careful identification and definition of applicable criteria.

12. Seen in that light, the question posed by the Special Rapporteur in paragraph 121 of the report, namely whether the importance of the functions performed by high-ranking officials in ensuring the State's sovereignty

was further criterion for including such officials among those enjoying immunity *ratione personae*, became extremely relevant.

13. The effective conduct of a State's foreign relations was inherent in the preservation of its sovereignty. Together they constituted an integral whole that should be considered as such when establishing the criteria for granting jurisdictional immunities to State officials; the two should not be treated as discrete criteria.

14. The question of possible exceptions to jurisdictional immunity in the case of international crimes was a difficult and complex issue on which the legal literature appeared to be sharply divided. Although the Special Rapporteur had announced that the issue would be dealt with in his second report, it nevertheless had an unseen presence, hovering over the Commission's debate like some ghost at the banquet. At a previous meeting, Mr. Brownlie had raised some very pertinent issues concerning the scope and extent of exceptions to jurisdictional immunity on the basis of such crimes, and had cautioned against too liberal an approach in extending the boundaries of such exceptions, which could lead to the total disappearance of the whole notion of jurisdictional immunities (2984th meeting above, para. 47).

15. A whole range of complex issues would arise in considering an exception in the case of international crimes, issues which would require the Commission's very careful consideration. Those included such questions as the precise scope of crimes that would constitute such an exception; whether they would consist exclusively of what had come to be generally regarded as "core crimes" under international law, namely genocide, crimes against humanity and war crimes, or whether they would also cover what were referred to as "other crimes of international concern", the precise parameters of which were unclear; the problem of identifying possible *jus cogens* norms establishing such crimes; whether such an exception would also apply to incumbent officials or only to officials whose term of office had expired; and the question of the impact of current developments in the field of international criminal jurisdiction, which, however, constituted a distinct category that fell outside the scope of the current topic. The Secretariat's memorandum, particularly in its paragraphs 193 to 212, provided extremely useful material for the Commission's future consideration of those difficult issues.

16. While there was certainly a tension between contending principles in dealing with an exception to immunity from criminal jurisdiction in respect of international crimes, he would hesitate to approach the issue from the somewhat restrictive standpoint of declaring oneself to be categorically either for or against immunity or impunity. However difficult the task might be, the Commission must aim to strike a delicate balance between the possible recognition of carefully defined exceptions, on the one hand, and preserving the essence of jurisdictional immunities essential for the conduct of international relations, on the other. The Commission would await with interest the Special Rapporteur's treatment of that issue in his second report.

17. Lastly, on the issue of exclusions from the scope of the topic, he shared the doubts expressed by the Special Rapporteur and several previous speakers as to the advisability of including within the current topic the questions of recognition and of immunity of members of the families of high-ranking officials. From an international law perspective, the immunity of a State official from criminal jurisdiction was based on the well-established principle of the sovereign equality of States. Although the maxim *par in parem non habet imperium* implied that one Head of State or his or her representative entered the territory of another on the implicit understanding that he or she would not be subject to its jurisdiction, that maxim could hardly be said to apply to an unrecognized entity. On the question of family members, he agreed with the view that the basis of the granting of immunity in such cases was essentially international comity rather than international law, and that there was no settled practice in that regard. Consequently, he favoured the exclusion of those issues from the scope of the topic.

18. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent preliminary report, and also the Secretariat for the very useful memorandum it had prepared. As had been noted by the President of the International Court of Justice, Judge Rosalyn Higgins, in her recent address to the Commission, the immunity of State officials from foreign criminal jurisdiction was a topic that was not well developed. The Commission's work in that area would therefore make a particularly significant contribution to the progressive development of international law and its codification.

19. It had been amply recognized in the literature, the case law of national courts and by the ICJ itself, that the immunity of State officials from foreign criminal jurisdiction had as its source international law, especially customary international law, and concerned the legal rights and obligations of States. The right to immunity and the corresponding obligation to respect that right by abstaining from exercising jurisdiction over beneficiaries of immunity were derived from international law. The immunity of State officials from criminal jurisdiction was therefore a legal issue that had important implications for the stability and predictability of inter-State relations and was based on the principle of the sovereign equality of States. Since the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on special missions provided adequate rules concerning the immunity of the respective categories of public officials from criminal jurisdiction, it was not necessary to include those categories in the scope of the current topic.

20. In speaking of immunity from foreign criminal jurisdiction, it would be necessary to define the nature of the concepts of "immunity" and "foreign criminal jurisdiction". It should be stressed that immunity was procedural in nature and did not affect the substantive criminal law of the State in question, neither exonerating its beneficiaries from individual criminal responsibility nor excluding them from the jurisdiction of their State of origin. The State of origin also had the authority to waive the immunity of its public officials. As had been indicated by the Special Rapporteur, the current topic was limited to the

immunity of State officials from the criminal jurisdiction of the courts of other States, but not from the criminal jurisdiction of international courts.

21. The Special Rapporteur had questioned to what extent the distinction drawn in case law and in the literature between immunity *ratione personae* and immunity *ratione materiae* was necessary for the legal regulation of the subject of immunity of State officials from foreign criminal jurisdiction, since the ICJ had not used that categorization in the *Arrest Warrant* case, nor had it been used in the aforementioned conventions on diplomatic relations, consular relations and special missions, or in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Special Rapporteur had noted that the International Law Institute, too, had not used those concepts in its resolution on the topic.²⁷⁰

22. In his view, it was essential to provide a rationale for the immunity of State officials from foreign criminal jurisdiction, since that would have an impact on which public officials would enjoy such immunity. Delimiting its scope was also important, as it would determine whether immunity would be absolute or cover only acts performed in an official capacity. Despite the various reasons cited as justification for granting absolute or personal immunity, which did not distinguish between acts performed in an official capacity and those performed in a private capacity, and which was enjoyed, *inter alia*, by the trio of high-ranking State officials, it was the "functional necessity" theory that appeared to provide the most up-to-date rationale for immunity. Indeed, in the *Arrest Warrant* case, the ICJ had found that immunity should be granted to Ministers for Foreign Affairs in order to ensure the effective performance of their representative functions, as well as to Heads of State and Heads of Government. According to the judgment of 14 February 2002 issued in the *Arrest Warrant* case,

[t]he Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. [para. 53]

23. Moreover, as indicated by the Special Rapporteur, acts performed by a public official in the exercise of his or her official functions were attributable to the State, and such officials enjoyed immunity from jurisdiction for those acts. At first sight, that would seem to cover all State officials, but that concept needed to be developed further, as did the determination of the exceptions thereto. In the case of such functional immunity, public officials bore individual criminal responsibility, in particular for crimes under international law, without prejudice to the responsibility of the State for internationally wrongful acts.

24. Attention had also been drawn to the importance of efforts to combat impunity, and in that context reference had been made to possible exceptions to immunity from criminal jurisdiction *ratione personae* in the case of crimes under international law. The Special Rapporteur,

²⁷⁰ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.* (see footnote 224 above).

in delimiting the topic, indicated that it referred to the immunity of State officials only from foreign criminal jurisdiction, and not from international criminal jurisdiction, in conformity with the instruments of international law on the basis of which that jurisdiction was exercised. As had rightly been noted by Mr. McRae, the reason why the prosecution of international crimes in national courts, as exceptions to immunity, was seen as desirable was that there was as yet no fully functioning international criminal jurisdiction; however, the prospect of the prosecutorial authorities of any country of the world being able to commence criminal proceedings against the high-ranking officials of any State for alleged international crimes was hardly a reassuring thought. Indeed, as he had already indicated, the immunity of State officials from criminal jurisdiction was an important legal question for the stability and predictability of inter-State relations and was based on the principles of the sovereign equality of States. Consequently, a proper balance must be struck between the stability of inter-State relations and the paramount need to put an end to impunity.

25. The need to do away with impunity for the most serious offences of concern to the international community as a whole had prompted that community to respond by setting up courts, such as the International Criminal Court, before which immunity could not be invoked. Continuing to strengthen and to ensure the universality of international criminal jurisdiction would seem to be more important in combating impunity than promoting the prosecution of such crimes in national courts. He eagerly awaited the Special Rapporteur's next report, since it would address, *inter alia*, exceptions to immunity from foreign criminal jurisdiction. Lastly, the Commission should also seize the opportunity to deal with the question of the immunity of the members of the families of persons who enjoyed immunity.

26. Mr. WISNUMURTI commended the Special Rapporteur's comprehensive and thorough preliminary report and the Secretariat's excellent memorandum on the topic. His comments would attempt to address aspects of the report on which the Special Rapporteur had requested members' views. With regard to the relevant sources of the topic, which were comprehensively presented in the report, he endorsed the Special Rapporteur's conclusion that the primary source of the immunity of State officials from foreign criminal jurisdiction was international law and, in particular, customary international law. He also agreed that immunity concerned inter-State relations and had its roots in State sovereignty.

27. Before consideration could be given to the term "immunity", it was necessary to specify what was meant by "jurisdiction". In paragraph 45, the Special Rapporteur had indicated that a distinction should be drawn between legislative, executive and judicial jurisdiction. Legislative jurisdiction concerned the promulgation of laws and regulations, while executive and judicial jurisdiction involved the application and enforcement of the law. He could agree with the Special Rapporteur's suggestion in paragraph 47 that, for the purposes of drafting articles on jurisdictional immunities, the Commission should consider only the executive and judicial aspects of jurisdiction, since the invocation of immunity from foreign jurisdiction was

basically relevant only to the implementation and enforcement of the laws of the State having jurisdiction. He also agreed that the concept of jurisdiction should cover the whole spectrum of procedural actions, since in criminal proceedings, unlike the case with civil executive jurisdiction and civil procedure, the issue of immunity could arise as early as in the pretrial phase. Such considerations were important for determining the extent of immunity.

28. Although, as noted in paragraph 56, there were no definitions of the concept of immunity in universal international agreements, the immunity of State officials from foreign criminal jurisdiction was a rule of international or at least customary international law. Such immunity could be seen at once as a right of the person with immunity not to have the State's jurisdiction exercised over him, and as a duty of the State having jurisdiction not to exercise it. In that connection, he agreed with the Special Rapporteur's suggestion, stated in paragraph 63, that the Commission should consider the advisability of formulating draft articles on the topic, including a provision that defined the term "immunity". Since the issue of jurisdiction was closely linked to immunity, it too should be addressed in the draft articles.

29. Another important point made by the Special Rapporteur was that immunity from criminal jurisdiction was, by nature, a procedural issue, and did not address the merits of the case in question. Immunity from criminal jurisdiction related only to the jurisdiction of judicial and administrative authorities, and did not place the person enjoying it outside the reach of the legislative jurisdiction of the State.

30. Other limitations on State jurisdiction, referred to by the Special Rapporteur in paragraphs 71 to 77, were the "non-justiciability" and "act of State" doctrines. According to the "non-justiciability" doctrine, a court might refuse to pronounce upon the validity of a law of a foreign State applying to matters within its own territory on the ground that to do so would amount to an assertion of jurisdiction over the internal affairs of that State; consequently, the court would not consider the merits of the case. According to the "act of State" doctrine, which related to the act of a foreign State against the right to property of that State, the court considered the merits of the question whether the act of the foreign State was valid. Despite the fact that the "non-justiciability" and "act of State" doctrines were primarily used in the courts of common law systems, those limitations should also be included within the scope of the Commission's study.

31. With regard to the scope of the topic, the Special Rapporteur referred to three parameters: that it concerned, first, only immunity of State officials from foreign criminal jurisdiction and not from international criminal jurisdiction or from national civil or national administrative jurisdiction; second, immunity on the basis of international law; and third, immunity of the officials of one State from the jurisdiction of another State. The Special Rapporteur favoured excluding immunity from *international* criminal jurisdiction from the scope of the topic, stating that such immunity differed fundamentally from immunity from *national* criminal jurisdiction, a difference traceable to their respective origins. At the heart of

the issue of immunity from international criminal jurisdiction was the question of exceptions thereto in cases involving grave crimes such as genocide, war crimes and crimes against humanity. That politically sensitive issue had the potential to disrupt the stability of inter-State relations, which was the very foundation of immunity.

32. Furthermore, there seemed to be no consistency in the decisions rendered by either the international or national courts on the question of whether immunity *ratione materiae* was applicable in respect of international crimes. In the *Arrest Warrant* case, the ICJ had held that immunity from criminal jurisdiction of an incumbent Minister for Foreign Affairs was not subject to any exception in the event of crimes under international law, whereas the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case had found that immunity *ratione materiae* did not exist in respect of crimes under international law. As noted in paragraph 188 of the Secretariat memorandum, at the national level, even recently, domestic authorities had not been unanimous in denying immunity *ratione materiae* to State officials accused of crimes under international law.

33. Viewed from that standpoint, widening the scope of the topic to include immunity from international criminal jurisdiction might complicate the study. That being said, several members considered it necessary to address that aspect of the topic, and the Special Rapporteur had indicated that he would address it in his next report. Because of his own misgivings on the matter and consistent with his view that impunity must not be tolerated, he urged the Special Rapporteur, when addressing that issue, to proceed with the utmost caution in order to strike a balance between the conflicting needs to prevent impunity and to maintain stability in inter-State relations, having regard to the principle of the sovereign equality of all States as set forth in the Charter of the United Nations.

34. As to the question of which persons should be covered by the topic, the Special Rapporteur had suggested that it should deal with all State officials who enjoyed immunity from foreign criminal jurisdiction in respect of acts performed in their official capacity; and that it should not extend to acts performed in their private capacity, or to immunity *ratione materiae* or functional immunity. On the other hand, Heads of State, Heads of Government and Ministers for Foreign Affairs—the so-called “three-some” or “triumvirate”—would enjoy immunity *ratione personae* or personal immunity, extending to acts performed in both an official and private capacity before and while occupying their respective posts. In paragraph 119 of the report, the Special Rapporteur referred to the possibility of extending immunity *ratione personae* to other high-ranking State officials, such as ministers of defence, the rationale being that, in certain cases, a minister of defence performed acts on behalf of the State that he or she represented that were important for the maintenance of international relations and inherent in the sovereignty of that State. In his report, the Special Rapporteur had cited several cases that supported such an extension. He himself saw merit in the argument that, in contemporary international relations, diplomacy was no longer the exclusive preserve of the Minister for Foreign Affairs, and that in addition to the minister of defence, other government

ministers sometimes represented the State in performing diplomatic or negotiating functions in specialized areas, and should accordingly be granted immunity from foreign criminal jurisdiction.

35. That being the case, the Special Rapporteur should take a cautious approach to the issue of extending personal jurisdiction beyond the threesome. As was noted in paragraph 120 of his report, in order to be able to determine which other high-ranking State officials should enjoy personal immunity, it was of the utmost importance that specific criteria for that purpose should first be established, given the wide-ranging scope of immunity *ratione personae*, which extended to acts performed by State officials in their official and private capacity before and while occupying their posts.

36. There was no definition of the term “State official” in international law. Consequently, the Special Rapporteur considered it necessary to define that term for the purposes of the topic or to identify the officials covered by it. That proposal merited consideration. As to the terminology to be used, he himself favoured the term “State official”, which was more neutral than “State representative” or “State agent”.

37. On the questions of immunity of a State not recognized by the State exercising jurisdiction and of a person not recognized as the Head of State, Head of Government or Minister for Foreign Affairs, he was inclined to think that, as those questions were more closely related to the issue of the recognition of States or Governments, they did not fall directly within the Commission’s mandate on the topic, and that it would thus be unwise to include the question of non-recognition in the context of immunity in the present study. However, he would not rule out the possibility that, at a later stage in its study of the topic, the Commission might need to address that question.

38. Lastly, on the question of granting immunity to the members of the families of Heads of State or Heads of Government, the Special Rapporteur had drawn attention to the various positions taken by national courts. As noted in paragraph 114 of the Secretariat memorandum, the question of granting immunity *ratione personae* under international law to the family members and members of the entourage of Heads of State remained an area of uncertainty, and he shared the Special Rapporteur’s doubts as to whether that issue fell within the Commission’s mandate.

39. Mr. VASCIANNIE said that the Special Rapporteur’s preliminary report on immunity of State officials from foreign criminal jurisdiction was a *tour de force*, combining analytical clarity with appropriate respect for the sources of international law so as to provide the Commission with a solid foundation for its future work on an important and increasingly controversial subject. He was also grateful to the Secretariat for its substantial and thoroughly researched memorandum on the topic.

40. Owing to time constraints, he would confine himself to a statement of his views, focusing first on the summary contained in paragraph 130 of the report. With respect to subparagraph (a), he agreed that the topic embraced only immunity from national criminal jurisdiction in foreign

States and did not include immunity rules with respect to international tribunals, immunity from civil jurisdiction *simpliciter* or issues of immunity within the home State. In some instances, however, practice and principles pertaining to international tribunals, civil jurisdiction and the home State might provide useful guidance in formulating rules on immunity from foreign criminal jurisdiction. For that reason, the Special Rapporteur had been right to acknowledge that cross-fertilization might take place, though the degree of cross-fertilization acceptable on particular points would be a matter of judgement. It would therefore be important for the Special Rapporteur to continue determining the circumstances in which rules and principles from international tribunals, civil jurisdiction and home States would be applicable to the topic.

41. He further agreed with the Special Rapporteur that, for present purposes, immunity should be interpreted as immunity from criminal process and criminal procedure, including during the pretrial phase. That issue had been of relevance in the case brought before the ICJ concerning *Certain Questions of Mutual Assistance in Criminal Matters*. He was inclined to the view that immunity of process also included immunity from interim measures of protection or measures of execution, a question touched upon by the Special Rapporteur in paragraph 70 of his report. The Special Rapporteur was also correct to proceed on the basis that the immunity under consideration was immunity from executive and judicial jurisdiction.

42. In paragraph 63, the Special Rapporteur noted that the issue of jurisdiction would have to be taken up. As Mr. Brownlie had indicated, that was particularly true of the question of universal jurisdiction. As certain issues of universal jurisdiction also arose in the context of the topic of the putative obligation to extradite or prosecute (*aut dedere aut judicare*), the matter called for the Commission's systematic attention.

43. With regard to subparagraph (b) of the summary, he was of the opinion that the topic should cover all State officials, in one way or another. With respect to subparagraph (c), it therefore followed that it would be necessary to identify the persons enjoying immunity and therefore to define the concept of "State official". As for subparagraph (d), the authoritative statements made during the Commission's deliberations showed that the Special Rapporteur would need to give further consideration to the extent of the circle of high-ranking officials who enjoyed personal immunity by virtue of their posts. At least two points were debatable in that connection: first, whether Heads of Government and/or Ministers for Foreign Affairs should have personal immunity; and, secondly, whether other officials such as ministers of defence, or Vice-Presidents responsible for foreign affairs, should be assimilated in that category.

44. He was of the view that, notwithstanding the apparent lack of practice in that area, the majority approach in the *Arrest Warrant* case could be accepted by the Commission as *lex lata*. In the first place, while he would not support uncritical acceptance of decisions, even those of the ICJ, considerable weight should be attached to a pronouncement by the Court that a rule of international law was "firmly established". Although Judges Higgins, Kooijmans

and Buergenthal, in their much-cited joint separate opinion had expressly departed from the Court's conclusion that the beneficiaries of personal immunity went beyond Heads of State, they were, together with Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert, who had expressed dissenting opinions, in the minority.

45. Secondly, the decision in that case was fairly recent, and it was hard to argue with force, as some had tried to do, that subsequent developments in the law were of sufficient significance to warrant a shift from the majority perspective of the Court. He noted in passing that the notion of complementarity in the context of the Rome Statute of the International Criminal Court did not necessarily imply that leaders must be subject to the criminal jurisdiction of a foreign State; it could, however, be construed as referring to the home State's right to try its own nationals and as giving it the option of trying its leaders or surrendering them to that Court. Hence the notion of complementarity in the context of the Rome Statute did not necessarily lead to the conclusion that leaders were subject to criminal jurisdiction in jurisdictions other than that of the home State.

46. The third reason why the Commission should support the majority view in the *Arrest Warrant* case was that the Court's conclusion that personal immunity was to be granted to Heads of Government, Ministers for Foreign Affairs and certain other officials was not arbitrary. The minority view in that case built on the proposition that the entitlement to personal immunity for the Head of State derived from the idea that he or she personified the State. However, the notion of personification was simply a metaphor; in the context of foreign relations, the Head of Government, the Minister for Foreign Affairs and other high-ranking officials with foreign affairs-related duties might also be regarded as embodiments of the State in much the same way as was the Head of State. Some people liked to refer to the works of Shakespeare; in *Hamlet*, the eponymous protagonist had, as Prince, been as much the representative of the State of Denmark as his father had been before him.

47. There remained the important issue of practice. In the *Arrest Warrant* case, Judge Al-Khasawneh had referred to the "total absence of precedents" regarding the personal immunity of Ministers for Foreign Affairs. That point had also been taken up by some members of the Commission. In his view, that issue turned in part on the identification of the relevant items of practice. While national legislation would provide some guidance, it might nevertheless be open to divergent interpretations.

48. In paragraph 127 of the Secretariat memorandum, it was noted that "[t]he national laws that explicitly contemplate the immunity of the head of State generally do not contain a similar provision applying to the head of government or minister for foreign affairs" (A/CN.4/596). Although that could be taken as evidence that personal immunity was limited to Heads of State, it was not in any way conclusive. For one thing, the memorandum cited only State immunity acts of Australia and the United Kingdom in support of what was characterized as the general position. More legislation needed to be examined in order to justify the drawing of such a general conclusion. For another, even if most States' legislation

expressly limited personal immunity to Heads of State, that would not be conclusive because other forms of State practice would need to be considered.

49. More importantly, in assessing the personal immunity question, it had to be asked why the positive State practice was so scarce. Some States might simply not have passed legislation on immunity for Heads of Government, Ministers for Foreign Affairs or others because they had taken it for granted that a customary law rule of restraint already existed. Some States might have assumed the existence of a rule of immunity for Heads of Government, Ministers for Foreign Affairs and others and have left it for their courts to affirm that rule through judicial decisions. States might also have taken it for granted that the absence of convictions in that area was itself strong evidence in favour of personal immunity for Heads of Government, Ministers for Foreign Affairs and other high-ranking officials. Accordingly, the majority approach in the *Arrest Warrant* case could be accepted as a statement of the *lex lata*.

50. While noting the Special Rapporteur's suggestion in paragraph 130 (e) that an attempt should be made to determine which other high-ranking officials in addition to the "threesome" should have personal immunity, he considered that the point at issue was in fact whether any others should be added and, if so, which ones. In that connection, he was inclined to support the position taken by Mr. Perera.

51. With reference to subparagraph (f), he shared the Special Rapporteur's view that the questions of recognition and of the immunity of family members of high-ranking officials could be omitted from the topic.

52. Lastly, on the question of international crimes and, in particular, whether and to what extent immunity should shield perpetrators of international crimes from the jurisdiction of national courts, the Special Rapporteur had announced his intention of dealing with those matters in due course. Meanwhile, Mr. Dugard and others had brought some important considerations to the fore.

53. On the one hand, there was a strong case for ensuring that government leaders could not act with impunity, especially in respect of heinous crimes recognized as such by the international community. For those purposes, government leaders would include Heads of Government, Ministers for Foreign Affairs, other high-ranking officials and even Heads of State, where they exercised executive functions. That approach would promote the recognition of core community values, for example in the area of human rights, and would provide practical means of implementing those values through local courts. If that line were taken, implicitly or explicitly, concepts such as sovereignty and non-interference, together with their subspecies acts of State, non-justiciability and the political question doctrine, should not serve as a shield for grave wrongdoing.

54. On the other hand, the waiver of high-ranking officials' immunity from criminal jurisdiction could be problematic. First, there was the issue of equality, to which Mr. Brownlie had drawn attention. If foreign courts were

given broad jurisdiction over international crimes, with no scope for immunity, the system could easily become one in which judges in more powerful countries could bring political leaders from weaker countries to trial, while in practice there would be no reciprocity. If that were to happen partly as a result of the approach taken by the Commission, a charge of double standards would be levelled in predictable directions.

55. Moreover, a scheme in which foreign high-ranking officials could be tried in domestic courts would undermine the stability of the international system. Reprisal prosecutions would be possible in some instances, and there could be an escalation of tension between States, particularly when proceedings against foreign leaders were perceived to be motivated primarily by political considerations.

56. Other objections might also be briefly anticipated. Some States might recall the language of Article 2, paragraph 7, of the Charter of the United Nations and suggest that, in most instances, trials in a foreign country for crimes committed in the home State appeared to conflict with the idea of the "reserved domain" of States. Others might suggest that the trial by the strong of the weak reflected neocolonial tendencies, or at least a peculiar kind of victors' justice. The fact that in some countries courts had jurisdiction regardless of how the accused had come within its jurisdiction might kindle fears that attempts might be made to secure the extraordinary rendition of high-ranking officials. In short, the removal of immunity *ratione personae* was susceptible to significant abuse.

57. The Special Rapporteur would therefore face a difficult challenge. His own view was that personal immunity for Heads of State, Heads of Government, Ministers for Foreign Affairs and a defined category of other high-ranking officials should be favoured. Leaders who committed international crimes should be subject to international tribunals, such as the International Criminal Court, and to the courts of their home jurisdiction.

58. Mr. NOLTE said that the Special Rapporteur's preliminary report combined a mastery of detail with a methodical approach, providing clear definitions and raising pertinent questions, thereby already indicating the direction the Commission's work should take. Together with the Secretariat's very thorough memorandum, it constituted an excellent basis for the Commission's discussions.

59. Beginning with a few general observations, he said that a number of speakers had launched what he was tempted to term a pre-emptive strike, by calling the judgment of the ICJ in the *Arrest Warrant* case "a disaster", or by suggesting ways in which the Special Rapporteur should take into account modern trends in human rights law and the goal of combating impunity. Some speakers had asserted that the Special Rapporteur was playing Hamlet without the Prince, and had called for a more open attitude to the "really important issues". However, he himself considered that it was not fruitful to preface the discussion with such statements, because they tended to narrow the debate prematurely and to oversimplify it. In consideration of the topic, due heed would have to be

paid to some of the most important principles of international law and contemporary international policy. He assumed that it was because of the importance of the topic that the Special Rapporteur had started with an analysis of the legal basis for immunity and had not yet tackled the issue of possible exceptions. In view of its great significance, members must be prepared to consider all the relevant aspects of the topic. Such an open-minded approach called, first, for an analysis and description of the primary purposes of immunity, since that offered the sole basis for assessing countervailing trends and balancing competing goals in order to determine the degree and scope of possible exceptions.

60. The discussion thus far had not concentrated sufficiently on the basic reasons for granting State officials immunity from foreign criminal jurisdiction in the first place. Those reasons were often stated in rather abstract terms and they sounded either somewhat old-fashioned: sovereign equality, *par in parem non habet imperium*, representation of the State, stability and predictability of inter-State relations; or else rather technocratic, for example, the necessity of immunity for the performance of State functions. When formulated in those terms, those reasons might sound rather weak, especially when set against reasons embodying such substantive values as human rights and the need to combat impunity. At the current stage it was, however, vital to clarify the substantive values underlying the abstract and apparently technocratic terms by which immunity was usually justified. Mr. Vasciannie had taken a few steps in that direction, and Mr. Brownlie had reminded the Commission that sovereign equality was designed to ensure that strong States did not treat weak ones unfairly. He would add that the stability of inter-State relations was not just important in securing technical cooperation between Governments, but was also essential for securing the human rights of individuals and, in some situations, for ensuring that force was not used within and between States. The rules on immunity therefore protected not only the “egoistical” sovereign interest of a particular State, but also the very community values that were safeguarded by human rights and by the principle that there should be no impunity for international crimes. The Special Rapporteur had alluded to those interests, in paragraph 96 of his report, but they deserved more emphasis as collective goods.

61. Turning to the distinction between national and international criminal jurisdiction, he agreed with the stress placed on that distinction in paragraph 44 of the report. Since the jurisdiction of international criminal tribunals derived from agreements between the States concerned, there could be no justification for immunity from that jurisdiction. That also meant, however, that developments in the field of international jurisdiction could not be used as an argument in support of restricting immunity before national courts. For example, the judgment of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case could not be regarded as a precedent for purely national criminal jurisdiction. If any conclusions were to be drawn from the existence of international criminal jurisdiction, they should go in the direction of confirming the immunity of State officials from another State’s criminal jurisdiction, the reason being that the growth and entrenchment of international criminal

jurisdiction would make it unnecessary for third States to assume criminal jurisdiction over State officials in order to combat impunity.

62. His last general point was that modern developments must be taken into account in a comprehensive rather than a selective manner. He had therefore been rather concerned at the assertions of some members that the judgment of the ICJ in the *Arrest Warrant* case had “interrupted” a trend towards the recognition of a new exception to immunity in cases involving international crimes or grave human rights violations. He had the impression that this assertion owed more to a particular interpretation of the significance of the decisions in the *Pinochet* case than to what they actually stood for if analysed critically. Even if they constituted a new trend, history did not always go in a straight line, but took twists and turns. Why should the judgment of the ICJ not be the expression of another equally legitimate and even more recent countervailing trend, stemming from the experience of different jurisdictions since the *Pinochet* case? Perhaps those jurisdictions had weighed the pros and cons of according such an exception and had concluded, explicitly or implicitly, that the time was not ripe for allowing a new exception, or that countervailing reasons prevailed. The general trend of national and international case law since the *Pinochet* case should not be played down, but rather it should be taken seriously, for it might be based on valid considerations. Excessive importance should not be attached to exceptions to that general trend, or to certain individual dissenting voices, merely because they happened to coincide with a widespread moral and political perception.

63. Turning to more specific points, he agreed with the view expressed by the Special Rapporteur in paragraph 83 of the report that, while it might be appropriate to distinguish between immunity *ratione personae* and immunity *ratione materiae* for analytical purposes, it was questionable whether that distinction was necessary for the legal regulation of the subject of immunity. He took that comment to mean that, as practising lawyers, the members of the Commission should not lose sight of the common purpose underlying those two seemingly different forms of immunity. That common purpose was the protection of State officials’ functions, irrespective of whether they were limited or whether they extended to the representation of the State at the international plane—in other words what the Special Rapporteur called the “mixed functional/representative rationale” of immunity *ratione materiae*. But, naturally, a State alone could not define which of its officials had a wide representative role; such a definition must depend on a shared understanding on the part of the international community, an understanding that was not frozen in time but would evolve in parallel with changes in the external and representative functions of certain officials. He therefore saw no contradiction in the fact that there might be a tendency simultaneously to expand both the immunity of certain State officials and exceptions thereto, since the two tendencies were not mutually exclusive. In theory, in the *Arrest Warrant* case, the ICJ could have found that Ministers for Foreign Affairs in principle enjoyed immunity *ratione personae*, except in cases of prosecution for genocide. The reason why the Court had not followed that line of reasoning might have had to do with the inherent persuasiveness of the analogy of Head

of State with Minister for Foreign Affairs in terms of their representative function, as compared to the much more difficult task of establishing an exception for international crimes. That, however, was a question that the Commission should examine at subsequent sessions.

64. He concurred with the Special Rapporteur that, in principle, all State officials should be considered within the context of the topic, but that must not be taken to imply that all persons regarded as officials by a particular State must be recognized as State officials for purposes of enjoying immunity from criminal jurisdiction. There were two ways of narrowing down the definition of the category in question. The first would be to consider only those persons who exercised powers intrinsic to the State, thereby excluding the vast majority of State officials whose work could be performed equally well by the private sector, or who did not have the instruments of State power at their disposal. That category would include most officials working in the sectors of education, health, inland transport, telecommunications, water, gas and electricity. Since the Court of Justice of the European Communities had developed a similarly narrow concept of “public service” in the admittedly different context of the right to freedom of movement within the European Union, in considering what the term “State official” essentially meant, the Special Rapporteur could perhaps draw some inspiration from that case law, as it reflected the functional approach which formed the basis of the law of immunity. That would make it possible to narrow down somewhat the wider notion of “State official”, which the Special Rapporteur had drawn from article 4, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts,²⁷¹ without detriment to the basic principle of the protection of the function.

65. A second way of narrowing down the concept of State officials entitled in principle to immunity could be to identify certain groups of officials who would form an exception because in State practice they were not generally considered to benefit from immunity. For example, soldiers who were prisoners of war did not usually benefit from immunity if they were charged with war crimes. Perhaps, however, that exception was limited to certain crimes and did not affect the principle whereby soldiers, as public officials, normally enjoyed immunity, in which case it should be dealt with in the context of possible substantive exceptions to immunity.

66. As for the group of persons enjoying immunity *ratione personae* because they were considered to represent the State as such, he agreed with the Special Rapporteur that it should comprise the trio of Head of State, Head of Government and Minister for Foreign Affairs, whose immunity was recognized in customary international law. The Commission should not address the question of whether other State officials, such as ministers of defence, enjoyed the same immunity. However, while the Commission should not encourage an extension of that category, neither should it exclude possible developments, or insights derived from specific cases. In his opinion, in the *Arrest Warrant* case the ICJ had plausibly recognized

that the rationale for immunity *ratione personae* applied equally well to Ministers for Foreign Affairs. That principle had not been explicitly recognized hitherto, nor, however, had it been explicitly challenged. On the other hand, it would be going too far to interpret paragraph 51 of the judgment in that case as recognizing that immunity *ratione personae* covered more than the trio. The decisions in the *General Shaul Mofaz* and *Bo Xilai* cases, concerning the Israeli Defence Minister and the Minister of Commerce of the People’s Republic of China respectively, might quite legitimately have had a different outcome in other national jurisdictions. In any case, the deciding factor must be, not the importance that the State ascribed to the post of the official concerned, but rather the international community’s recognition of, and mutual assumptions regarding, the importance of a particular post for the exercise of public functions and in particular for the representation of the State as a whole.

67. He concurred with the Special Rapporteur that the issue of recognition was part of the wider topic of the effects of recognition in general, and should be alluded to only by way of a “without prejudice” clause. In his opinion, however, it would seem to follow from the general principles of *bona fides* and legitimate expectations that if a State recognized an entity as a State and that entity met the usual criteria for statehood, the recognizing State must accord immunity to the officials of that entity.

68. He had no firm preferences on how to deal with the issue of family members of persons enjoying immunity *ratione personae*. He suspected that the matter was inextricably bound up with the topic under consideration and unconnected with any other topic, in which case the Commission should try to tackle it. The Special Rapporteur had already mapped out a good approach in that regard in paragraphs 125 to 129 of his report.

69. He agreed with the conclusions to chapters I to III of the report as summarized in paragraph 102 and with the conclusions to chapter IV as summarized in paragraph 130. His only suggestion would be to delete the word “primarily” in paragraph 130 (d) in order to avoid any suggestion that the Commission held that more officials than the trio already enjoyed immunity *ratione personae*.

70. Mr. BROWNLIE said that the Special Rapporteur had quite rightly reserved the question of international crimes for his next report. As a way of organizing the relevant material and evidence of the legal position, that was perfectly defensible. His own earlier statement on the topic, however, seemed to have fostered the unfortunate assumption that the rubric of international crimes concerned a set of issues substantively different from those concerning such crimes considered within the ambit of municipal jurisdictions. In the *Pinochet* case, no counsel—either for General Pinochet, the Government of Spain, the Government of Chile, Amnesty International or the other six interveners—had considered such a distinction to be of great importance. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others, had been regarded as evidence of the content of the applicable law, which was general international law. Another important issue considered was to

²⁷¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42, especially paragraphs (11) and (13) of the commentary, p. 42.

what extent the relevant international law had actually been incorporated in the legislation of the United Kingdom. He did not think there was a substantive difference between international crimes and other types of crimes: the fact that international tribunals were organizationally separate from municipal courts created a degree of confusion. The real issue was what kind of evidence the Convention against Torture and similar standard-setting conventions provided on the issue of immunity.

71. Mr. HMOUD said that the decision of the ICJ in the *Arrest Warrant* case was multifaceted. While the Court had stated that Ministers for Foreign Affairs enjoyed immunity from foreign jurisdiction under general international law while they were in office, it had also stressed that impunity was not to be condoned and that, once they left office, Ministers for Foreign Affairs lost their immunity. Aside from the trio who performed essential functions, there was no general immunity for State officials. The ICJ had intended for there to be some leeway for confronting impunity, as demonstrated by the fact that it had not addressed the question of functional immunity. He therefore did not think the Commission need necessarily go against the Court on the issue of immunity: some exceptions could be found within the confines of general international law.

72. On Mr. Vasciannie's remark concerning complementarity, he pointed out that article 27 of the Rome Statute of the International Criminal Court provided that the Statute applied to all persons without any distinction based on official capacity as a Head of State or Government; and article 98, paragraph 1, stipulated that the Court could not proceed in a manner that would require a State to act inconsistently with its obligations under international law.

73. Ms. JACOBSSON, responding to Mr. Nolte's remarks, said that, to the best of her recollection, only Mr. Pellet had described the decision in the *Arrest Warrant* case as disastrous. Others had viewed the case from different perspectives. She herself had simply said that the Commission should not be prevented from discussing the case. Mr. Dugard had pointed out that the Commission had already, on other occasions, taken a position that was not identical to that of the ICJ. The Commission had not only the procedural right but also the duty systematically to address the implications of important decisions such as the one in the *Arrest Warrant* case and to keep an open mind when doing so. Where its analysis would lead the Commission, she did not know: perhaps it would come to the conclusion that the *Arrest Warrant* decision had been flawed. That, however, remained to be seen.

74. Mr. PELLET said that what he had called a trend could not simply be reduced to the *Pinochet* case. That decision was not the only ruling that attested to an evolution in recent years, the *Gaddafi* [Qadhafi] case in France being another example among several. He agreed with Ms. Jacobsson that there was no reason to treat all the decisions of the ICJ with unquestioning reverence.

75. Mr. Hmoud's remark about there being leeway for interpretation of the Court's decision was not quite accurate: unfortunately, there was precious little leeway, the

decision having been very clear about the main point, namely that absolute immunity existed, at least for Heads of State, Heads of Government and Ministers for Foreign Affairs. The sole point on which there was room for interpretation was whether leaders other than that threesome could be deemed to have personal immunity.

76. The core of the debate was what the grounds for immunity were. Were they that a person represented the State—in other words, was the incarnation of the State—in which case almost any official could have immunity, an outcome that he would consider catastrophic? Or were they, as the Court had found in the unfortunate *Arrest Warrant* decision, that absolute immunity was necessary for the purposes of the international relations of the State? The question was clearly posed in the preliminary report, and the Commission would need to take a position on it, as it would have a bearing on many other aspects of the topic. Personally, he was prepared to accept only the latter grounds for immunity.

77. Last but not least, he did not wholly agree with Mr. Brownlie's remarks about crimes. International crimes differed: first there were ordinary international crimes such as piracy; then there were the most serious international crimes in respect of which impunity was intolerable, which according to the draft code of crimes against the peace and security of mankind numbered five,²⁷² although he himself had staunchly advocated limiting their number to four. Lastly, there were grave violations of obligations arising from peremptory norms of general international law. That lengthy periphrasis was simply a way of speaking about international crimes without naming them as such, derived from article 19 of the draft articles on State responsibility as adopted on first reading.²⁷³ He did not think it was taboo to speak of international crimes. He had always argued that one of the consequences of grave violations of obligations arising from peremptory norms of general international law was that those who committed such violations could no longer hide behind the State: their individual responsibility came to light. That was a coherent approach to grave violations. Such violations were of concern to the international community as a whole and an affront to the conscience of humanity. According immunity in that context would be repugnant and intolerable, and if that complicated a State's international relations somewhat, that was simply too bad.

78. Mr. NOLTE, responding to Mr. Brownlie's and Mr. Hmoud's remarks, said he suspected there was less of a difference of opinion than might appear to be the case. His earlier statement had been about the competence of international criminal jurisdiction in relation to national criminal jurisdiction. The *Pinochet* decision dated back nearly 10 years; when it had been adopted, the International Criminal Court had only just been negotiated. More consideration now had to be given to coordination between the nascent global international criminal jurisdiction and national jurisdiction. He fully agreed with Ms. Jacobsson on the need for open-mindedness. No one had advocated unquestioning reverence for the *Arrest Warrant* decision, but some had adduced reasons why the decision could be seen as correct. It was true that the *Pinochet* decisions

²⁷² *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

²⁷³ *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*, para. 34.

were not the only relevant ones; recent decisions by the House of Lords, for example, went in a direction that was diametrically opposed to that of *Pinochet*. The Commission needed to identify what was the dominant trend, and for what reasons, and what—perhaps for better reasons—was the minority trend. Lastly, he was thrilled to hear that for Mr. Pellet, the *Arrest Warrant* decision was no longer disastrous: it was now merely unfortunate.

79. Mr. PETRIČ said that much had been said both for and against the *Arrest Warrant* decision. The Special Rapporteur should continue to follow the balanced approach he had used so far, whereby he took case law into consideration. Case law, however, did not create the law, even though it had an important impact on the law, and the Commission was not obliged to be bound by it if its reasoning or its observations of State practice led it in a different direction.

80. Mr. HMOUD, clarifying his position on the *Arrest Warrant* case, said his point had been, not that there was room for interpretation, but rather that there was room to address international crimes from three different standpoints: the category of official; the time frame, i.e. the period during which the official was in the service of the State; and the distinction between personal and functional immunity.

81. Ms. XUE said that the preliminary report presented a wealth of research materials, raised pertinent issues that States frequently encountered in practice, contained clear and thought-provoking analysis and was extremely enjoyable reading. She also wished to pay tribute to the Secretariat for its helpful research paper.

82. On the general issues that the Special Rapporteur wished the Commission to consider, firstly, she agreed with his general approach. Given recent developments in international criminal law and the rising number of controversial prosecutions of foreign officials in domestic courts, the topic of immunity of officials from foreign criminal jurisdiction was of practical importance as well as theoretical relevance. The Commission's decision to take up the topic was therefore timely. The question of immunity was one of the classic areas of international law, touching on some fundamental aspects of international relations. Both in law and in practice, it presented constant concerns for States. The analysis carried out by the Commission and the Institute of International Law justified the Special Rapporteur's conclusion that immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law. The Commission's first task should be to codify the law so as to ascertain the extent of the immunity that State officials enjoyed in a foreign court where a criminal charge had been laid against them. That did not mean, however, that the Commission's exercise involved only codification and excluded progressive development. The question was not merely a policy issue, but also a legal matter. How far the Commission should go in developing the law largely depended on how the conflicting legal interests underlying the topic could be reconciled with a view to maintaining stable international relations. In that regard, she welcomed the cautious approach adopted by the Special Rapporteur.

83. While agreeing in principle with the general thrust of paragraph 102 of the report, she wished to emphasize a few points. First, in looking for evidence of customary international law, the Commission should, of course, take into account the judicial decisions of national courts. In analysing those cases, however, it should carefully ascertain to what extent those national judgements reflected generally accepted international practice and *opinio juris*. As the immunity issue had a direct bearing on international relations and sovereign rights and interests, it was essential to study the general practice of States—a point just made by Mr. Petrič.

84. Secondly, given the object and purpose of the topic, the analysis of immunity must be confined to the procedural aspects of foreign criminal jurisdiction, including measures taken in the pretrial phase. While leaving aside the substantive law of foreign States was acceptable, that did not mean that the Commission endorsed those national legislations that established unlimited universal jurisdiction. Such extraterritorial jurisdiction in criminal matters, even in the case of the most serious international crimes, was questionable under international law.

85. Thirdly, paragraph 102 (f) stated that immunity from criminal jurisdiction meant immunity only from executive and judicial jurisdiction. That statement was rather sweeping and could only be accepted in context and for the purposes of the present topic. When a person was entitled to jurisdictional immunity under international law, such immunity extended to legislative jurisdiction as well, including substantive law in criminal matters. In other words, *certain* substantive criminal law did not apply to such persons. Exemptions from the law were primarily of a substantive nature. Although that was a minor technical point not directly related to the issues under the topic, it would be better to clarify it. For that very reason, she agreed that diplomatic and consular immunities should be left aside, as they were regulated by special regimes.

86. As for the bases of immunity of State officials from criminal prosecution, she agreed with the Special Rapporteur that both immunity *ratione personae* and immunity *ratione materiae* should be considered. In practice, however, it was difficult to draw a line between the two categories. The rationale applicable to the trio also applied to other high-ranking officials. She was inclined to accept the suggestion that criteria containing both representative and functional elements should be adopted, including, *inter alia*, the official status of the person, the purpose and nature of the visit, and the legal status granted by the host country. In principle, family members could be excluded from the scope, but immediate family members accompanying the Head of State, Head of Government or Minister for Foreign Affairs during the visit should benefit from certain immunities, given their functions in the context of the mission. That, however, was an open question that merited further consideration.

87. As for the more controversial issue of whether there should be any exceptions to the rule of immunity of State officials, the primary rationale for exceptions was linked to the question of whether a foreign court could exercise criminal jurisdiction over State officials for allegedly committing serious international crimes such as torture,

crimes against humanity, war crimes and genocide. At first sight, it seemed rather difficult to reject that idea. However, it was the legal rather than the policy aspects of the matter that required deeper study. Apart from the question of equality, a point raised by Mr. Brownlie, the question of criminal justice was also relevant: in such cases, the legal standards of fair trial and due process could scarcely be guaranteed, as judicial assistance and collection of evidence were hard, if not impossible, to ensure. For the most part, such proceedings were used to serve political purposes rather than to pursue criminal justice. If exceptions were permitted, no matter how the terms were defined, the rule of immunity could easily be set aside because legal charges were likely to be brought against State officials on those grounds simply for purposes of jurisdiction. Consequently, improper legal proceedings against State officials, instead of being checked, would grow more frequent, a situation which was certainly not conducive to maintaining stable international relations. She did not agree with some of the criticisms of the judgment of the ICJ in the *Arrest Warrant* case. Most States appeared to have welcomed the decision because it clarified the rules in that area, even though some issues might have been left in abeyance. The Court had performed a useful service to the international community by directly addressing a very difficult legal issue.

88. Her second point was that immunity from foreign criminal jurisdiction did not mean impunity. The notion that certain States were entitled to act on behalf of the international community had always proved to be problematic in international relations because the basis of its legitimacy could be challenged. While serious international crimes had become the general concern of all States and the concern of the international community as a whole, legal process should be regarded as one of the means available to prevent and punish such crimes. Since the *Pinochet* case, legal practice in that field had developed further, and the Commission should look not only at what had been said, but also at what States were actually doing. In the consideration of any possible exceptions to the immunity rule, the questions of equality, due process (both substantive and procedural) and legitimacy were important and difficult issues that the Commission should not overlook.

89. One of the legal corollaries of recognition was the granting of sovereign status to the recognized State, which then enjoyed immunity from the jurisdiction of the recognizing State. In deciding whether to grant judicial immunities, national courts often had first to look at recognition issues, whether the entity in question was a sovereign State or a Government. In most cases, the matter came up only in bilateral relations, but sometimes the decisions of international organizations on recognition might be involved. Although directly linked, the question of recognition and the rules of immunity belonged to separate legal regimes under international law. The Commission should not become embroiled in a consideration of the substance of recognition, in other words of the question of whether recognition had been properly granted under international law. The approach taken by the Institute of International Law in its 2001 resolution, namely the use of a "without prejudice" clause, could be adopted.

90. Mr. SABOIA commended the quality and clarity of the Special Rapporteur's preliminary report and also expressed appreciation of the Secretariat's excellent memorandum. He proposed to focus on particular issues regarding which views had diverged or the Commission's opinion had been sought.

91. Basically he agreed with the points made in the summary of chapters I to III of the report, contained in paragraph 102. However, in subparagraph (a), besides international law, relevant national court decisions should also be mentioned as a source of immunity of State officials. The decisions of the House of Lords in the *Pinochet* case, referred to by the Special Rapporteur and dealt with in the Secretariat memorandum, were particularly important and deserved further in-depth consideration at an appropriate stage in the study. The reasons were twofold: it was an area of international law that, in her recent address to the Commission, the President of the International Court of Justice had recognized as being relatively underdeveloped; furthermore, it concerned the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which placed obligations on States parties concerning the exercise of jurisdiction that were relevant to the question of immunity and possible exceptions thereto. In that connection, contrary to what was stated in paragraph 63 of the report, it might be necessary to consider the issue of universal criminal jurisdiction, particularly with regard to its implications for the immunity of former office holders.

92. Turning to the summary of chapter IV of the report, contained in paragraph 130, he agreed with the points made in subparagraphs (a) and (c). However, he had doubts regarding the suggestion made in subparagraph (b) that the topic should cover all State officials. He understood that the issue at stake was functional immunity, yet, as immunity created an obstacle to the exercise of criminal jurisdiction, it should be strictly limited to cases in which the function was relevant to inter-State relations.

93. He endorsed the view set forth in subparagraph (d), that incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs were recognized holders of personal immunity, because of their representative status and the essential role they played in international relations. There might be some justification for extending the category in the light of the increasingly important role played in international affairs by other high-ranking officials, such as ministers holding other portfolios and Presidents of Parliament and the Supreme Court who, in Brazil for example, sometimes deputized for the President. Nevertheless, he would prefer to retain the current category as it stood, possibly allowing for some degree of ambiguity, without embarking on the difficult exercise of defining other categories or criteria that more often than not depended on national legislation. In that connection, it might be relevant to bear in mind that, in Brazil and other countries, it was not uncommon for other high-ranking officials to travel abroad as members of missions or on official bilateral visits, usually preceded by official exchanges between the States concerned. Such officials might therefore be granted immunity on other grounds.

94. Concerning subparagraph (f), he agreed that the issue of recognition should be dealt with only insofar as it was relevant to the topic. However, it would be useful to consider the question of the immunity of family members of high-ranking officials, so as to establish the possible grounds for immunity and limits to the granting of immunity to such persons as an obligation. An analogy could be found with diplomatic immunities, which were normally granted only to immediate family members, including children up to a certain age, who resided with the diplomatic agent concerned. In other circumstances, favourable treatment was sometimes granted as a matter of courtesy and reciprocity.

95. The Special Rapporteur has asked whether, in handling the topic, the Commission should remain within the domain of *lex lata*, as expressed, for instance, in the judgment in the *Arrest Warrant* case, or should go beyond it and, recognizing the current trend and the interests of the international community in combating impunity in the case of the most serious international crimes, should try to establish a basis for exceptions to the rule of immunity. In the light of his own attachment to and previous work in the field of human rights, he was in favour of working, by way of progressive development, towards establishing exceptions to and limitations on the granting of immunity in the case of serious international crimes such as genocide, crimes against humanity and war crimes. There were legal grounds for moving in that direction, as illustrated by the material examined in paragraphs 141 to 153 of the Secretariat memorandum and the comments of Mr. Dugard, Ms. Escameia, Ms. Jacobsson and Mr. Pellet.

96. Nonetheless, the role played by immunity from criminal jurisdiction of State officials, particularly high-ranking ones, in guaranteeing the stability of inter-State relations and respect for sovereignty and non-intervention could not be underestimated. As stated in the joint separate opinion of Judges Higgins, Kooijmans and Buergethal in the *Arrest Warrant* case, it was a question of a balancing of interests: on the one hand, there was the interest of the community of mankind to prevent and stop immunity for perpetrators of grave crimes against its members; on the other hand, there was the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. He counselled caution in seeking the right balance. It seemed unrealistic to propose exceptions to the immunity from criminal jurisdiction of foreign States enjoyed by incumbent high-ranking officials, given their special representative status and functional positions. There might, however, be grounds for exceptions in the case of former office holders and State officials of other levels whose involvement in serious international crimes and crimes subject to clauses establishing universal jurisdiction was sufficiently substantiated.

97. Mr. McRae had hinted at a possible middle way whereby the search for exceptions to immunity could be linked to the process of strengthening international criminal jurisdictions, a suggestion which, although attractive, needed to be further elaborated. Mr. Hmoud had pointed to the need to reconcile the principle of immunity with the challenge posed by the growing importance attached to international efforts to combat impunity. He shared the

concerns expressed regarding the need to make progress in reducing the scope for impunity in the case of serious crimes, while taking into account the different factors and principles at play.

98. In conclusion, he thanked the Special Rapporteur for a report that had prompted a lively debate. He hoped that the second part of the preliminary report would shed light on other aspects of the topic, including possible exceptions to immunity from foreign criminal jurisdiction.

99. Mr. DUGARD said that the debate on the topic had been fruitful and it had become clear that the principal issue at stake was the immunity of senior government officials from national criminal jurisdiction where international crimes were concerned. Although views had diverged on the *Arrest Warrant* case, there seemed to be general consensus that the judgment was not beyond criticism and might be in need of reappraisal. He looked forward to the second part of the Special Rapporteur's report for a thorough examination of judicial decisions and national legislation. All members who had spoken thus far had pointed to the need for consensus and a balanced solution to the problem.

100. Mr. BROWNLIE endorsed the general assessment of the situation given by, amongst others, Mr. Dugard and Mr. Petrič. All relevant material should be given due consideration and it was not particularly helpful to assert that some material was seriously impaired. He had not invoked the *Pinochet* case at any stage in the debate to support a particular point of view; when he had first raised the matter, he had pointed out that the other senior municipal courts had taken a different line on it. The *Pinochet* case remained important: it had been argued twice by fairly senior international lawyers, and the level of debate had therefore been high. He had been glad to see that the Secretariat memorandum had taken the decision very seriously.

101. Mr. NOLTE asked Mr. Brownlie whether, in his view, the lawyers involved in the *Pinochet* case had been aware of the extent of the legal debate it would elicit, not only in the United Kingdom, but also in other countries. Perhaps the case could be reappraised from that perspective.

102. Mr. BROWNLIE said that all the Lords of Appeal involved in the case had shown great interest in international law as a major component of the applicable law. Counsel had obviously been more concerned about the interests of their clients than about the future implications of the case. It should be borne in mind, however, that the effect of the Spanish indictment had been considerably diminished owing to the very late stage in the proceedings at which the United Kingdom had incorporated the Convention against Torture in its municipal legislation.

103. Ms. XUE said that since the Special Rapporteur would be dealing with the substance of the matter and the *Pinochet* case had given rise to so much heated debate within the Commission, members must keep in mind that it was only one domestic case. What was important was not the jurisprudence itself or the lawyers involved, but the extent to which their opinions reflected generally

accepted international practice, why their decision had prompted such debate and how it had affected subsequent State practice.

104. Mr. PELLET said that, while he basically agreed with Ms. Xue, it should also be borne in mind that the requests for extradition by France, Spain and Switzerland were part of international practice and showed that those States were not entirely convinced that General Pinochet's immunity was absolute.

105. Mr. BROWNLIE said that by and large he agreed with Ms. Xue. Nevertheless, the importance of drawing analytical material from municipal decisions should not be overlooked. In the *Pinochet* case, the Law Lords had examined an important piece of State practice, namely the Convention against Torture, and their different views on the subject provided an authoritative source of commentary.

106. The CHAIRPERSON, speaking as a member of the Commission, said that the *Pinochet* case had affected the conscience of all Chileans. There was not one single Chilean who did not have something to say on the matter. General Pinochet had seized power following a *coup d'état* during which very serious human rights violations and crimes against humanity had been committed. He had succeeded in securing immunity from prosecution for those crimes, first by amending the Constitution, then in his capacity as Commander-in-Chief of the Chilean Armed Forces, a post he had continued to hold even under a democratic Government, and latterly as a senator for life. That anomalous situation had to be seen in the context of the restoration of democracy in Chile, which would not have been possible if Chileans had not accepted, albeit reluctantly, a Constitution allowing for his continued immunity following his removal from power.

107. General Pinochet's cardinal error had been to believe that his immunity also applied at the international level: for many years he had travelled extensively, confident of his immunity from prosecution. He had visited the United Kingdom on several occasions, including as a member of a national defence commission to do business with the British arms industry. Then, suddenly one day he had been arrested in London following an extradition request from Spain, based on a Spanish judge's interpretation, not of a point of international law, but of Spanish domestic law, pursuant to which the Spanish courts had extraterritorial jurisdiction over cases of terrorism and of genocide, of which General Pinochet was accused. The charge of genocide had subsequently dropped out of the case.

108. The Divisional High Court decision that his arrest had been unlawful had been appealed against and overturned by a panel of five judges in the House of Lords, a judgement subsequently set aside on the grounds that the panel had not been properly constituted. The second hearing, conducted by a panel of seven Law Lords, had invoked an international instrument, namely the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Chile, Spain and the United Kingdom were all parties, and had found it to be applicable. It had found that the acts of torture instigated by General Pinochet were not covered by his immunity *ratione materiae*.

However, views had diverged as to the date at which the Convention had become applicable in respect of each of the three States parties. There had also been considerable debate as to whether General Pinochet had been physically and mentally fit to stand trial in Spain. The final decision had rested with the United Kingdom Home Secretary, who, in the light of medical assessments, had decided that General Pinochet had been unfit to stand trial. That had been another controversial decision, because, upon his return to Chile, General Pinochet had made the blunder of standing up and walking away from his wheelchair, thereby making a mockery of the proceedings.

109. At the time of General Pinochet's release, the Home Secretary had made a very significant statement to the effect that the whole process was destined to have a great impact on international law and that thereafter no one who committed such serious crimes would be able to do so with impunity. Arguably, it was Chile, rather than Spain, the United Kingdom or any other State, that should have requested General Pinochet's extradition. For reasons with which he personally did not agree, the Government of Chile had nonetheless decided that it could not itself request General Pinochet's extradition, since it would first have needed to initiate procedures to waive his parliamentary immunity.

110. There could be no doubt that the *Pinochet* case had had far-reaching implications, not least in Chile, where the judicial system had changed radically as a result. There had been requests for General Pinochet to stand trial in Chile for a variety of crimes, including economic crimes. Furthermore, at least seven generals and many high-ranking officials had been arrested for crimes committed during the dictatorship, something which, in his view, would never have been possible but for the *Pinochet* case.

111. Mr. NOLTE said he had the impression from recent cases on State immunity examined in the House of Lords that the Law Lords were reconsidering their former position, and were now inclined to reaffirm rather than restrict immunity.

112. Mr. BROWNLIE said that the judges regarded cases involving immunity from civil jurisdiction as qualitatively different from those involving immunity from criminal jurisdiction. Moreover, recent cases, some of which concerned persons detained by the United Kingdom military authorities in Iraq, had been based on the principle of non-justiciability. Each case was decided on its individual merits and he did not consider that the judges concerned referred back to the *Pinochet* case either positively or negatively in that connection.

113. Ms. XUE said that the Commission clearly recognized the significant impact of the *Pinochet* case on international law, particularly where international efforts to combat impunity and immunity in the case of serious international crimes were concerned. Nevertheless, when considering the impact of the case, the Commission must bear in mind that immunity from the criminal jurisdiction of foreign courts was a very different matter.

The meeting rose at 1.05 p.m.

2987th MEETING

Wednesday, 30 July 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).

2. Mr. WAKO said that, as noted by the Special Rapporteur, the question of immunity from foreign criminal jurisdiction had been considered by the Commission on a number of occasions under different agenda items. It was an issue which, if not properly handled, as noted by Mr. Brownlie and Mr. Vasciannie, might give the impression that the principles of equality and the rule of law were under attack from the application of double standards and the attachment of weight to political considerations in what was essentially a matter of criminal justice. Hence it was necessary not only to take account of the current status of international law in that area, but also to encourage progressive development so that the applicable rules of international law were clear. He therefore agreed entirely with the Special Rapporteur's view expressed in the first sentence of paragraph 63 of his preliminary report, although he would omit the word "perhaps" and state that the Commission should certainly formulate draft articles or guiding principles on the issue.

3. The Special Rapporteur had limited the scope of his preliminary report on immunity of State officials from foreign criminal jurisdiction. Every State had the right to exercise jurisdiction over its territory and over all persons and things therein, but that right was subject to the immunities recognized by international law. As indicated in the Secretariat's memorandum, while international law considered criminal jurisdiction to be ordinarily territorial, almost all domestic legal systems had extended its application to extraterritorial offences through, *inter alia*, the nationality principle, the protective principle and the principle of universal jurisdiction. It was the latter principle that had a bearing on the topic before the Commission,

since it determined jurisdiction by reference to the nature of the offence, which was deemed to be of concern to the international community as a whole, regardless of the *locus delicti* and the nationality of the offender and the victim. According to *Oppenheim's International Law*, "[w]hile no general rule of positive international law [could] as yet be asserted which [gave] States the right to punish foreign nationals for crimes against humanity ... , there [were] clear indications pointing to the gradual evolution of a significant principle of international law to that effect".²⁷⁴ States might therefore have jurisdiction under international law to try foreign nationals. However, such jurisdiction was "subject to immunities recognized by international law".

4. He agreed with the Special Rapporteur's conclusion in paragraph 102 (g) of his report that immunity of State officials from foreign criminal jurisdiction was procedural and not substantive in nature. That was an important point to grasp because there was a tendency to argue that if State officials were to enjoy complete immunity and could not be tried abroad for international crimes, the result would be impunity. He took issue with that line of reasoning. The immunity from the jurisdiction of foreign courts enjoyed by the State officials concerned did not mean that they enjoyed impunity for any crimes that they might have committed. As the ICJ had stated in the *Arrest Warrant* case, "[w]hile jurisdictional immunity is procedural in nature, criminal jurisdiction is a question of substantive law" [para. 60]. As there had been very few juridical actors in the world previously and the concept of the nation State had been surrounded by insurmountable barriers, it had been necessary to grant universal jurisdiction to national courts in certain types of cases to supplement the structures put in place by international mechanisms. As recognized in the Secretariat's memorandum, the international system actually relied on domestic law for enforcement and the tendency at the time was to attribute competence over international crimes to national jurisdictions or to assume that they enjoyed such competence.

5. The situation was now different. First, as stated by the three judges who had issued a joint separate opinion in the *Arrest Warrant* case, the increasing recognition of the importance of ensuring that the perpetrators of serious international crimes did not go unpunished had had an impact on the immunities enjoyed by high State dignitaries under traditional customary law.²⁷⁵ The Rome Statute of the International Criminal Court did not in fact provide for immunity. Secondly, as stated by Mr. Nolte, if any conclusions were to be drawn, they should tend to confirm the immunity of State officials from another State's criminal jurisdiction, the reason being that the greater the extent to which international criminal jurisdiction was established, the less necessary it would be to combat immunity by allowing third States to assume jurisdiction over State officials. Hence, the fact that State officials were not to be subjected to the jurisdiction did not mean that impunity was being tolerated. It simply meant that such State officials would be answerable to an international court

²⁷⁴ *Oppenheim's International Law*, 9th ed., vol. I, *Peace*, R. Y. Jennings and A. D. Watts (eds.), Harlow, Longman, 1992, p. 998.

²⁷⁵ See the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal.

or tribunal. In a closely knit international community, it was preferable for such State officials, especially—to use a term employed by Ms. Jacobsson—the “big fish”, to be tried by an international court or tribunal if they were beyond the reach of their own country’s justice system. He agreed with Mr. Vasciannie that one way forward was to stipulate that State officials who had perpetrated international crimes should be tried in their own countries or by an international court or tribunal set up for the purpose.

6. The goal was to ensure that there was no immunity. In some circumstances, however, there could be other compelling interests such as peace and security or national reconciliation that had to be addressed. At the international level, especially under the Rome Statute, the Security Council might in some cases adopt a resolution under Chapter VII of the Charter of the United Nations requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution. The Court could then decide whether or not to comply. Such requests were not possible where a national jurisdiction was trying the case, and it was no wonder that, as a result, misunderstandings of the type alluded to by Mr. Brownlie and Mr. Vasciannie arose. A decision adopted recently by the Assembly of the African Union held in Egypt provided a good example of the kinds of fears that universal criminal jurisdiction could arouse.²⁷⁶

7. The Assembly, while recognizing that universal jurisdiction was a principle of international law whose purpose was to ensure that individuals who committed grave offences such as war crimes and crimes against humanity did not do so with impunity and were brought to justice, in line with article 4 (*h*) of the Constitutive Act of the African Union, resolved that the abuse of the principle of universal jurisdiction was a development that could endanger international law, order and security; that the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders was a clear violation of the sovereignty and territorial integrity of those States; and that the abuse and misuse of indictments against African leaders had a destabilizing effect that would have a negative impact on the political, social and economic development of States and their ability to conduct international relations. The Assembly therefore requested all United Nations Member States, in particular the States members of the European Union, to impose a moratorium on the execution of such warrants until all the legal and political issues had been exhaustively discussed by the African Union, the European Union and the United Nations.

8. It was therefore necessary both to clarify international law in that area and to contribute to its progressive development. He agreed with the Special Rapporteur’s comments in that regard in paragraph 41 of the preliminary report and considered that the codification of international law would not only be “most useful”, but that it was imperative.

9. The next question was which State officials should benefit from such immunity. The Special Rapporteur indicated that all State officials enjoyed immunity from foreign criminal jurisdiction *ratione materiae* but that only some of them enjoyed immunity *ratione personae*. There seemed to be a well-established principle of customary international law that the high-ranking officials who enjoyed personal immunity included Heads of State, Heads of Government and Ministers for Foreign Affairs, sometimes referred to as the “troika”. The ICJ had confirmed the principle in the *Arrest Warrant* case, but had used the words “such as” the Head of State, Head of Government and Minister for Foreign Affairs, thus indicating, by virtue of the *ejusdem generis* rule, that other State officials of the same rank were not excluded. The British courts had accorded such immunity to the Minister of Defence of Israel (see the *General Shaul Mofaz* case) and the Minister of Commerce of the People’s Republic of China (see the *Bo Xilai* case). When required to rule on the issue, the ICJ and national courts had rigorously examined the functions of the post held by State officials before concluding that they enjoyed immunity *ratione personae*. To state that persons “such as” the Minister for Foreign Affairs enjoyed immunity meant that other ministers might be in the same category.

10. Gone were the days when, apart from the Head of State, the Minister for Foreign Affairs had sole responsibility for the conduct of foreign policy and was the sole representative of the State in international negotiations and at intergovernmental meetings. In the global village, every activity involved international relations, and it could be argued that diplomacy was no longer about politics but about trade. Ministers of trade, finance and even in some countries, tourism, had taken over some of the functions that had previously been the preserve of the Minister for Foreign Affairs. At the regional level, where there was a trend towards political, economic and social integration, ministers of regional or community affairs were performing the functions that the Minister for Foreign Affairs had performed in the past. On issues such as organized crime or transnational crime or corruption, one often found ministers of justice representing the State at the international level.

11. He agreed with the Special Rapporteur and with other Commission members such as Mr. Pereira that it was necessary to develop criteria that took into account numerous factors, including: the rank of State officials; their functions; the circumstances in which they performed those functions; whether what they were representing in international relations was indispensable and a core component of the State’s functions; how the performance of their functions related to that of the Minister for Foreign Affairs; and other factors that had been taken into account by the ICJ in the *Arrest Warrant* case and by national courts in the various cases that had come before them.

12. Mr. NIEHAUS said that the topic of immunity of State officials from foreign criminal jurisdiction was particularly interesting in view of the topicality of the issue and the fact that international law in the area was underdeveloped. The codification of such an important subject was clearly in the interest of international

²⁷⁶ Assembly of the African Union, eleventh ordinary session, 30 June–1 July 2008, Sharm el-Sheikh (Egypt), Decisions, declarations, tribute and resolution [Assembly/AU/Dec.193-207 (XI)], Decision Assembly/AU/Dec.199 (XI) on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction [Doc.Assembly/AU/14 (XI)], available at www.au.int/en/decisions/assembly (accessed 8 January 2013).

relations in the early twenty-first century. While the final speakers in the debate on a topic on the Commission's agenda had the advantage of being able to draw on the informed opinions already expressed by other members of the Commission, they also risked repeating what had already been said, and said very eloquently. In order to avoid that pitfall, he would seek to confine his comments to the summaries of the first and second parts of the Special Rapporteur's preliminary report, which by no means implied that the actual content of those two parts was insignificant.

13. With regard to the summary of the first part in paragraph 102 of the report, he agreed with Ms. Xue that it was important to take account of the case law of domestic courts, but he endorsed the comment in subparagraph (a) of the summary to the effect that the basic source was international law, particularly customary international law. He approved of the Special Rapporteur's decision to confine his study to immunity and to avoid considering jurisdiction as such. Moreover, like several other members of the Commission, he thought that diplomatic and consular immunities should be omitted from the study because they were already covered by a special regime. With regard to jurisdiction *ratione personae*, it was logical to restrict immunity to the highest-ranking officials, but he wondered whether it should be enjoyed only by Ministers for Foreign Affairs. In the modern world, other ministers, such as those for foreign trade, the environment or defence, performed functions that were equivalent in terms of representation to those performed by the Minister for Foreign Affairs. A more thorough study of the question was therefore necessary, although the concept of immunity *ratione personae* should be narrowly construed. Immunity should be granted only to the highest-ranking State officials, and if it was extended to other officials, the immunity in question was functional and not personal. At the same time, the immunity of high State dignitaries who played an indispensable role in international relations should be preserved.

14. Furthermore, the Commission should constantly bear in mind the need to fight against impunity. However, Mr. Nolte's comment in that regard was pertinent: the more the scope of international criminal jurisdiction expanded, the less necessary it would be to fight against impunity by allowing States to try foreign State officials. He noted that the Special Rapporteur intended to deal with the question of exceptions to immunity in his next report. Another question that several Commission members had mentioned but, in his view, had failed to emphasize sufficiently was that of the immunity of former Heads of State or Heads of Government, which he thought should be studied. The immunity of members of the families of State officials also formed part of the topic.

15. In conclusion, he thanked the Chairperson, Mr. Vargas Carreño, for his excellent summary at the previous meeting of the proceedings in the *Pinochet* case, a case of key importance for the questions of immunity and jurisdiction.

16. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to make some very general comments. First, the Commission's work

on the topic had, in his view, got off to a good start, thanks to the high quality of the Secretariat's memorandum, the excellence of the Special Rapporteur's preliminary report and the wide-ranging debate in which a very large number of members had participated. He would not review the first part of the report but merely enumerate some of the problems that remained to be solved. First, the Commission would have to decide whether the scope of immunity *ratione personae* should be limited to the "troika" (Head of State, Head of Government and Minister for Foreign Affairs) or whether it should be extended to other officials. As noted by Mr. Niehaus and Mr. Wako in particular, there was a trend in the era of globalization to grant immunity to other State officials involved in international relations, such as the minister of defence or the minister of the interior in the case of issues such as the fight against terrorism. The question was a very sensitive one and due caution should be exercised. As he saw it, the Commission should, in principle, adopt a restrictive approach in order to address the need to reconcile State sovereignty with action against impunity for the perpetrators of serious crimes, two principles that were well established in international law.

17. Secondly, with regard to exceptions to immunity, a number of members had stressed the importance of ensuring that Heads of State who had committed crimes against humanity did not enjoy impunity. Recent events had shown, however, that things were not quite so simple in practice. If, for example, the prime minister of a European State or the President of the United States was alleged to have committed a crime against humanity, would other States be prepared to arrest him or her? The Commission would have to be realistic. One option would be to make exceptions to immunity applicable only to former Heads of State, Heads of Government or Ministers for Foreign Affairs.

18. Thirdly, an important question raised during the debate concerned the concepts of complementarity and subsidiarity. In his view, foreign criminal jurisdiction should be exercised only where the national criminal jurisdiction was unable or unwilling to prosecute, an approach that was in line with the Rome Statute of the International Criminal Court. The principle of subsidiarity of the exercise of foreign jurisdiction should somehow be reflected in the draft articles.

19. The Special Rapporteur had included in the list of questions raised in chapter IV of his preliminary report the question of recognition of States and State officials. In his view, that was a highly political issue and, as it rarely arose, he thought that any attempt at codification would be premature. On the other hand, it was essential to deal with the question of the immunity of family members of a Head of State or Head of Government, an area in which both codification and progressive development were conceivable.

20. Mr. KOLODKIN (Special Rapporteur), summarizing the debate on the topic, said that he would bear in mind the many comments that had been made on his preliminary report and the diverse views expressed on the questions that he intended to take up in his next report.

21. First, the members of the Commission broadly agreed that the main source of the immunity of State officials from foreign criminal jurisdiction was international law and, in particular, customary international law. Some members had also emphasized the importance of national practice and the decisions of domestic courts.

22. Many members supported the idea that the immunity of State officials from foreign criminal jurisdiction constituted a legal relationship linked to existing rights and obligations. Many members also recognized that such immunity was basically procedural; however, others considered that in some circumstances immunity might also relate to substantive law. There had been broad support for the idea that immunity from criminal jurisdiction extended only to executive and judicial jurisdiction and that the question of such immunity was important because it could be raised in the pretrial phase of criminal proceedings.

23. Some members had expressed support for the postulate that immunity was based on a combination of functional and representative components. One member had argued that the basis of immunity could be different according to the rank of the State official concerned. For example, Heads of State derived their immunity from the fact that they personified the State, but that rationale was not applicable to other State officials.

24. Many members agreed that jurisdiction preceded immunity. The question of universal jurisdiction also arose. Some members considered that the concept of jurisdiction could not be ignored and should be addressed at least in the context of exceptions to immunity. In that regard, he said that while he certainly intended to examine the issue, he proposed to adopt an analytical approach since it was unnecessary for the Commission to adopt a substantive position regarding jurisdiction as such.

25. Many members had found his reflections on the immunity *ratione personae* and the immunity *ratione materiae* of State officials very helpful, at least in analytical terms, but at least one member had proposed, as an alternative to that distinction, referring to acts performed in an official capacity and acts performed in a private capacity. He drew attention in that connection to his statement in the report that the distinction between immunity *ratione personae* and immunity *ratione materiae* was useful for analytical purposes but that no such distinction was made in the normative instruments.

26. While the debate had shed light on the scope of the topic, many questions were still unresolved. In general, the members took the view—and he fully agreed with them—that the immunity of diplomatic agents, consular officials and members of special missions (with the possible addition of representatives of States in and to international organizations) fell outside the scope of the topic. One member had referred to the situation in which a diplomatic agent accredited to one State was sent by the accrediting State to attend an event in the territory of a third State. In that situation, which was considered in the report, the official would enjoy immunity as a State official but not as a diplomatic agent. Diplomatic and consular law were well-established branches of international

law, and the outcome of the Commission's work on the topic should not undermine the immunity of persons in those categories.

27. Most members who had addressed the question considered that the topic should not cover issues of international criminal jurisdiction. Nevertheless, some felt that such issues could not be overlooked in the context of exceptions to immunity. The importance of taking into account the principle of complementarity, as set out in the Rome Statute of the International Criminal Court, had also been mentioned. While he intended to deal with those matters in due course, he would do so without prejudice to whatever conclusions he reached.

28. There seemed to be a majority of members against taking up the question of recognition. However, several members disagreed. Some suggested that the wisest option might be simply to examine the consequences of non-recognition of an entity as a State when matters pertaining to the immunity of its officials were addressed.

29. With regard to immunity *ratione personae*, some members took the view that only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity. Others, while admitting that other officials might also enjoy immunity *ratione personae*, cautioned the Commission against venturing beyond the limits of the "troika". At least two members held that, even if officials other than the troika enjoyed such immunity, the Commission should not mention them explicitly lest it prejudge the situation regarding other categories of persons who might enjoy personal immunity. At the same time, several members of the Commission—indeed perhaps the majority—considered that, in the light of current trends in the conduct of affairs of State, the Commission would have difficulty in confining its study to the troika. However, even those who were in favour of extending its scope felt that the Commission should exercise very great caution. State officials who might enjoy immunity *ratione personae* had been cited, for example, ministers of defence, ministers of foreign trade, Presidents of Parliaments, Vice-Presidents and judges. The question of immunity for officials representing the constituent units of federal States had also been raised. Many members had proposed, as an alternative to listing State officials who enjoyed immunity *ratione personae*, the definition of criteria that could be invoked to determine the categories of eligible persons. He suggested that, in deciding on the approach to be adopted, a more thorough analysis of the judgment rendered by the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case should be undertaken.

30. The views of members of the Commission were more or less evenly divided on the question of whether the family members of State officials and their entourage should be included within the scope of the topic. Even those who were in favour of including them expressed a variety of reservations. For instance, one member considered that the question should be examined at a later stage and solely with a view to denying immunity to such persons. Some members held that only family members of high-ranking State officials should be taken into account. One member suggested that the only ground for addressing the question was to determine whether international comity was

the sole source of such persons' immunity. Many other members agreed. On the whole, the debate on the question had not convinced him that the view expressed in his preliminary report should be revised, but of course he was more than willing to review the arguments.

31. One member of the Commission had advocated including members of the armed forces within the scope of the topic.

32. With regard to the terminology and definitions, support had been expressed for the term "State official" but several members preferred "State representative" or "State agent". Many members emphasized the importance of defining "State official". One member proposed a different approach to the definition from that adopted in the preliminary report, and he agreed that such an approach might prove helpful.

33. Several members had also mentioned the need to define "immunity" and "immunity from criminal jurisdiction".

34. With regard to the content of his next report, he said that he had presented a preliminary broad description of the structure and logical sequence of the study on the topic in the Commission's report on the work of its fifty-eighth session,²⁷⁷ which all members would have had an opportunity to read. In the fourth part of his presentation, entitled "Possible scope of consideration of the proposed topic", he had proposed 11 clusters of issues for examination and had stated, *inter alia*, that the core issue was the scope or limits of immunity of State officials from foreign criminal jurisdiction (point 6). His report was thus based on what he had announced two years previously. In general, he still felt that it was the right approach, although some modifications had been necessary. For instance, he had not yet addressed the question of exceptions to immunity.

35. In his capacity as a legal adviser, he was constantly reflecting on all the issues involved. As a result, his ideas had evolved and would probably continue to evolve as he pursued his study of the topic. At the outset, he had thought that the topic should be based on the relations between immunity and *jus cogens* norms prohibiting the most serious international crimes. That issue would, of course, be addressed in his next report, but it would not exhaust the question of the scope of immunity. The question could be formulated in the following terms: did the immunity of State officials from foreign criminal jurisdiction depend on the gravity of the crimes committed? It was necessary to consider the impact on immunity of universal jurisdiction for core crimes, but it should be borne in mind that, in practice, the question of immunity of State officials also arose in the case of less serious international crimes such as corruption and money laundering.

36. He also planned to consider whether State officials enjoyed immunity when they committed acts within the territory of the State exercising jurisdiction that breached the law of that State. Mention had been made in that context of espionage, and the "Rainbow Warrior" case might also be cited. He thus had every intention to consider

whether exceptions to immunity existed. The question might be formulated in the following terms: did exceptions to immunity exist under general international law? If not, should exceptions be created? And if they existed or should be created, what exactly were the exceptions? There was no doubt in his mind that exceptions to immunity could be created by concluding an international treaty.

37. He further intended in his next report to consider the extent of immunity *ratione personae* and immunity *ratione materiae*. He was proceeding on the premise that immunity *ratione personae* was applicable only during the term of office of the person concerned. Other questions that needed to be addressed were: how could acts performed in an official capacity be distinguished from acts performed in a private capacity? What kinds of acts could be deemed to have been performed in an official capacity? Could illegal acts qualify as acts performed in an official capacity? The question of whether, for example, personal immunity should be extended to acts committed prior to the assumption of office would also be considered. In addition to examining which acts committed by a State official were covered by immunity and which were not, he proposed to consider from which acts of the State exercising jurisdiction immunity afforded protection and from which it did not. He also intended to study separately the question of the extent of the immunity of incumbent State officials and that of former States officials.

38. With regard to the procedural aspects of immunity, he had previously taken the view that the only issues that needed to be addressed were those relating to the waiver of immunity, questions such as: who was entitled to waive State officials' immunity—the officials themselves or the State they served? What form should the waiver take? Was an implicit waiver conceivable? Could a State's consent to be bound by obligations flowing from the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which made no mention of immunity or a waiver of immunity, be regarded as an implicit waiver of immunity? However, he now thought that there were other important procedural questions, including the following: should the State on behalf of which the official was acting raise the question of immunity with the State seeking to exercise its criminal jurisdiction over the official concerned in order to ensure that it was taken into account? Should the State of which the official was a national declare or demonstrate, where the question of functional immunity arose, that the official's acts had been performed in an official capacity? The latter question was related to a point raised by two members, namely the question of the link between the immunity of a State official from foreign criminal jurisdiction and the responsibility of the State on behalf of which the official was acting. He considered that the issue merited further study.

39. With regard to the approach and methodology to be adopted, he was convinced, contrary to some members of the Commission, that the judgment of the ICJ in the *Arrest Warrant* case was correct and important and that it provided a clear picture of the current state of international law in the area under consideration. The judgment had been adopted by 13 votes to 3, an overwhelming majority. It differed in that respect from the judgement in the *Al-Adsani v. The United Kingdom* case by the European

²⁷⁷ Yearbook ... 2006, vol. II (Part Two), annex I, p. 191.

Court of Human Rights, which had been adopted by a one-vote majority. Moreover, at a meeting in 2002, CAHDI had emphasized the importance of the judgment in the *Arrest Warrant* case, describing it as a clear statement of international law on the matter.

40. He would continue to base his analysis of the foregoing issues on the sources used to prepare the preliminary report, namely: State practice, including legislation and judicial decisions; decisions of international courts and tribunals (particularly the ICJ); and academic writings. Decisions of national courts were another important source, not only in themselves but also because the material considered by the courts frequently reflected the position of the States concerned.

41. Furthermore, it was essential to analyse judicial and other practice from a dynamic and developmental perspective and to take into account the chronological sequence in which judicial decisions were adopted. It was inaccurate, in his view, to assert, for example, that there was a conflict between the judgment of the ICJ in the *Arrest Warrant* and the decision of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blakšić* case or the *Pinochet* judgement. Admittedly, however, practice was not homogenous, and domestic decisions had been taken after the judgment in the *Arrest Warrant* case which were inconsistent with its conclusions. He emphasized, however, that judicial practice must be studied in the light of their chronological sequence.

42. Judicial decisions regarding immunity from civil jurisdiction should not be dismissed out of hand just because civil jurisdiction was different from criminal jurisdiction. The two forms of jurisdiction were admittedly different, but not to the extent that decisions regarding immunity from civil jurisdiction had no bearing on the topic under consideration. It was essential, in his view, to take into account international and national practice, and the practice and opinions of States. He cautioned against formulating abstract proposals on what international law should be, and against moving beyond the scope of the law in force and operating without reference to manifestations of existing international law.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued)* (A/CN.4/588, sect. F, A/CN.4/599, A/CN.4/603)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)*

43. The CHAIRPERSON invited the Commission to continue its consideration of the third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/603).

44. Ms. ESCARAMEIA commended the Special Rapporteur on his thorough and well-researched report. She intended to comment on the three draft articles proposed by the Special Rapporteur and on the next steps in the Commission's work on the topic.

45. With regard to draft article 1, she would have preferred the title "Scope" to "Scope of application", since the latter gave the impression that the scope of the draft articles was confined to the principle of application, which was clearly not the case. She was in favour of including the temporal aspect, namely the establishment, content, application and effects, since it clarified the different aspects of the issue that would be covered. On the other hand, she proposed deleting the word "legal" in the phrase "legal obligation of States" since it was redundant in a legal document. With regard to the alternatives in square brackets, she preferred "under their jurisdiction", since it would make clear that the obligation was incumbent on States administering territories that were not their own. Moreover, as noted by Mr. Pellet, it was the term used in the European Convention on Human Rights.

46. With regard to draft article 2 (Use of terms), she supported the suggestions in paragraph 1. However, she would prefer subparagraph (d) ("persons under jurisdiction" means...) to be divided in two, with one subparagraph dealing with persons, since it should be clear that the term referred to natural and not legal persons, and another dealing with jurisdiction. She further suggested inserting a subparagraph containing a definition of universal jurisdiction.

47. She was unsure what purpose was served by paragraph 2. Given that paragraph 1 stated "For the purposes of the present draft articles", it seemed unnecessary to add that the definitions were "without prejudice to ... the meanings which may be given to them [in other international instruments or] in the internal law of any State".

48. She emphasized the importance of draft article 3 (Treaty as a source of the obligation to extradite or prosecute), not only because it might lead to "the beginning of the formulation of an appropriate customary norm", as the Special Rapporteur put it, but above all because of the opinion stated by the United States in the comments and observations received from Governments.²⁷⁸ According to the United States, a multilateral treaty created specific obligations for a State party only if the same obligations were contained in a bilateral treaty. In other words, only a bilateral treaty could be a source of obligations. She found that position quite strange and stressed that the purpose of draft article 3 was precisely to remove all ambiguity in that regard.

49. She proposed referring the three draft articles to the Drafting Committee. With regard to the next steps in the Commission's work on the topic, she shared certain concerns raised by Mr. Pellet, who considered that the Special Rapporteur had already gathered abundant information on the matter, that the Commission had sufficient sources of guidance and that it was therefore unnecessary to await further replies from States. The Special Rapporteur should simply proceed with his work. He had already outlined a large number of draft articles in paragraph 61 of his preliminary report.²⁷⁹ In his fourth report, he might propose draft articles on the sources of the obligation, in

* Continued from the 2984th meeting.

²⁷⁸ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1-4.

²⁷⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

particular a draft article 4 on the customary nature of the obligation, and a draft article 5 on the *aut dedere aut judicare* principle as a general principle of law founded on shared national laws, jurisprudence and practice. In that context, it might be helpful to analyse the relationship between the *aut dedere aut judicare* principle and, on the one hand, universal jurisdiction and, on the other, crimes under international law. Many more draft articles could be proposed in due course, for instance on universal jurisdiction and the “triple alternative” (involvement of an international criminal tribunal). As those issues were particularly complicated and gave rise to different opinions within the Commission, she suggested setting up working groups, not right away as proposed by Mr. Pellet, but after the Special Rapporteur had proposed draft articles on the various questions raised.

50. Lastly, she urged the Special Rapporteur to look into procedural questions such as the grounds for refusal to extradite, the safeguards to which persons to be extradited were entitled and the question of simultaneous requests for extradition.

51. Mr. DUGARD said that he would limit his comments to the third report on the obligation to extradite or prosecute. There were three main reasons, in his view, why the progress made by the Special Rapporteur fell short of what might have been expected. First, he failed to see why the Special Rapporteur attached so much importance to obtaining guidance from States. In paragraph 33 of his report, he claimed that the slow inflow of State opinions and comments adversely affected the progress of his work, and in paragraph 44 he noted that only about 20 States had responded. In his experience, however, it was highly unlikely that more States would respond. Moreover, the Special Rapporteur should bear in mind that the only countries sending in comments were those of Western Europe, so that the views of developing countries could not be taken into account, although the International Law Commission was supposed to serve the interests of a wide range of States.

52. The lack of progress was also due to substantive problems, since it appeared that the Special Rapporteur had not yet made up his mind about core issues such as whether there was a customary basis for the obligation to extradite or prosecute, and whether or not the topic should be linked to the question of universal jurisdiction. Such crucial issues should be resolved at the outset. The third issue that troubled him was the time factor, since it seemed unlikely that work on the topic could be completed by the end of the current quinquennium.

53. He agreed with Ms. Escameia that it was essential at the outset to establish whether a customary basis existed for the *aut dedere aut judicare* obligation. In the absence of such a rule, the Commission would be hard put to proceed with its work. Secondly, the issue of the relationship between the *aut dedere aut judicare* obligation and universal jurisdiction should be resolved. It was unnecessary to embark on a full-scale examination of the principle of universal jurisdiction, since it was applicable almost exclusively to the most serious crimes, and the same was true of the obligation to extradite or prosecute. According to the Special Rapporteur, some States had

made the nonsensical claim that the latter obligation was applicable to all crimes. The customary rule to extradite or prosecute, if it existed, could only concern the most serious crimes. In that connection, the views of China and Sweden, reflected in the footnotes to paragraph 98 of the Special Rapporteur’s report, were particularly helpful.

54. The Special Rapporteur should consider the question of whether the obligation to extradite or prosecute existed only where an accused person was present in the territory of the State concerned. He was inclined to think that treaties and common sense demanded an affirmative answer to that question. For instance, a State that did not have custody of the accused could not be required to request a third State to extradite the person concerned. The Special Rapporteur should also take a decision on whether the State which had control over or custody of the accused had a choice between prosecution and extradition. He thought that the choice lay with the territorial State. With regard to the “triple alternative”, it would be very difficult at that stage, in his view, not to take account of the option of surrendering the accused to the International Criminal Court. Another question that should be considered was whether the obligation to extradite or prosecute arose only if another State requested extradition. Ms. Escameia had also raised a number of procedural matters such as the existence of obstacles to extradition and whether the requested State had a margin of appreciation. The Commission’s work on the topic would inevitably involve a certain amount of progressive development. The Special Rapporteur had rightly taken into account the number of national court decisions, which would probably prove more helpful than the views expressed by States.

55. He did not think that the draft articles could yet be referred to the Drafting Committee, since they required further consideration. Draft article 1 was still too uncertain; indeed, the Special Rapporteur himself seemed to be undecided about its content. Draft article 2, as currently worded, could not be referred to the Drafting Committee either. In the case of draft article 3, account must be taken of the various international treaties containing clauses regarding the obligation to extradite or prosecute. He suggested compiling a list of such treaties, which might indicate the existence of a customary rule in cases not covered by those treaties. The Special Rapporteur should therefore continue his work and produce draft articles to which he was more firmly committed. In that connection, he was not in favour of Mr. Pellet’s proposal to set up a working group; he also considered that it was inappropriate for the Special Rapporteur to await further comments and information from States.

56. Mr. PELLET said that, unlike Mr. Dugard, he did not think that the Commission’s work would prove irrelevant if no customary rule governing the obligation to extradite or prosecute was identified. The *aut dedere aut judicare* clauses contained in treaties were often vague and lacking in detail, so that a draft article on the matter would be helpful in clarifying their content and addressing the complex problems involved in their implementation. He continued to consider that the creation of a working group to support the Special Rapporteur would be a good idea, given the very large number of questions of principle raised by Mr. Dugard and Ms. Escameia and the

hesitations of the Special Rapporteur and other members of the Commission regarding certain aspects of the topic under consideration. However, it was for the Special Rapporteur himself to decide.

57. Mr. GAJA thanked the Special Rapporteur for his useful and clearly drafted third report. He wished to comment on the direction that future work on the topic should take. He hoped that his remarks would prove helpful, although they differed to some extent from those just made by Mr. Dugard and Ms. Escameia. They both considered that the complex question of the existence of an obligation to extradite or prosecute under customary international law should be addressed at the outset. That was also the opinion of the Special Rapporteur, as reflected in paragraphs 88 and 89 of his report, in which he analysed recent interesting cases, and in paragraph 125, where, briefly commenting on a draft article concerning treaties as a source of the obligation, he cited the view that the conclusion by a State of several treaties containing some form of clause on the obligation to extradite or to prosecute provided evidence of an existing rule of customary law to the same effect.

58. Recognition of a basis in customary international law for the obligation to extradite or prosecute raised the complex question of universal jurisdiction which, as noted by Mr. Wako, was a controversial matter. It would therefore be more expedient, in his view, to take up first issues relating to the *aut dedere aut judicare* obligation, whatever its source. In any case, the rule or principle was generally understood as having one and the same meaning, which could be stated subject to the exception of a *lex specialis*.

59. He proposed that the Commission should examine what Mr. Dugard and Ms. Escameia referred to as procedural questions at the outset. The Special Rapporteur could first consider the conditions triggering the obligation to prosecute pursuant to the rule or principle of *aut dedere aut judicare* and then examine the content of that obligation. With regard to the conditions, the first question to be addressed was whether the presence of an alleged offender in the territory of the State concerned had to be voluntary, and the nature of the territorial State's obligation to ascertain that an alleged offender was present in its territory. A second question was whether the existence of a request to extradite by a State enjoying primary jurisdiction over the crime was always necessary for an obligation to prosecute to arise. The point at which a State could be said to have refused a request to extradite should be clarified. A third condition concerned the existence of jurisdiction over the crime, which could exist independently of a treaty or other rule of international law making its exercise compulsory. One question was which organ of the State would be in a position to ascertain the existence of jurisdiction. Another question was the extent to which jurisdiction would be affected by the immunity that the alleged offender might enjoy in the State where he or she was present.

60. The content of the obligation to prosecute also raised a number of questions. How could the obligation be reconciled with the discretion that prosecutors enjoyed in many countries? What bearing should the availability of pertinent evidence have on the obligation to prosecute?

Should the alleged offender necessarily be held in custody pending trial? Could extradition of the alleged offender to a State other than the requesting State qualify as compliance with the obligation to prosecute? To respond to that list of questions, which was not exhaustive, the Special Rapporteur should discuss with the Secretariat the modalities of undertaking a thorough study of available practice. The results of such a study would probably elicit more focused and hence more useful comments from States.

61. Mr. FOMBA noted that, despite the difficulties encountered by the Special Rapporteur in obtaining and compiling responses from States, his report contained some interesting preliminary conclusions. Addressing the question of whether and to what extent the obligation to extradite or to prosecute formed part of customary international law, the Special Rapporteur described what he considered to be the current legal situation: the existence of a large number of international treaties dealing with the obligation and of a growing number of national laws and judicial decisions; the creation and development of legal practice, which was a crucial element for the establishment and acceptance of emerging customary norms; and the existence of a measure of State receptiveness in that regard. As to whether that legal situation actually reflected an *opinio juris*, the Special Rapporteur was inclined to think that it did, arguing in paragraph 125 of his report that

[i]f a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.²⁸⁰

He agreed that such an interpretation was acceptable. However, it referred to a specific case that did not seem to be generally applicable in the context of the Commission's study. In any event, if the provisional outcome of the Special Rapporteur's research and analysis was acceptable to the Commission, one might set aside concerns arising from the sluggishness of States' responses and conclude that it was no longer necessary to seek fresh reactions, thereby enabling the Special Rapporteur to proceed with his work.

62. With regard to the question whether *aut dedere aut judicare* was an alternative obligation, he failed to understand the argument against treating it as such, unless there were several possible interpretations of the term "alternative", which, in his view, was not the case. In any event, it was quite clear that the obligation should be formulated in alternative terms. Four options were conceivable: simply extraditing the suspect; simply prosecuting the suspect; first extraditing and then prosecuting the suspect, which raised the issue of trial *in absentia* and its possible consequences; or, lastly, first prosecuting and then extraditing the suspect, which raised questions such as dual criminal liability and enforcement of the sentence. In any case, the question arose of whether and to what extent those options, particularly the third and fourth, were relevant and under what circumstances they would be implemented. With regard to the "triple alternative", he wondered what kinds of situations it might cover, apart from the surrender of suspects to the International Criminal Court.

²⁸⁰ Enache-Brown and Fried, *loc. cit.* (see footnote 254 above).

63. The ruling rendered by the Spanish criminal court on 28 April 2008, cited in paragraph 88 (c) of the report, was interesting in that it illustrated, in a somewhat novel way, the legal regime applicable in the event of refusal of extradition. It established two conditions: first, that the territorial State must prosecute the suspect in its own courts; and second, that the trial should take place solely if so required by the State requesting extradition. The latter was a condition characterized by the Special Rapporteur as “new and so far unknown”, but it was a condition of which one must be absolutely sure. In conclusion, he noted that the Special Rapporteur was clearly running up against difficulties that were beyond his control. He therefore thought that Mr. Pellet’s idea of setting up a working group to assist the Special Rapporteur was a wise proposal, provided that the group’s terms of reference were specified. In response to the Chairperson’s appeal, he said that he reserved the right to revert to the issues raised and to deal with other issues at the following session.

64. Mr. CANDIOTI, referring to the comments by Mr. Gaja, noted that he had spoken only of the obligation to prosecute, as though it was the sole obligation flowing from the *aut dedere aut judicare* principle. Mr. Fomba had listed four possible options for the obligation to extradite or prosecute. Under the circumstances, he suggested that it might be helpful to adopt a single working definition of the obligation involved; that would facilitate the Commission’s work on the topic and perhaps elicit fresh responses from States.

The meeting rose at 1 p.m.

2988th MEETING

Thursday, 31 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded) (A/CN.4/588, sect. F, A/CN.4/599, A/CN.4/603)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the obligation to extradite or prosecute (*aut dedere aut judicare*).

2. Mr. GALICKI (Special Rapporteur) thanked all the members of the Commission who had participated in the debate for their constructive and friendly criticism. Most of that criticism had been aimed at the approach he had adopted in his third report, which consisted of the continued consideration of material covered in his preliminary²⁸¹ and second reports,²⁸² and at the slow pace of progress on the topic. While he attributed those shortcomings chiefly to the reluctance or failure of many Governments to submit the comments and information requested of them, he agreed that a more expeditious and proactive approach was needed, and that the situation should not stand in the way of determining the basic structure and content of the topic. At the current stage, input from Governments should be viewed as valuable support, but not as a prerequisite for the further development of the study. In the light of those comments, he would continue his efforts with a view to presenting a more substantive set of draft articles in his next report.

3. With regard to the draft articles proposed in the third report, some members had been of the view that draft article 1 (Scope of application) should not specify the various time periods corresponding to the establishment, operation and effects of the obligation, while others had taken the contrary view that their inclusion would help to provide a structure for the future work of the Commission on the topic. On the question whether the adjective “alternative” should be replaced by “legal”, the prevailing opinion had been that any adjective was redundant, and Mr. Fomba had pointed out that the phrase “alternative obligation” could be interpreted in at least four ways. He would therefore refrain from qualifying the obligation in any way, and would also shorten the title of the draft article to “Scope”.

4. As to the substantive element of draft article 1 and the delimitation of the crimes and offences to be covered by the obligation, the view had been expressed that the obligation, and also the principle of universal jurisdiction, arose only in connection with serious crimes under international law. That view was supported by statements made by the representatives of Sweden and China in the Sixth Committee.²⁸³ Mr. Candiotti had suggested that the Commission’s primary focus should be on determining the exact nature and content of the obligation on the basis of the various opinions expressed by members during the current session. The need for such a determination as a precondition for any further development of the topic had been unconditionally endorsed by all members who had spoken in the debate.

5. With regard to the personal element, there had been fairly widespread support for the formulation “persons under their jurisdiction”, given that the matter was essentially regulated by existing treaties on extradition. The point had also been made that the obligation arose only when the alleged offender was present in the territory of the requested State, which had the discretionary power

²⁸¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

²⁸² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585.

²⁸³ *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 22nd meeting (A/C.6/62/SR.22)*, paras. 33 and 62, respectively.

either to prosecute or to extradite the offender. The obligation was thus contingent on there being a request for extradition.

6. Although doubts had been expressed on the matter at previous sessions, there had been some support for his position on the advisability of analysing the “triple alternative” hypothesis, given current developments regarding the complementary character of the Rome Statute of the International Criminal Court. It had also been considered advisable to expand the scope of the current study to include key procedural issues, such as the conditions for extradition and States’ margin of discretion in respect of a refusal to extradite.

7. With regard to draft article 2 (Use of terms), in keeping with the emphasis on the personal element favoured by some members, he would include definitions of the terms “persons”, “persons under jurisdiction”, and also “universal jurisdiction”, as had been suggested by Ms. Escaramenia.

8. Regarding draft article 3 (Treaty as a source of the obligation to extradite or prosecute), he endorsed Mr. Dugard’s suggestion that the text would benefit from the inclusion of examples of specific treaties or categories of treaty.

9. It had been stressed that progress on the topic ought to be accelerated, given that sufficient materials had already been collected to provide a basis for drawing some decisive and constructive conclusions. As to the shape that future provisions might take, it had been suggested that draft articles should be elaborated to address each of the following issues: the source of the obligation; its customary nature; and the obligation as a general principle deriving from elements both of national legislation and of practice.

10. As to the methodology, a two-phase approach had been advocated, whereby first the substantive, then the procedural issues would be addressed. Mr. Gaja, however, had suggested that procedural aspects, such as the elements that triggered the obligation, should be addressed before substantive ones such as the source and content of the obligation.

11. It had also been observed that the next report should directly address two fundamental issues: the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction; and the “triple alternative” hypothesis. Support had been expressed for his proposed approach using the Commission’s 1996 draft code of crimes against the peace and security of mankind²⁸⁴ as a legal background.

12. Members had generally favoured the establishment of a working group entrusted with the specific mandate of analysing the most controversial substantive issues to be addressed in future draft articles, such as the customary nature of the *aut dedere aut judicare* obligation, the relationship between that obligation and the principle of universal jurisdiction, crimes and offences covered by the

obligation, and the role of international criminal jurisdiction in that context.

13. Support had also been expressed for an assessment of other procedural questions, to be undertaken at a subsequent stage of the exercise, including conditions of extradition, grounds for its refusal and legal safeguards available to individuals, concurrent requests for extradition, and the regulation of judicial guarantees. The need for a more pragmatic, rather than an academic or abstract approach to the topic had been stressed, as had the need for more decisive progress in the elaboration of substantive draft articles dealing with specific and clearly delimited aspects of the topic.

14. He was particularly grateful to Mr. Pellet for his frank and constructive comments, and for his suggestion, which had been supported by other members, that a working group be established in order to determine the scope of the obligation to extradite or prosecute and to identify and provide answers to the fundamental questions that it posed. Experience had shown that working groups could provide valuable assistance in developing and accelerating work on a particular topic.

15. The draft articles to be included in his fourth report should deal, first, with such general matters as the sources of the obligation, its content and its extent. At least some of those draft articles could draw on the work of the Commission on its 1996 draft code of crimes against the peace and security of mankind. He looked forward to participating actively in the work of the new working group, and suggested that Mr. Pellet was ideally suited to serve as its chairperson.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/L.742²⁸⁵)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

16. Mr. KOLODKIN (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.742), said that the Planning Group had held five meetings. Included in its agenda had been the following items: Working Group on the long-term programme of work; date and place of the sixty-first session of the Commission; consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels; documentation and publications; dialogue between the Commission and the Sixth Committee; meeting with legal advisers; and other matters. His report was organized around those issues, though not presented in that order. Although it was self-explanatory, he wished to highlight several of its salient aspects.

17. First, it was unanimously agreed that the two-day event commemorating the sixtieth anniversary of the Commission had been one of the highlights of the current session. The Planning Group had considered the meeting with legal advisers held in the context of that

²⁸⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

²⁸⁵ Mimeographed; available on the Commission’s website.

event to be a useful forum for interaction and believed that it would be beneficial to hold such meetings at least once during every quinquennium, preferably before its midpoint. Moreover, Member States, in association with existing regional organizations, professional associations, academic institutions and members of the Commission, played an important role in convening national or regional meetings dedicated to the work of the Commission, and they should be encouraged to continue to convene such events as appropriate.

18. Secondly, in its resolution 62/70 on the rule of law at the national and international levels, the General Assembly had, *inter alia*, invited the Commission, in its report on the work of its current session, to comment on its current role in promoting the rule of law. In response to that invitation, the Planning Group had reflected on the matter and had prepared several paragraphs for inclusion in its report. Owing to a heavy translation workload, it had not been possible to include those paragraphs (paragraphs 8 to 13) in the present report. The Secretariat had circulated an informal text containing the relevant paragraphs in English only, for eventual inclusion in the relevant chapter of the Commission's report.²⁸⁶ The Planning Group had been well aware that the agenda item before the General Assembly was multifaceted and had been mindful of that fact in preparing the Commission's contribution. It was indebted to Mr. Vasciannie for preparing the draft used as a basis for formulating its response.

19. Thirdly, the relationship between the Commission and the Sixth Committee remained central to the work of the Commission. From a strategic perspective, it was obviously essential for States to submit evidence of State practice to the Commission, as well as written comments and observations on the work of the Commission. It was nevertheless useful to explore ways and means of harnessing the relationship with the Sixth Committee by encouraging interactive dialogue, either within the framework of the Sixth Committee itself, or in other informal meetings that took place during the International Law Week in New York, so as to redirect the focus towards topics on the Commission's agenda.

20. Fourthly, financial issues that would enable the Commission to discharge its functions more meaningfully had also been discussed. In particular, the Planning Group had once again raised the question of honoraria for special rapporteurs. It had also considered it useful to highlight the importance of ensuring that more than one special rapporteur would be able to attend the meetings of the Sixth Committee when it considered the report of the Commission.

21. Lastly, the Working Group on the long-term programme of work had held several meetings, and on the basis of the report of the Working Group, the Planning Group had endorsed the inclusion of two topics in the long-term programme of work of the Commission: one entitled "Treaties over time", on the basis of a revised and updated proposal by Mr. Nolte,²⁸⁷ the other entitled "Most-favoured-nation clause", on the basis of the

report of the 2007 Working Group on the subject chaired by Mr. McRae.²⁸⁸ Both topics reflected States' needs in respect of the progressive development and codification of international law; they were sufficiently advanced in terms of State practice to permit progressive development and codification; and they were concrete and feasible for progressive development and codification. The syllabuses of the topics would be annexed to the report of the Commission, should it agree to their inclusion. The paper by Mr. Nolte was currently available in English only; it was being translated and would be available in other official languages the following week. The Planning Group had also proposed the inclusion of the two topics in the current programme of work of the Commission and recommended the establishment of study groups on both topics at the sixty-first session of the Commission.

22. As was customary, the report of the Planning Group would be reproduced as part of the last chapter (chapter XII) of the report of the Commission, under "Other decisions and conclusions of the Commission", with the necessary adjustments to reflect the issues covered in the report. He wished to thank the members of the Planning Group for their active participation in the discussions, and the Secretariat for the assistance it had extended to himself and to the Planning Group.

23. The CHAIRPERSON invited the Commission to adopt the report of the Planning Group paragraph by paragraph.

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

24. Mr. GAJA suggested that the forms of address "Her Excellency" and "His Excellency" were redundant and should be deleted.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

25. Mr. CANDIOTI suggested that, in footnote 5, the phrase "in respect of the Seminar" should be deleted, since the publication by the Argentine Council of Foreign Relations, which was intended as a tribute to the Commission, addressed not only the topic of aquifers but also most of the Commission's current topics.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 13

26. The CHAIRPERSON suggested that since paragraphs 8 to 13 of the report were not yet available in all official languages, they should be taken up when the

²⁸⁶ *Yearbook ... 2008*, vol. II (Part Two), paras. 341–346.

²⁸⁷ See *Yearbook ... 2008*, vol. II (Part Two), annex I.

²⁸⁸ Document A/CN.4/L.719 (mimeographed; available on the Commission's website, documents of the fifty-ninth session). See also *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 377.

Commission turned to the consideration of the relevant chapter of the report on the work of its current session.

It was so agreed.

Paragraphs 14 to 20

Paragraphs 14 to 20 were adopted.

27. The CHAIRPERSON said that the text under section A.6 relating to the meeting with members of the Appellate Body of WTO would be prepared in time for consideration and adoption as part of chapter XII of the report of the Commission on the work of its current session.

Paragraph 21

28. Mr. HASSOUNA said that he fully supported paragraph 21, but wished to raise a separate financial issue. In his view, it was unacceptable that a number of members of the Commission and the Secretariat had received their daily subsistence allowance a week late. Since the Commission was requesting that funds should be allocated to allow more special rapporteurs to attend the meetings of the Sixth Committee, it should also, as a matter of principle, express its disappointment concerning that delay.

29. The CHAIRPERSON said that, while he shared Mr. Hassouna's concerns, he did not think the report under consideration was the appropriate place in which to air such a complaint. If members so wished, he would take the necessary measures to contact the authorities in Geneva and in New York to inform them of the problem.

Paragraph 21 was adopted.

Paragraphs 22 to 28

Paragraphs 22 to 28 were adopted.

30. The CHAIRPERSON said that the report of the Planning Group as a whole, as amended, would be adopted once the Commission had considered its paragraphs 8 to 13 in the context of its consideration of chapter XII of its report.

Cooperation with other bodies (continued)*

[Agenda item 12]

STATEMENT BY THE REPRESENTATIVE OF THE
ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

31. The CHAIRPERSON invited Mr. Singh to make a brief statement to the Commission on behalf of the Secretary-General of the Asian–African Legal Consultative Organization (AALCO).

32. Mr. PELLET said it was a shame that a statement by the representative of a regional body should be dispatched in indecent haste without the opportunity for a proper dialogue between the representative and the Commission. He suggested that an hour of the programme of work for the following week should be set aside for that purpose.

33. Mr. SINGH, speaking as the representative of AALCO, suggested that he should make a brief statement to the Commission and submit to the Secretariat the detailed report of the Secretary-General of AALCO on the its forty-seventh session,²⁸⁹ held in New Delhi from 30 June to 4 July 2008, for possible inclusion in the Commission's report.

34. Ms. XUE said it was because the new Secretary-General of AALCO would not take up his duties until late August 2008 that Mr. Singh had been invited to address the Commission on behalf of the Secretary-General. Since the Commission would probably need to devote all the following week's meetings to the adoption of its annual report, she urged the Chairperson to allow Mr. Singh, who had presided over the Organization's forty-seventh session, to report briefly on the activities of AALCO at the current meeting, as there might be no further opportunity for him to do so.

35. The CHAIRPERSON suggested that Mr. Singh should make a brief presentation during the current meeting, on the understanding that, if time allowed, a fuller discussion would take place the following week, as proposed by Mr. Pellet.

36. Mr. HASSOUNA and Mr. PETRIČ endorsed that suggestion.

It was so decided.

37. Mr. SINGH, speaking as the representative of AALCO on behalf of the Secretary-General of AALCO, said it was an honour to address the Commission on the occasion of its sixtieth anniversary session. AALCO recognized the Commission's great contribution, in furtherance of its mandate, to the progressive development and codification of international law over the past 60 years. It attached great importance to its long-standing relationship with the Commission, which involved the statutory obligation to consider the topics under consideration by the Commission and to forward to the Commission the views of its member States. The fulfilment of that mandate over the years had helped to forge a closer relationship between the two bodies.

38. Traditionally, it was the Secretary-General of AALCO who presented highlights of the views of delegations participating in its annual sessions to the Commission. However, since the newly-appointed Secretary-General, Mr. Rahmat Mohamad, would not take up his duties until the following month, he had been requested, as the President of the forty-seventh session of AALCO, to present to the Commission the highlights of its deliberations on matters relating to the Commission's work.

39. He was grateful to the Commission for enabling Mr. Perera to represent it at the forty-seventh annual session of AALCO. Mr. Perera had reported on the work of the Commission at its fifty-ninth session and the first part of its sixtieth session. Mr. Kamto and Ms. Xue had also attended the session, which had taken place in New Delhi, where the headquarters of AALCO were located, from 30 June to 4 July 2008. He himself had been elected President, and Mr. Wanjuki Muchemi, Solicitor General of Kenya, had

* Resumed from the 2985th meeting.

²⁸⁹ Available from www.aalco.int.

been elected Vice-President. In addition to the deliberations on a number of organizational matters and substantive agenda items, a one-day special meeting had been held on the theme of “Contemporary issues in international humanitarian law”, jointly organized by AALCO and ICRC.

40. During discussions on the agenda item relating to the work of the Commission, many delegations had made detailed comments on the topics of shared natural resources, effects of armed conflicts on treaties, reservations to treaties, responsibility of international organizations, expulsion of aliens, and the obligation to extradite or prosecute (*aut dedere aut judicare*). Owing to time constraints, he would submit a detailed summary of those comments to the Secretariat.

41. The forty-seventh session had welcomed the establishment by the Commission of an Open-ended Working Group on the most-favoured-nation clause to examine the possibility of including the topic in its long-term programme of work.²⁹⁰ It had also appreciated the fruitful exchange of views on the items discussed during the meeting between AALCO and the Commission held in conjunction with the AALCO legal advisers’ meeting in New York on 5 November 2007. The member States of AALCO had requested that such meetings should continue to be convened in future. He looked forward to hearing the Commission’s views and suggestions on possible topics for discussion at the next meeting between AALCO and the Commission.

42. On the occasion of the Commission’s sixtieth anniversary, proposals had been made that AALCO should organize a seminar on the work of the Commission, to be held before the end of 2008. He hoped that some members of the Commission would be able to participate in that event.

43. The Secretariat of AALCO would continue to prepare notes and comments on the substantive items considered by the Commission in order to assist the representatives of AALCO member States in the Sixth Committee in their deliberations on the report of the Commission on the work of its sixtieth session. An item entitled “Report on matters relating to the work of the International Law Commission at its sixtieth session” would be considered at the forty-eighth session of AALCO.

44. In closing, he extended an invitation to members of the Commission to attend the forty-eighth session of AALCO, the date and venue of which would be communicated to them in due course, and thanked the Commission for allowing him the opportunity to address it.

Reservations to treaties (concluded)* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE (concluded)**

45. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the first part of the

final report of the Drafting Committee, which consisted of its third and final report on the topic “Reservations to treaties”, to be found in document A/CN.4/L.740. That document contained the titles and texts of twelve draft guidelines provisionally adopted by the Drafting Committee. The draft guidelines read:

2.8.1 *Tacit acceptance of reservations*

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 *Unanimous acceptance of reservations*

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

2.8.3 *Express acceptance of a reservation*

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 *Written form of express acceptance*

The express acceptance of a reservation must be formulated in writing.

2.8.5 *Procedure for formulating express acceptance*

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 *Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation*

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

2.8.7 *Acceptance of a reservation to the constituent instrument of an international organization*

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 *Organ competent to accept a reservation to a constituent instrument*

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

2.8.9 *Modalities of the acceptance of a reservation to a constituent instrument*

1. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2.8.10 *Acceptance of a reservation to a constituent instrument that has not yet entered into force*

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered

²⁹⁰ See footnote 288 above.

* Resumed from the 2978th meeting.

** Resumed from the 2974th meeting.

to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final nature of acceptance of a reservation

Acceptance of a reservation cannot be withdrawn or amended.

46. Draft guideline 2.8.1 was entitled “Tacit acceptance of reservations”. It would be recalled that the Special Rapporteur had proposed two alternative texts for the draft guideline in his twelfth report: a shorter version (2.8.1) and a longer version (2.8.1. *bis*).²⁹¹ The latter option had essentially tracked the language of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions and duplicated draft guideline 2.6.13 concerning the time period for formulating an objection. In the debate in plenary a majority had expressed a preference for the longer option.

47. In view of the adoption by the Commission of draft guideline 2.6.13 on the time period for formulating an objection (see the 2970th meeting above, paragraph 93), the Drafting Committee had preferred to work on the basis of the shorter version. It had been considered that such an approach would avoid duplicating the language of draft guideline 2.6.13.

48. Several changes had nevertheless been introduced to the draft guideline. First, the brackets around the phrase “Unless the treaty otherwise provides” had been deleted, although their inclusion in draft guideline 2.6.13 might seem to render its retention in the present guideline superfluous.

49. Secondly, the words “in accordance with” had been replaced by “within the time period provided for in”, to better reflect the link to the time limit after which a tacit acceptance would be implicated.

50. Thirdly, instead of making reference to guidelines 2.6.1 to 2.6.14, there was only a reference to the guideline relevant to the time period for formulating an objection, namely draft guideline 2.6.13.

51. Draft guideline 2.8.2 was entitled “Unanimous acceptance of reservations” and was intended to cover the specific circumstances in which unanimous acceptance was required. Various situations could arise in that regard, which could not easily be subsumed into a single provision. Accordingly, the commentary would make the necessary distinctions, depending on whether the treaty was already in force when the reservation was notified. It would also make it clear that the reference to “parties” included contracting parties in the sense of article 2, paragraph 1 (*f*), of the 1969 Vienna Convention.

52. The commentary would also emphasize the case in which the reservation required acceptance by particular States or international organizations, which were parties to or entitled to become parties to the treaty. That case, which might for example arise in respect of the acceptance by nuclear powers of a reservation to a nuclear-free-zone treaty, was reflected by the words “some or all” in draft guideline 2.8.2.

53. In those circumstances, it appeared crucial that the participation of the reserving State should be preserved from subsequent challenges of objecting States. Thus, draft guideline 2.8.2 stated that the unanimous acceptance of the reservation “once obtained is final”.

54. Draft guideline 2.8.3 was entitled “Express acceptance of a reservation”. Although acceptance of a reservation in the case of multilateral treaties was almost invariably implicit or tacit, the draft guideline simply covered the situation in which such an acceptance was expressly made. There were isolated examples of such express acceptances.

55. The Drafting Committee had adopted the draft guideline without any change.

56. Draft guideline 2.8.4 was entitled “Written form of express acceptance”. The draft guideline tracked the language of the 1969 and 1986 Vienna Conventions, whose article 23, paragraph 1, stated in part that “an express acceptance of a reservation must be formulated in writing”.

57. The Drafting Committee had adopted the draft guideline without change.

58. Draft guideline 2.8.5 was entitled “Procedure for formulating express acceptance”. It would be recalled that the form and procedure for formulating reservations had been addressed in draft guidelines 2.1.1 to 2.1.7. Draft guidelines 2.1.1 and 2.1.2 dealt with formulation of reservations in writing and their formal confirmation in writing and thus corresponded to the formal requirements of draft guideline 2.8.4. Draft guidelines 2.1.3 on formulation of a reservation at the international level; 2.1.4 on absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations; 2.1.5 on communication of reservations; 2.1.6 on procedure for communication of reservations; and 2.1.7 on functions of depositaries, applied *mutatis mutandis* in relation to express acceptances.

59. The Drafting Committee had adopted the draft guideline without any change.

60. Draft guideline 2.8.6 was entitled “Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation”. It reproduced in slightly modified form the provisions of article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. The reference to draft guideline 2.2.1 was intended to recall the requirement of formal confirmation of a reservation formulated when signing a treaty.

61. The Drafting Committee had adopted the draft guideline without any change.

²⁹¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, pp. 38–39, paras. 25–26.

62. Draft guideline 2.8.7 was entitled “Acceptance of a reservation to the constituent instrument of an international organization”. It reproduced the text of article 20, paragraph 3, of the 1986 Vienna Convention. For reasons he had previously explained, the Special Rapporteur had indicated that he was not in favour of making a distinction between reservations to institutional provisions of a constituent instrument and reservations to its substantive provisions. The distinction, while it might be interesting from an academic point of view, was difficult to make in practice and was not drawn in the 1986 Vienna Convention.

63. In the light of that explanation, the Drafting Committee had adopted draft guideline 2.8.7 without any change.

64. Draft guideline 2.8.8 was entitled “Organ competent to accept a reservation to a constituent instrument”. It should be noted that the Drafting Committee had decided to reverse the order of draft guidelines 2.8.8 and 2.8.9, because it had been felt that it would be more logical to address first the issue of the organ and then that of the modalities. Like draft guideline 2.8.9, draft guideline 2.8.8 too dealt with an important issue deriving from article 20, paragraph 3, of the 1986 Vienna Convention, namely the determination of the organ competent to accept the reservation. As indicated by the words “Subject to the rules of the organization”, the issue was primarily to be resolved by the members of the relevant international organization. Accordingly, the three alternative options introduced in the draft guideline had a subsidiary character, insofar as they were to be considered only if the rules of the organization remained silent.

65. As to those various options, the Drafting Committee had concluded that some flexibility should be retained. Acceptance should not be restricted to the organ competent to decide on the admission of members to the organization, as the reserving State or organization could already be a member of the organization and make a reservation to an amendment to its constituent instrument. In addition to the admitting organ, reference was thus made in draft guideline 2.8.8 to the organs having competence to amend or interpret the constituent instrument.

66. Draft guideline 2.8.9 (which had previously been draft guideline 2.8.8) was entitled “Modalities of the acceptance of a reservation to a constituent instrument”. As it dealt with two questions deriving from draft guideline 2.8.7, the Drafting Committee had considered the possibility of merging the relevant provisions into a single guideline, but in the end it had preferred to preserve the integrity of the text of article 20, paragraph 3, of the 1986 Vienna Convention, as reproduced in draft guideline 2.8.7.

67. The first issue addressed in draft guideline 2.8.9 was related to the non-requirement of acceptance, by the members of an organization, of a reservation to its constituent instrument. It was reflected in the first paragraph of the draft guideline. In the case envisaged in that provision, draft guideline 2.8.1 was not applicable; what was actually required was that the reservation should be accepted by the competent organ of the organization. As implied

by article 20, paragraph 5, of the 1986 Vienna Convention, acceptance of the reservation by the members of the organization was not necessary.

68. The second issue addressed in draft guideline 2.8.9 related to the form of acceptance of a reservation by the competent organ of the organization. As had been indicated by one member of the Committee, the point at issue was not that of a presumption of acceptance, but rather the refusal of tacit acceptance. On that basis, the suggestion had been made that the requirement should be for the competent organ expressly to accept the reservation. Other members of the Committee, however, had considered that an element of flexibility was needed. Accordingly, the second paragraph of draft guideline 2.8.9 referred to the rules of the organization; it also lifted the requirement of express acceptance when the reserving State or organization was admitted into the organization.

69. Draft guideline 2.8.10, entitled “Acceptance of a reservation to a constituent instrument that has not yet entered into force”, related to situations in which a constituent instrument had not yet entered into force and where the competent organ referred to in article 20, paragraph 3, of the 1986 Vienna Convention had not yet been established. It sought to provide a *modus vivendi* for an anomaly, thereby complementing draft guideline 2.8.7, which reflected article 20, paragraph 3, of the 1986 Vienna Convention. Its purpose was to address a particular lacuna that existed because there was no mechanism for accepting a reservation to a constituent instrument when the treaty had not yet entered into force, or when the competent organ had not yet been established.

70. The draft guideline had been intensely debated. Some members had felt that there was no need for such a guideline on the matter, since the issue could await the entry into force of the treaty, or the establishment of the organization. In addition, it was noted that such a guideline would not resolve every problem, because there might still be a time lag between the entry into force of a treaty and the establishment of a competent organ. Other members had, however, been of the view that such a guideline would provide legal certainty and stability in treaty relations. Moreover, in the practice of the Secretary-General, as depositary, there were instances of consultations being held with all States that were already parties to the constituent instrument.

71. In the final analysis, the formulation of a possible guideline had been generally favoured. At least three aspects had been considered crucial. First, it had been agreed that the phrase “all the States and international organizations” was vague, but that the phrase “all contracting States and organizations” was unduly limited. The Drafting Committee had therefore settled on the formulation “all signatory States and international organizations”.

72. Secondly, it had been considered necessary to ensure that there was some degree of legal certainty. The central question had been, not whether the time period provided for in draft guideline 2.6.13 was complied with, but whether, once acceptance had been given, the time period ought to be varied. It had been agreed that the solution to be followed was that provided for in draft

guideline 2.8.2 relating to the unanimous acceptance of reservations, which stipulated that once such acceptance had been obtained, it was final. Hence there was no need for express acceptance, which rarely occurred in practice. The reservation was considered to have been accepted if no signatory State or organization had raised an objection by the end of the twelve-month period.

73. Thirdly, it had been recognized that the timelines between the entry into force of a treaty and the actual establishment of a competent organ might be different. The commentary would address the various implications of that time lag. The essential consideration was to avoid more than one scheme applying. Once the treaty entered into force, the relevant guidelines relating to article 20, paragraph 3, of the 1986 Vienna Convention, would provide the necessary guidance.

74. Moving to draft guideline 2.8.11, entitled “Reaction by a member of an international organization to a reservation to its constituent instrument”, he explained that it should be read in conjunction with draft guideline 2.8.7 and the first paragraph of draft guideline 2.8.9. The Drafting Committee had retained a deliberately general wording so as not to give the impression that members of the organization would have a right, or “*faculté*”, to accept the reservation. Those words had therefore been deleted from the draft guideline, the title of which now referred to a “reaction” by a member of the organization. The substance of draft guideline 2.8.11 nevertheless remained unchanged.

75. Draft guideline 2.8.12 (“Final nature of acceptance of a reservation”), had originally been entitled “Final and irreversible nature of acceptances of reservations”. The Drafting Committee had discussed at length the categorical nature of the guideline, which had stated that the acceptance of a reservation was final and irreversible and could not subsequently be withdrawn or amended. Attention had been drawn to the fact that, since States or international organizations had a twelve-month period in which to object to a reservation, it would be logical to allow them, during that period, to reverse their acceptance of a reservation, provided that they did not jeopardize treaty relations. In other words, they could reject a reservation that they had previously accepted, but they could not declare that they would not have treaty relations with the reserving State or organization, if they had not already made such a declaration. On the other hand, several members of the Committee had wondered whether the possibility of reversing the acceptance of a reservation would not result in different regimes with respect to tacit acceptances which, by definition, would become operative only after the expiry of the twelve-month period, whereas express acceptances would already have taken place beforehand. It had, however, been recalled that this concern was somewhat theoretical, since there were hardly any examples of express acceptances of reservations. Hence most acceptances would be tacit and become operative after the twelve-month period; in that case they could not, of course, be reversed. Nonetheless, even in the event that an acceptance had been made expressly before expiry of the twelve-month period, it had been felt that such a solemn and formal acceptance could not be reversed.

76. Bearing that in mind, the Committee had decided to keep the draft guideline almost in the form proposed, with only a few changes. It had deleted the word “irreversible” from the title, as it was redundant, and had not maintained the distinction in the text between express and tacit acceptance, which no longer had a *raison d’être*. It had also merged the two sentences of the original draft into one, deleting the word “subsequently”. The guideline stated that acceptance of a reservation could not be withdrawn or amended.

77. He recommended that, at the current stage of its work, the Commission should take note of draft guidelines 2.8.1 to 2.8.12.

78. The CHAIRPERSON said that he took it that the Commission wished simply to take note of draft guidelines 2.8.1 to 2.8.12 contained in the report of the Drafting Committee on reservations to treaties, and that it would resume its consideration of the report of the Drafting Committee on the topics of responsibility of international organizations and expulsion of aliens at its next plenary meeting.

It was so decided.

Cooperation with other bodies (concluded)

[Agenda item 12]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

79. The CHAIRPERSON welcomed Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, and Mr. Philippe Gautier, Registrar of the Tribunal, and invited Judge Wolfrum to address the Commission.

80. Judge WOLFRUM (President of the International Tribunal for the Law of the Sea) said he wished to address three legal issues where the work of the International Law Commission and that of the International Tribunal for the Law of the Sea, converged: first, the fragmentation of international law; second, diplomatic protection; and, third, shared natural resources.

81. When Mr. Candioti, the then-Chairperson of the Commission, had visited the International Tribunal for the Law of the Sea in 2004, the issue of fragmentation of international law had already been high on the agenda of discussions with the representatives of the Tribunal. Since then, the question had received further attention from the academic world and practitioners and had formed the subject of an International Law Week in New York. The Study Group set up by the Commission under the chairpersonship of Mr. Koskienniemi had produced a report²⁹² that had focused mainly on the substantive fragmentation of international law and had left aside institutional aspects. It had therefore not examined the validity of the concern occasionally expressed that the proliferation of specialized international courts and tribunals could also

²⁹² Document A/CN.4/L.682, mimeographed; available on the Commission’s website (see footnote 265 above.)

lead to inconsistencies and contradictions in international jurisprudence, an issue examined during the International Law Week in New York.

82. Nevertheless, the Study Group's conclusions might be useful when assessing the proliferation of institutions. The Commission had found, in paragraph 485 of the report, that "the absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise". Although those findings related to conflicts between the norms of international law, not between its institutions, he was convinced that international jurisprudence did not suffer from a perceived lack of a central hierarchy. Undoubtedly, with independent courts and overlapping jurisdictions, the possibility of different interpretations could not be excluded, and had indeed already materialized. Nevertheless, the availability of multiple jurisdictions only reflected the state of current international relations. Global society, far from being homogeneous, was characterized by various international regimes and institutions which were at different stages of evolution and consolidation. At the same time, there was a recognizable need to maintain the coherence of the international legal order. In that respect, comity and dialogue between existing international courts, especially standing courts, might to some extent contribute to the achievement of that goal. Although the Commission was not a court, he would include it in that context.

83. The endeavour to achieve coherence did not, however, completely preclude the possibility of jurisdictional conflicts. For instance, parallel proceedings could be held before international judicial bodies, as the case concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks* had shown. The case had been submitted to a special chamber of the Tribunal and simultaneously to WTO. The dispute before the Tribunal had concerned issues regarding the conservation and management of living resources, as well as the freedom of fishing on the high seas. Trade-related issues, such as the freedom of transit under the General Agreement on Tariffs and Trade 1994, had been submitted to WTO. As the parties' claims before each judicial body clearly differed in nature, he could see no obstacle to their bringing separate aspects of more or less the same case before more than one judicial institution.

84. The proliferation of international courts and tribunals was a consequence of the growth of public international law, which encompassed more policy areas than ever before. The creation of specialized tribunals to adjudicate disputes arising in specialized areas of law was a deliberate choice of the community of States and a reaction to those developments. Those courts and tribunals were well aware of the fact that they did not lead completely separate existences, but needed to cooperate, consider one another's work and harmonize their jurisprudence as far as possible. When it came to the settlement of disputes concerning the law of the sea, article 287 of the United Nations Convention on the Law of the Sea offered the option of choosing between the International Tribunal for the Law of the Sea, the ICJ and arbitration. He was quoting the sequence of the text and not speaking *pro domo*.

85. He was glad to note that the report of the Commission's Study Group had also taken the view that the relevant "institutions will seek to coordinate their jurisprudence in the future" in order to avoid jurisdictional conflicts. He was also pleased that when Judge Rosalyn Higgins, President of the International Court of Justice, had addressed the International Law Association in 2006, she had emphasized that judges should regard "this complex world" as "an opportunity rather than a problem" and had called upon international judges to "read each other's judgments ... respect each other's judicial work [and] ... try to preserve unity ... unless context really prevents this".²⁹³

86. Relations between the ICJ and the International Tribunal for the Law of the Sea displayed that spirit of cooperation and mutual respect. The visit of Judge Higgins to the Tribunal on the occasion of its tenth anniversary in 2006 testified to the cordial relations existing between the two institutions. Those relations had been further strengthened when members of the ICJ and of the Tribunal had met recently in The Hague to hold their first exchange of views on issues of common interest. Those issues had pertained to provisional measures, advisory opinions, the relationship between international and national law and the conditions of service of international judges. While the relationship between international and national law might seem an old-fashioned issue, unfortunately the Tribunal had had to deal with it in the "*Hoshinmaru*" case and the "*Tomimaru*" case.

87. In its decisions, the Tribunal had not hesitated to refer, when appropriate, to the precedents set by the ICJ. Under article 293 of the United Nations Convention on the Law of the Sea, the Tribunal was required to apply rules of international law, on the condition that they were not incompatible with the Convention. That was an example of a hierarchy in international law. In such cases, the Tribunal had found it necessary, on a number of occasions, to cite the relevant decision of the ICJ. For instance, the Tribunal had relied on the Court's jurisprudence in respect of issues concerning the state of necessity, the existence of a legal dispute, the ability of a tribunal to examine its jurisdiction *proprio motu*, the exhaustion of negotiations as a precondition for a dispute to be submitted to a court or tribunal, the decisive date for determining issues of admissibility, the notion of acquiescence and the status of a protocol or minutes of meetings. The two latter issues had arisen in the "*Hoshinmaru*" and "*Tomimaru*" cases.

88. The Tribunal did not, however, always agree with the Court, as had been demonstrated by the *Southern Bluefin Tuna Cases*. The jurisprudence of the Court had hitherto not accepted the precautionary approach as a binding principle of international law. The Tribunal, which had been asked to prescribe provisional measures for the protection and conservation of southern bluefin tuna fish stocks, had nevertheless relied upon that principle. In view of the uncertainty of available scientific data, the Tribunal had held that the parties to the dispute should act with "prudence and caution". It had abstained, however, from

²⁹³ "A babel of judicial voices? Ruminations from the bench", *International and Comparative Law Quarterly*, vol. 55, No. 4 (October 2006), pp. 791–804, at p. 804.

expressing general considerations relating to the status of the precautionary principle and had even abstained from explicitly referring to that principle. The Tribunal had therefore effectively used it, but had not overstated it. The President of the Tribunal believed that this approach was exactly within the limits prescribed by Judge Higgins in her speech to the International Law Association.

89. Turning to the exercise of diplomatic protection, another issue of common concern, he said that the impact of the 19 draft articles drawn up under the direction of the Special Rapporteur, Mr. Dugard,²⁹⁴ had been considerable, as they had not only codified existing customary law, but also contained a number of innovative provisions. As a result, as former Commission member James Kateka had observed, a topic which had once been deemed obsolete had become a vibrant and topical one in State practice, jurisprudence and doctrine.

90. The Special Rapporteur's fifth report,²⁹⁵ dealing *inter alia* with the diplomatic protection of ships' crews by the flag State, had made ample reference to the Tribunal's jurisprudence, particularly to the judgment in the "*Saiga*" case. With regard to the multinational composition of the ship's crew, which had been made up of Russians, Senegalese and Ukrainians, the Tribunal had argued that "undue hardship would ensue" if every crew member had to seek diplomatic protection from his or her home State. He was pleased to note that the report of the Special Rapporteur obviously concurred with those findings.

91. Conversely, the Tribunal had also drawn on the Commission's work in that judgment. When examining the issues of the "genuine link" between a vessel and its flag State, it had consulted the Commission's 1956 draft articles on the law of the sea.²⁹⁶ In assessing whether exhaustion of local remedies was required in that case, the Tribunal had relied on the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission in 2001.²⁹⁷

92. In the "*Saiga*" case, the Tribunal had had to examine the question whether a flag State was entitled to protect and bring claims on behalf of non-nationals who were crew members of a ship under its flag. After analysing the United Nations Convention on the Law of the Sea, the Tribunal had found that the Convention "considers a ship as a unit" and therefore "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant". Once again, there was a link with the topic of diplomatic protection.

93. In its analysis, the Tribunal had relied *inter alia* on article 292 of the Convention, which provided for the prompt release of vessel and crew from detention by a third State upon the posting of a reasonable bond or other financial security. The flag State might request the

Tribunal to order prompt release with regard to any vessel flying its flag and to any crew member on board such a ship, regardless of the former's nationality.

94. Prompt release cases might be compared with diplomatic protection cases. One of their objectives was to maintain a balance between the interests of the flag State and the coastal State. In addition, they protected the interests of other persons affected by the detention of the vessel and its crew. Apart from the owner of the vessel, it was mainly the crew who would benefit from efficient procedures leading to the ship's comparatively rapid liberation from detention. A distinct humanitarian aspect was therefore attached to prompt release proceedings. That had been clear in the "*Tomimaru*" case.

95. The availability of prompt release proceedings before the Tribunal placed the individual in an even stronger position than did traditional diplomatic protection. First, there was no requirement to exhaust local remedies before an application was submitted to the Tribunal. With regard to the exhaustion of local remedies, which was often invoked in the context of diplomatic protection, the Tribunal had declared in the "*Camouco*" case that

[n]o limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period. [para. 58]

Moreover, in the "*Saiga*" case, the Tribunal had considered that "[n]one of the violations of rights claimed by Saint Vincent and the Grenadines" relating to several breaches of the Convention "can be described as breaches of obligations concerning the treatment to be accorded to aliens". It had therefore excluded the exhaustion of local remedies clause.

96. Traditional diplomatic protection and prompt release proceedings under the Convention also differed with respect to the availability of international judicial remedies, in that in prompt release cases the Tribunal had compulsory jurisdiction. In its rules and practice, the Tribunal assured their expeditious handling in view of the grave humanitarian consequences of detaining a crew. In the last two prompt release cases which it had handled, the Tribunal had refrained from defining what was meant by the word "detention", for very good reasons.

97. Prompt release proceedings, as provided for by the United Nations Convention on the Law of the Sea, also strengthened the procedural position of the individual. It was not only the flag State that might submit an application to the Tribunal, but also the private party concerned, on behalf of the State and with its authorization. There had already been one such case.

98. The Tribunal had also heard one case in which it had not been certain whether the vessel was flying the flag of a particular State, because in the "*Grand Prince*" case, Belize had decided to delete the vessel from its national register after it had been arrested by France. Similar situations could arise in respect of diplomatic protection if a person had lost the citizenship of a given State. For the Tribunal, the solution had been clear, and it had decided

²⁹⁴ Yearbook... 2006, vol. II (Part Two), pp. 24–26, paras. 49–50.

²⁹⁵ Yearbook ... 2004, vol. II (Part One), document A/CN.4/538.

²⁹⁶ Yearbook ... 1956, vol. II, report of the Commission to the General Assembly, document A/3159, pp. 256 *et seq.*

²⁹⁷ See Yearbook ... 2001, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

that it had no jurisdiction. It had been a delicate case because the Tribunal's decision meant that the vessel had been without a flag, with all the grave consequences that ensued.

99. Touching briefly on shared natural resources, he said that the Special Rapporteur's work on the subject, especially the draft articles on the law of transboundary aquifers, was a noteworthy achievement, because the draft articles enshrined principles such as the obligation to protect and preserve ecosystems, the duty to cooperate and the obligation to exchange data and information.

100. It had to be remembered that the world's oceans were also in some sense a shared natural resource. In strictly legal terms that was not the case, but from a more functional perspective the similarities were evident. The United Nations Convention on the Law of the Sea clearly held the international community as a whole responsible for the oceans' future. Article 192 of the Convention made it clear that all States had an obligation to protect and preserve the marine environment and article 193 provided for a sovereign right to exploit natural resources only in accordance with that obligation. The Convention focused in particular on the protection of the marine environment against pollution, although the Tribunal had given a broader meaning to Part XII of the Convention and had in particular felt that article 192 also covered living resources. Under article 194, States were obliged to take all the necessary measures to prevent, reduce and control pollution of the marine environment. Pursuant to article 197, States should cooperate on a global and regional basis in the adoption of rules and standards. In accordance with articles 200 and 206, they must exchange relevant information and data and assess the potential effects of planned activities on the marine environment.

101. It was noteworthy that the great significance attached to the protection of the marine environment also had procedural repercussions. Under article 290, paragraph 1, of the Convention, provisional measures might be prescribed by the Tribunal, not only in order to preserve the respective rights of the parties to a dispute, but also to "prevent serious harm to the marine environment". Such measures could likewise be ordered by the International Court of Justice or arbitral tribunals. The procedure for prescribing provisional measures had already been invoked in several cases concerning the protection of the marine environment.

102. In its jurisprudence, the Tribunal mainly emphasized the importance of cooperation. In two judgments, in the *MOX Plant* case and the *Straits of Johor* case, it had held that "the duty to cooperate is a fundamental principle in the prevention of the pollution of the marine environment under Part XII of the Convention and general international law". It had also stressed the need to establish mechanisms for the exchange of information between the parties concerning potential risks or effects of the activities in question.

103. Moreover, in these two cases, the Tribunal had adopted a pragmatic approach and had prescribed measures that, in its view, would assist the parties in finding a solution. For example, in the *Straits of Johor* case,

the Tribunal had requested the parties to set up a joint group of independent experts to advise them. The work of that group and the provisional measures ordered by the Tribunal had been instrumental in providing a diplomatic solution to the dispute.

104. Lastly, article 138 of the Tribunal's Rules offered it the possibility of giving advisory opinions. The Tribunal took the view that not all disputes should be adjudicated as contentious cases. Sometimes it was better for parties to be brought to negotiations at a more informal level, something that could be achieved through advisory opinions. He would very much like to see parties use that instrument of the Tribunal, which had not yet been tested.

105. In closing, he said that his intention had been to share some information on the Tribunal's work but also to indicate to the Commission areas where the two institutions had common concerns and could cooperate easily. Both were guardians of international law, and the United Nations Convention on the Law of the Sea was one important element thereof; historically speaking, the law of the sea stood at the beginning of the development of modern international law.

106. Mr. BROWNLIE said that while the idea that members of international tribunals should meet on a collegial level, as did experts in medical and technical fields, was perfectly unexceptionable *prima facie*, it was extremely important to bear in mind that tribunals did not perform merely expert functions; they engaged in dispositive decision-making. In the case of the International Tribunal for the Law of the Sea, those decisions affected the territorial sea and fisheries resources—in other words, matters of property. There was a danger that any close cooperation among tribunals, desirable as that might be at one level, might impinge upon institutional independence. The operation of international tribunals, especially in inter-State cases, was to a great extent political. A Government might be deterred from bringing a case to a tribunal by the perception that it worked concertedly with other tribunals. Even cooperation on how to deal, not with individual disputes but with patterns of disputes, might raise questions about a tribunal's independence. On the other hand, it had to be acknowledged that the existence of a variety of institutions made it more difficult for outside or special interests to gain effective control.

107. Mr. CAFLISCH noted that article 303, in combination with articles 33 and 149 of the Convention, regulated shipwrecks with specific relation to archaeological and historical objects. There had been some discussion at the Third United Nations Conference on the Law of the Sea, prompted by the "Glomar Explorer" incident, about wrecks of State vessels, particularly warships. At that time, a group of socialist States had called for the immunity of warships to be extended indefinitely to the wrecks of such ships.²⁹⁸ The Nairobi International Convention on the Removal of Wrecks, which had been adopted in 2007 but had not yet entered into force, applied

²⁹⁸ See J. R. Harris, "The protection of sunken warships as gravesites at sea", *Ocean and Coastal Law Journal*, vol. 7, No. 1, pp. 75 *et seq.*, especially p. 83. See also *Official Records of the Third United Nations Conference on the Law of the Sea, Ninth Session, New York, 3 March–4 April 1980*, vol. XIII, document A/CONF.62/L.51.

solely in the exclusive economic zone, leaving all other aspects of wreck removal unregulated despite the considerable theoretical as well as practical interest that the matter presented. Would it be useful for the Commission to take up the issue, either as a whole or with the exception of the aspects he had just mentioned? If so, and if a convention emerged from its efforts, could it be written into the dispute settlement mechanism under Part XV of the United Nations Convention on the Law of the Sea?

108. Ms. ESCARAMEIA welcomed the emphasis placed by Judge Wolfrum on the linkages between the work of the International Tribunal on the Law of the Sea and that of the Commission. Her first question related to the example given of attempts to harmonize the precautionary principle with the *Southern Bluefin Tuna Cases*. Was it possible that harmonization of jurisprudence between courts might prevent substantive issues from being addressed? Had the Tribunal not deliberately refrained from referring to the precautionary principle in the *Southern Bluefin Tuna Cases*, the Commission would have had a much stronger case for including a reference to or even a draft article on the precautionary principle in the draft articles on the law of transboundary aquifers. A hierarchy of international jurisprudence definitely seemed to be forming. Perhaps the Tribunal should lead the way, rather than deferring to the ICJ. Diversity was a good thing, and States might turn to the Tribunal more often if they were aware that it was willing to take an independent line.

109. Her second question related to diplomatic protection: it had not been easy to include in the Commission's draft articles on the topic a provision on protection of ships' crews. Many members had thought the matter was not related to diplomatic protection. In the relevant draft article, the only reference was to protection, not to diplomatic protection. The "*Saiga*" cases had been very important to the Commission's work in that area. She would like to know the President's views on that subject and whether he thought diplomatic protection should be a more all-encompassing concept, not one relating strictly to the nationality of persons.

110. Lastly, she wished to know if there were any topics that the Commission could take up that would be of particular value in furthering cooperation between the Tribunal and the Commission.

111. Mr. DUGARD asked, first, whether the President found the compromise relating to the protection that could be afforded by a flag State, as reflected in the draft articles on diplomatic protection,²⁹⁹ a helpful one. He personally would have liked to see the relevant draft article brought more directly under the head of diplomatic protection. Secondly, many members were disappointed that the Tribunal had not been more active, and surprised that States frequently preferred arbitration to adjudication by the Tribunal. Could that in some respect be due to the size of the Tribunal, or was there some other explanation?

112. Ms. JACOBSSON said that Judge Wolfrum's presentation had been especially interesting in that it had shown the connections of the Tribunal's work, not only

with the subjects that the Commission covered, but also with the work of the ICJ. One aspect of the Tribunal's work that she wished to discuss was the time factor. The *Southern Bluefish Tuna Cases* dated back to 1999, but there had been changes in customary law and other developments since then. A tribunal did not have to be bound by its past findings: indeed, it was unfortunate that past statements of the law should merely be repeated. She wished to know the President's view on the time element and what would be necessary in order to take a new look at such matters as the precautionary principle.

113. Mr. PELLET said he had an impertinent but relevant question to raise: aside from the *MOX Plant* case and the *Conservation and Sustainable Exploitation of Swordfish Stocks* case, the Tribunal had not had before it any major cases concerning the general international law of the sea and had never adjudicated a problem of maritime delimitation. How did the President account for that situation, which he presumably found disappointing?

114. Judge WOLFRUM (President of the International Tribunal for the Law of the Sea), responding to Mr. Caflisch's question, said he agreed that the rules on shipwrecks were a patchwork and that the Nairobi International Convention on the Removal of Wrecks did not form a complete regime. The matter should be taken up, perhaps in an even more comprehensive manner than Mr. Caflisch had suggested. Shipwrecks raised a number of problems: first, the treatment to be given to archaeological treasures; second, environmental protection, since shipwrecks were a source of pollution—the "*Tirpitz*", a German battleship sunk in 1944, could still be located by the oil spills leaking from it; third, State responsibility; fourth, State immunity and how long it lasted; and lastly, the implications of disasters like that of the "*M/S Estonia*" in the Baltic sea—the site had been declared a graveyard, which had repercussions on continental shelf activity, the exclusive economic zone and the like. There was therefore quite a broad regime to be worked on and the Commission would be well advised to do so. He would suggest, however, that close cooperation be established from the very outset with the International Maritime Organization and UNESCO. Regarding Mr. Caflisch's second question, as to whether such a regime could be written into the dispute settlement mechanism under Part XV of the Convention, the answer was that it could; the same had been done with the Nairobi International Convention on the Removal of Wrecks.

115. Ms. Escarameia was not alone in her disappointment about the absence of any reference to the precautionary principle in the Tribunal's jurisprudence. The compromise wording had taken the best part of a day to negotiate and had been hotly debated, as could be seen from a perusal of the separate opinions. The Tribunal's motive for its restraint had been, not to protect the ICJ, but rather to take account of the fact that in a provisional measures case which, by virtue of its urgent nature, the parties had not had the opportunity to argue fully, it would not be appropriate to develop certain issues in the merits. That would be rushing to judgement and inappropriate conduct for any judge, whether national or international. As to Ms. Jacobsson's question, he was confident that if a similar case came up again, the parties would make the necessary arguments and the Tribunal could then make

²⁹⁹ *Yearbook ... 2006*, vol. II (Part Two), pp. 24–26, paras. 49–50.

more extensive pronouncements. The example showed a form of judicial self-restraint, which occasionally—although perhaps not always—was wise.

116. As to which other issues would be appropriate for consideration by the Commission, one totally uncharted area of the law, surprising as that might seem, was pipelines—not just in a maritime context but generally. Past experience with railways, telegraph and telephone lines, and the relationship to the General Agreement on Tariffs and Trade 1994 and the General Agreement on Trade in Services could be drawn on in considering that very interesting problem. Another fruitful topic was subsequent practice, which had haunted the Tribunal in the “*Hoshinmaru*” case and the “*Tomimaru*” case.

117. On diplomatic protection, the Commission’s solution, namely to refer to protection rather than to diplomatic protection, had been an elegant compromise and was in fact helpful for the Tribunal. His own personal preference, however, was for diplomatic protection to be considered more broadly, with less reference to historical notions and so as to encompass prompt release.

118. As to why so few cases had been brought before the Tribunal, many reasons could be proffered. First, it was a new and comparatively little-known institution. Very recently, for example, he had found that a London law firm that concentrated on law of the sea issues had never even heard of the Tribunal. That was one reason why regional workshops had been developed, not only to make the Tribunal better known but also to explain its fairly complicated procedures. Secondly, many cases were taken to the ICJ on the basis of specific clauses, pacts or treaties of friendship. According to the Tribunal’s own count, more than 100 treaties had been referred to the jurisdiction of the ICJ and only 3 to that of the Tribunals. Thirdly, under article 287 of the Convention, States had the option to declare their preference for one of three mechanisms: the Tribunal, the ICJ or arbitration. Of about 150 States Parties to the United Nations Convention on the Law of the Sea, just over 30 had made such a declaration, 28 of which had opted for the Tribunal. While certain States, for example Norway, had deliberately opted for arbitration, about 120 had done so by default, simply because they had neglected to make a declaration. He did not know whether the framers of the Convention had had such a result in mind, but it certainly disadvantaged the Tribunal. If States were to make a clear choice between the three options, it would be easier for the Tribunal to predict its workload.

119. Fourthly, he believed that the sheer size of the Tribunal, which comprised 21 judges, was a deterrent in itself. The larger the body of judges, the more difficult it was to hazard a guess as to the probable outcome of a case. It could be argued, on the other hand, that a broad spectrum of opinions would ensure a fairer ruling. He was at a loss to understand why States did not use the option available under article 15 of the Statute of the Tribunal to form an *ad hoc* chamber consisting of three, five, seven or any uneven number of judges, which could even include external judges. In the *Conservation and Sustainable Exploitation of Swordfish Stocks* case, there had been four judges from the Tribunal and one *ad hoc* judge. That option combined the merits of arbitration with those of

a standing body and cut down on costs, since no financing had to be provided with respect to either the Tribunal judges or the *ad hoc* judges. Unfortunately, however, that option was little known; he hoped it would be better exploited in the future.

120. Lastly, he wished to assure Mr. Brownlie that, far from compromising its independence, the Tribunal was proud of the positions it had taken. Courts and tribunals needed to be aware of one another’s positions in order to avoid controversies such as the one that had arisen in the *Tadić* case. It should be noted that the ICJ had been in favour of the Tribunal’s findings on provisional measures, totally opposed to its position on advisory opinions, and had found the Tribunal’s handling of the relationship between national and international law interesting in that it had highlighted a relatively unknown feature of the United Nations Convention on the Law of the Sea. In future, the Tribunal would make good use of the jurisprudence of the Court and of the Permanent Court of International Justice, as well as of arbitration where necessary and adequate, but would also deviate therefrom where necessary. Since it had a particular mandate with respect to environmental matters, in the future, its position on such matters was likely to differ significantly from those arrived at through arbitration or by the ICJ or, for instance, the Court of Justice of the European Communities.

121. The CHAIRPERSON thanked the President of the International Tribunal for the Law of the Sea for his presentation and the answers he had given to the numerous questions put by members.

Organization of the work of the session (concluded)*

122. The CHAIRPERSON announced that Mr. Pellet had been appointed to chair the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

The meeting rose at 1.05 p.m.

2989th MEETING

Monday, 4 August 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Mr. Kolodkin (Vice-Chairperson) took the Chair.

1. Ms. JACOBSSON, recalling that, for lack of time, the Chairperson had requested her not to take the floor in the debate on the topic of the obligation to extradite

* Resumed from the 2985th meeting.

or prosecute (*aut dedere aut judicare*), assuring her that the discussions would continue at the next meeting, said that she had been very surprised to find that the Special Rapporteur had summed up the debate. Consequently, her views and those of the members who might have intended to speak on the topic, but who had not done so, had not been taken into account. That was quite unfortunate and she hoped that, in future, the members of the Commission would have a little more time to react before decisions were taken.

Responsibility of international organizations (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1) (concluded)*

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (concluded)**

2. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the second part of the Committee's report, as contained in document A/CN.4/L.725/Add.1.

3. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, at its 2978th meeting on 15 July 2008, the Commission had heard the oral report of the Working Group on responsibility of international organizations and had referred draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the recommendations of the Working Group. The Drafting Committee had held two meetings on 15 and 16 July 2008. It had completed the consideration of all the draft articles referred to it and had adopted an additional draft article on countermeasures by a member of an international organization, as recommended by the Working Group.

4. Part Three of the draft articles on responsibility of international organizations, which was based on Part Three of the draft articles on responsibility of States for internationally wrongful acts,³⁰⁰ was entitled "The implementation of the international responsibility of an international organization". Draft articles 46 to 53, which had been adopted by the Commission during the first part of the current session, formed chapter I of Part Three dealing with the invocation of the responsibility of an international organization. Chapter II, entitled "Countermeasures", was composed of draft articles 54 to 60.

5. Draft article 54 [52], entitled "Object and limits of countermeasures", had been the focus of extensive discussion in the Working Group, which had recommended that paragraphs 4 and 5, as proposed by the Special Rapporteur, should be reformulated and placed in a separate draft article. Paragraphs 1 to 3 had not given rise to substantial discussions in the Drafting Committee. In paragraph 1, the words "an injured" had been added between "State" and "international organization" so that the words "an injured State or an injured international organization"

did not have to be repeated in subsequent provisions. Apart from that change, paragraphs 1 to 3, which corresponded in substance to article 49 of the draft articles on State responsibility, had been adopted as proposed in the Special Rapporteur's sixth report (A/CN.4/597).

6. In contrast, the Drafting Committee had engaged in a substantial discussion on draft article 54, paragraph 4. That new paragraph, which had been proposed by the Special Rapporteur, followed the conclusion reached by the Working Group that the draft articles should reflect the fact that countermeasures should be taken in a manner respecting the specificity of the targeted organization. Some members of the Drafting Committee had requested the deletion of the words "as far as possible", which left open the possibility that countermeasures could impede the functioning of the organization. Others had been of the opinion that countermeasures would necessarily affect, at least partially, the exercise by the organization of its functions. According to that opinion, there was no justification for granting the responsible organization a minimum guarantee against countermeasures taken by the injured State or organization.

7. As the Special Rapporteur had put it, draft article 54, paragraph 4, was not intended to apply the principle of proportionality, which was embodied in another provision. The concern at stake was to preserve the functions usefully exercised by an international organization, especially those performed in the collective interest of the international community. On the suggestion of one of its members, the Drafting Committee had decided to retain the phrase "as far as possible" and to use the words "limit their effects on" rather than a stronger term. The commentary would make it clear that countermeasures should not hamper the basic functions of the organization.

8. Draft article 55 [52 *bis*], entitled "Countermeasures by members of an international organization", was a new draft article proposed by the Special Rapporteur, following the recommendation of the Working Group that the specific relationship between a responsible organization and one of its injured members taking countermeasures should be addressed in a separate provision. While it had left the task of drafting that provision to the Drafting Committee, the Working Group had indicated that it should state in substance that an injured member of a responsible organization could not take countermeasures against that organization so long as the rules of the organization provided some reasonable means for ensuring compliance with its obligations under Part Two of the draft articles.

9. The Drafting Committee had first considered how that new draft article should be related to the other provisions in chapter II of Part Three. Some members viewed it as unnecessary to indicate that the provision stated an additional rule specific to the situation of injured members. However, given the decision to devote a separate provision to that particular case, it had been considered preferable to add the words "In addition to the other conditions set out in the present Chapter" at the beginning of the sentence.

* Resumed from the 2978th meeting.

** Resumed from the 2971st meeting.

³⁰⁰ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

10. The Drafting Committee had then had an exchange of views on the reference to “reasonable means” for ensuring compliance by the organization with its obligations. It had been emphasized that there should be reasonable prospects for compliance at the time when countermeasures were envisaged. Once the means available in the given circumstances had been tried unsuccessfully—i.e. when it could be legitimately assessed that there was no more reasonable prospect for compliance—countermeasures could be resorted to. That would be reflected in the commentary.

11. Lastly, some members had indicated that, in all likelihood, the rules of the organization would not expressly address the issue dealt with in draft article 55. Accordingly, instead of envisaging the case that the rules would “provide” reasonable means, the Drafting Committee had decided to refer to reasonable means “available in accordance with the rules of the organization”, those being understood in the broad sense retained in draft article 4, paragraph 4.

12. Draft article 56 [53], entitled “Obligations not affected by countermeasures”, corresponded in substance to article 50 of the draft articles on State responsibility, with the replacement of the reference, in paragraph 2 (b), to diplomatic or consular agents by a reference to agents of the responsible international organization. The Drafting Committee had decided to use the words “any inviolability of agents” in order better to reflect the fact that only certain agents benefited from a measure of inviolability.

13. Draft article 57 [54], entitled “Proportionality”, replicated article 51 of the draft articles on State responsibility. The Special Rapporteur had recalled that the text of the provision, closely modelled on the relevant statement of the ICJ in its judgment on the *Gabčíkovo–Nagymaros Project*, linked proportionality to the injury rather than to the measures required to ensure compliance. One member questioned whether the functions of the responsible organization should not be taken into account in that regard. It had, however, been felt that the issue was sufficiently addressed in draft article 54, paragraph 4, whereas proportionality related to the rights of the injured State or organization and the injury it had suffered. Accordingly, no change had been made to the text of the provision.

14. With regard to draft article 58 [55], entitled “Conditions relating to resort to countermeasures”, the Drafting Committee had considered whether the phrase “or any other body” should be added after “a court or tribunal” in paragraph 3 (b), as had been suggested in plenary. In the opinion of one member of the Drafting Committee, the issue had been taken care of by draft article 55 in respect of injured members of a responsible organization; however, an organ other than a court or tribunal might have the authority to make binding decisions on non-members of the organization. Other members of the Drafting Committee had nevertheless argued that paragraph 3, as reinforced by paragraph 4, placed a clear emphasis on judicial mechanisms and litigation, which should not be broadened. It had also been felt necessary to preserve the consistency with

the articles on State responsibility, to which the suggested extension should equally apply if it was now adopted. Accordingly, the text of draft article 58 had not been modified and the commentary would explore further the relationship between that provision and draft article 55.

15. Draft article 59 [56], entitled “Termination of countermeasures”, had been adopted unchanged by the Drafting Committee without giving rise to any discussion.

16. Draft article 60 [57], entitled “Measures taken by an entity other than an injured State or international organization”, corresponded in substance to paragraph 1 of article 57 introduced in the sixth report of the Special Rapporteur, with the substitution of the usual wording “is without prejudice” for “does not prejudice” and an updated reference to article 52, paragraphs 1 to 3.

17. A few issues of substance had also been raised in respect of that provision. The suggestion made in plenary that “lawful measures” should be replaced by “countermeasures” had not been retained, as it had been considered preferable to keep the purposely ambiguous wording adopted in article 54 of the draft articles on State responsibility. The Drafting Committee had also considered whether it was necessary to provide for the possibility for non-injured international organizations to react against a responsible organization. It had concluded that the use of a “without prejudice” clause made it sufficiently clear that the question of the existence of such an entitlement had been left open by the Commission.

18. Draft article 53, entitled “Scope of this Part”, had already been adopted by the Commission on the understanding that the Drafting Committee would revert to it once a decision had been taken on the inclusion of provisions dealing with countermeasures. The Drafting Committee had considered the issue and concluded that the location, title and text of draft article 53 could remain unchanged.

19. He hoped that the plenary Commission would be in a position to take note of the draft articles submitted, with a view to their provisional adoption, together with the commentaries, at its next session.

20. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to take note of the report of the Drafting Committee on responsibility of international organizations, as contained in document A/CN.4/L.725/Add.1.

It was so decided.

21. The CHAIRPERSON, noting that, in its report, the Drafting Committee proposed that chapter I of Part Three, the draft articles of which had been adopted at the beginning of the current session, should be entitled “Invocation of the responsibility of an international organization”, said that, if he heard no objection, he would take it that the members of the Commission wished to adopt the title proposed by the Committee.

It was so decided.

**Expulsion of aliens (concluded)*
(A/CN.4/588, sect. C, A/CN.4/594)**

[Agenda item 6]

ORAL REPORT OF THE DRAFTING COMMITTEE

22. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the Committee's progress report.

23. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) recalled that, at the preceding session, the Commission had referred draft articles 1 and 2 (proposed by the Special Rapporteur in his second report³⁰¹) and draft articles 3 to 7 (contained in the Special Rapporteur's third report³⁰²) to the Drafting Committee. At that session, the Drafting Committee had provisionally worked out draft article 1, entitled "Scope", and draft article 2, entitled "Use of terms".³⁰³

24. Discussions had begun on a new draft article which sought to exclude from the application of the draft articles those aliens whose departure from the territory of a State might be governed by special rules of international law. At the preceding session, the Drafting Committee had also begun discussing draft article 3, entitled "Right of expulsion".

25. The Drafting Committee had held two meetings on the topic on 16 and 17 July 2008. Following the practice adopted in 2007, it had decided that draft articles provisionally worked out thus far would remain in the Drafting Committee until it had completed its work on a few more draft articles.

26. With regard to draft article 3 (Right of expulsion), the Drafting Committee had had before it two alternative texts proposed by the Special Rapporteur, the first composed of two paragraphs, and the second, more concise. The Committee had opted for the second version without departing substantively from the text proposed by the Special Rapporteur.

27. Secondly, the Drafting Committee had considered the above-mentioned new article and the three alternative texts to which the preceding year's discussion had given rise. It had decided to agree provisionally on the text which excluded from the scope of the draft articles diplomatic or consular officials and other officials of a foreign State. In the course of the discussion, the Committee had decided that agents of an international organization should also be included in that category and it had adopted the text with that amendment. It had also decided to make that new text the second paragraph of draft article 1 ("Scope") already adopted instead of creating a new separate article.

28. Thirdly, the Drafting Committee had started discussing draft article 5 on non-expulsion of refugees, which raised complex questions as it referred indirectly

to the 1951 Convention relating to the Status of Refugees. A fruitful debate had taken place on the possible relationship between the article and the Convention (and the 1967 Protocol relating to the Status of Refugees), but it had been inconclusive owing to a lack of time. It had been agreed that the Special Rapporteur would submit a new version of the text that would take account of the various points raised during the discussion.

29. The CHAIRPERSON proposed that the Commission should take note of the progress report by the Drafting Committee on the topic of "Expulsion of aliens".

It was so decided.

**Draft report of the Commission on
the work of its sixtieth session**

30. Ms. ESCARAMEIA (Rapporteur) said that some changes had been made to the report. Whenever possible, the Commission's work had been presented in a more structured way: introduction by the Special Rapporteur, summary of debates and conclusion.

31. In accordance with the wish expressed in paragraph 372 of the report on the preceding session, an attempt had been made at the current session to ensure that chapters II and III of the Commission's report were more user-friendly. Chapter II thus dealt with the main issues discussed. With regard to chapter III, she requested the Special Rapporteurs to state the reasons for the questions they wished to ask States so that States might understand why those questions were being asked.

Mr. Vargas-Carreño (Chairperson) took the Chair.

CHAPTER IV. Shared natural resources (A/CN.4/L.731 and Add.1–2)

32. The CHAIRPERSON invited the members of the Commission to consider chapter IV of the draft report on shared natural resources.

A. Introduction (A/CN.4/L.731)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 4

33. Mr. PELLET suggested that, in the French text, the words "*quant au fond*" should be replaced by the words "*au fond*".

34. Mr. GAJA proposed that the end of the last sentence should be amended to read: "(b) deciding at a later stage whether a convention should be adopted on the topic".

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

* Resumed from the 2984th meeting.

³⁰¹ Yearbook ... 2006, vol. II (Part One), document A/CN.4/573.

³⁰² Yearbook ... 2007, vol. II (Part One), document A/CN.4/581.

³⁰³ Yearbook ... 2007, vol. II (Part Two), paras. 188 and 258.

Paragraph 6

35. Mr. GAJA proposed that the words “on the relation to other conventions and international agreements” should be added in the English text and that the words “the draft articles becoming a convention” in both versions should be replaced by the words “the adoption of a convention”.

Paragraph 6, as amended, was adopted.

Paragraph 7

36. Mr. GAJA proposed that the beginning of the first sentence should be deleted and that it should start with the words “The matters raised”.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

37. Mr. GAJA proposed that the words “confined groundwaters” should be followed by the words “and in any event did not include the discharge zone”.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 14

Paragraphs 10 to 14 were adopted.

Paragraph 15

38. Mr. VALENCIA-OSPINA said that the “recommendation” in question was nowhere to be found, but if its purpose was to refer to the Special Rapporteur’s proposal for the convening of a conference, he would recall that, although article 23 of the Statute of the International Law Commission provided that “The Commission may recommend to the General Assembly: ... (d) To convoke a conference to conclude a convention”, it did not provide that the Commission could recommend that the General Assembly itself should adopt a convention.

39. Mr. YAMADA (Special Rapporteur) said that he had held consultations in that regard and had thus been able to improve the draft text. Section C, “Recommendation of the Commission to the General Assembly”, would read:

“At its 2989th meeting, on 4 August 2008, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly:

“(a) to take note of the draft articles on the law of transboundary aquifers in a resolution, and to annex these articles to the resolution;

“(b) to recommend to States to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles;

“(c) to also consider, at a later stage and in view of the importance of the topic, the possibility of convening

a conference to consider the draft articles on the law of transboundary aquifers for the purpose of concluding a convention on the topic.”

40. It would be for the General Assembly to decide how the draft articles would be considered, but, in any event, a conference would be necessary if a convention was to be adopted.

41. After exchange of views in which Mr. SABOIA, Mr. PELLET, Ms. XUE, Mr. YAMADA (Special Rapporteur), Mr. WISNUMURTI and Ms. ESCARAMEIA took part, the CHAIRPERSON proposed that the Commission should postpone the discussion of section C in order to hold consultations and reach a consensus. He therefore suggested that paragraph 15 should be adopted provisionally.

It was so decided.

Section B, as amended, was adopted.

E. Draft articles on the law of transboundary aquifers (A/CN.4/L.731/Add.2)

General commentary

Paragraph (1)

42. After a discussion in which Mr. PELLET and Ms. ESCARAMEIA took part, it was decided that the end of the second sentence should be amended to read: “migratory birds and some other animals”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

43. Mr. GAJA proposed that the beginning of the last sentence should be amended to read: “Some supported the adoption of a legally binding instrument”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

44. Mr. GAJA proposed that the end of the fourth sentence should be amended to read: “deciding at a later stage on the possibility of examining the draft articles with a view to adopting a convention”.

45. He also proposed that, in the last sentence, the words “first step” should be replaced by the words “second step”. This would take the General Assembly some time.

46. Mr. McRAE said that, if the Commission adopted Mr. Gaja’s second proposal, it would have to delete the words “the formulation of which would become necessary only when the second step would be initiated”, which would become meaningless.

47. Ms. ESCARAMEIA (Rapporteur) said that she would like the words “first step” to be replaced by the words “this step” because it was not certain that the “first step” Mr. Gaja was referring to would be all that short. The General Assembly might rapidly take note of the draft articles, but it would probably need more time to recommend that States should take appropriate action.

48. Mr. VALENCIA-OSPINA, supported by Mr. PELLET, said that, since the recommendation to be made to the General Assembly still had not been decided on, the adoption of paragraph (3) should be postponed.

49. The CHAIRPERSON said he took it that the Commission wished to leave the consideration of paragraph (3) pending.

It was so decided.

Paragraph (4)

50. Mr. PELLET said that the French text of the beginning of the second sentence read very badly. He proposed that it should be amended to read: *“Pour être efficaces, certains projets d'article devraient imposer des obligations aux États qui ne partagent pas l'aquifère transfrontière considéré”*.

51. Mr. HASSOUNA said that he agreed with Mr. Pellet's proposal and noted that the wording of that sentence in English should also be amended because it left something to be desired.

52. Mr. McRAE said that he did not understand Mr. Pellet's proposal for the replacement of the words *“auraient à imposer”* by the words *“devraient imposer”* because that would prejudice the Commission's response to the question whether the draft articles should be structured in such a way as to distinguish between obligations that would apply to all States generally, obligations of aquifer States *vis-à-vis* other aquifer States and obligations of aquifer States *vis-à-vis* non-aquifer States.

53. Ms. ESCARAMEIA (Rapporteur), agreeing with the comment by Mr. McRae, said that, as it stood, the beginning of the second sentence better reflected the Commission's position on the question.

54. Mr. GAJA said that he also agreed with the comment by Mr. McRae and proposed that the second sentence should end with the words *“aquifer States”* and that the following sentence should be added before the third sentence: *“Moreover, in some other instances, the obligation would be applicable to all States”*.

Paragraph (4), as amended, was adopted.

Paragraph (5)

55. Mr. PELLET said that, in the fourth sentence of the French text, the word *“joue”* should be replaced by the words *“a joué”* because UNESCO was no longer the coordinating agency on global water problems.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. PELLET proposed that the words *“mainly with regard to”* should be added after the words *“on first reading”* so that a list could be drawn up of some of the important points on which changes had been made.

57. The CHAIRPERSON said that Mr. Pellet's request did not reflect the Commission's usual practice.

58. Ms. ESCARAMEIA (Rapporteur) said she agreed with Mr. Pellet that it would be useful to indicate which changes had been made on second reading and appealed to the Special Rapporteur to provide his support in that regard.

59. Mr. KOLODKIN said that the Commission would be creating a precedent if it adopted Mr. Pellet's proposal.

60. Mr. CANDIOTI said that Mr. Pellet's interesting proposal to make the report more readable and enable States better to understand the changes made between the first and second readings should be adopted.

61. Mr. VALENCIA-OSPINA said that, if the Commission created a precedent, it would affect only the articles adopted on second reading.

62. Mr. YAMADA (Special Rapporteur) said that he had no objection in principle to Mr. Pellet's proposal, but drawing up a list of the changes to the draft articles made on second reading would give rise to problems because minor changes would have to be distinguished from major changes. That might also make the Commission's task much more difficult when it came to consider large numbers of draft articles.

63. Ms. XUE said that she had no objection to the idea of making the report more readable by including a list of the changes to the draft articles adopted on first reading.³⁰⁴ However, such a solution would create a precedent that would make the Secretariat's task particularly complicated. The changes made could simply be indicated and the reader could be invited to refer to the paragraphs in which the changes had been indicated. Paragraph (6) should be retained as it stood.

64. Mr. PELLET said that, as it stood, paragraph (6) departed from practice because the Commission did not usually point out in its general commentaries that changes had been made to a text adopted on first reading; that was unnecessary because it was a statement of the obvious. Paragraph (6) would be useful only if a precedent was created and the Commission decided to draw the reader's attention to the main points on which changes had been made on second reading.

65. Mr. SABOIA said that he had no objection in principle to Mr. Pellet's proposal, which would make the report more readable, but he nevertheless agreed with the Special Rapporteur and Ms. Xue that, if it was to be adopted, Special Rapporteurs would have to distinguish between minor and major changes, and that would give rise to great problems. He therefore proposed that paragraph (6) should either be kept as it stood or deleted.

66. Mr. VALENCIA-OSPINA proposed that, in order to meet the concerns expressed by the members of the Commission, the words *“most of which are explained in the corresponding commentaries”* should be added at the end of paragraph (6). That would enable the Commission to point out that changes had been made to the draft articles adopted on first reading without actually creating a precedent.

³⁰⁴ Yearbook ... 2006, vol. II (Part Two), chap. VI, sect. C, p. 91.

67. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Valencia-Ospina.

It was so decided.

Paragraph (6), as amended, was adopted.

Commentary to the draft preamble

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to the draft preamble was adopted.

PART ONE. INTRODUCTION

Commentary to draft article 1 (Scope)

Paragraph (1)

68. Mr. GAJA proposed that, in the second sentence, the word “perfectly” should be replaced by the word “generally” and that the word “commonly” should be deleted. In the last sentence, the word “an” should be deleted twice and the words “used together” should be replaced by the words “referred to jointly”.

69. Mr. PELLET proposed that the words “, as defined in article 2,” should be added after the words “the technical term ‘aquifer’ ” in the second sentence.

70. The CHAIRPERSON said he took it that the Commission wished to adopt the proposals by Mr. Gaja and Mr. Pellet.

Paragraph (1), as amended, was adopted.

Paragraph (2)

71. Mr. PELLET said that the fourth sentence of the French text was clumsy and practically incomprehensible as it now stood. He therefore proposed that the words “*pos-sèdent plus de caractéristiques des eaux de surface que des eaux souterraines*” should be replaced by the words “*s’apparentent davantage à des eaux de surface qu’à des eaux souterraines*”. In the same sentence, the word “*également*” should be added after the word “*régies*”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

72. Mr. PELLET said that there was no reason to begin the third sentence with the words “*Dans la version anglaise*” because the comment also applied to the French text. He therefore proposed that those words should be deleted, that the words in inverted commas should be replaced by their French equivalents—“*utilisation*” and “*usages*”—and that the words “*retenu dans la version française*” should be deleted in the last sentence.

It was so decided.

73. Mr. GAJA proposed that the words “must be covered” be replaced by the words “are covered”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 2 (Use of terms)

Paragraph (1)

74. Mr. PELLET proposed that the eighth sentence should be deleted, but, if it was not, he would suggest that the words “as they were a geological formation” should be added at the end, since paragraph (2) contained a lengthy explanation which suggested that the content of that sentence was not self-evident.

75. Mr. CANDIOTI said that the sentence should be retained because it was one of the few changes adopted on second reading.

76. Mr. PELLET proposed that a footnote reading “See paragraph (2) below” should be added to explain that the term was defined in paragraph (2).

77. Ms. ESCARAMEIA (Rapporteur) said that a definition of the term “geological formation” was already given after the sentence Mr. Pellet was proposing to amend.

78. Mr. VALENCIA-OSPINA proposed that half of Mr. Pellet’s proposal should be retained, namely, the addition at the end of the sentence of the words “as they were a geological formation”.

79. He was surprised that the term “‘confined’ ” was used because it did not appear in article 2 (Use of terms).

80. Mr. YAMADA (Special Rapporteur), replying to Mr. Valencia-Ospina’s comment, proposed that the last two sentences should be moved to a footnote.

81. Mr. GAJA said that the problem could also be solved by replacing the words “are termed as ‘confined’ groundwaters” in the last sentence by the words “are called ‘confined’ groundwaters”.

Paragraph (1), as amended by Mr. Pellet and Mr. Gaja, was adopted.

The meeting rose at 1 p.m.

2990th MEETING

Monday, 4 August 2008, at 3.05 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (continued)

CHAPTER IV. *Shared natural resources (continued)* (A/CN.4/L.731 and Add.1–2)

E. Draft articles on the law of transboundary aquifers (continued) (A/CN.4/L.731/Add.2)

PART ONE. INTRODUCTION (concluded)

Commentary to draft article 2 (Use of terms) (concluded)

Paragraph (2)

1. Mr. McRAE drew attention to the tenth sentence, which read: “The submarine geological formation off the coast and under the continental shelf does not hold freshwater and accordingly such formations and water therein fall outside the scope of the present draft articles.” In fact, however, geological formations under the territorial sea did fall within the scope of the draft articles. He therefore proposed that the first part of the sentence should be amended to read: “The submarine geological formations under the continental shelf do not hold freshwater and accordingly ...”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

2. Mr. McRAE proposed that the first part of the penultimate sentence, which read: “For disposal, a new technique is experimented to utilize an aquifer”, should be amended to read “such as a new experimental technique to utilize aquifers” and appended to the end of the previous sentence, after a comma.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft article 2 as a whole, as amended, was adopted.

PART TWO. GENERAL PRINCIPLES

Commentary to draft article 3 (Sovereignty of aquifer States)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

3. Mr. SABOIA proposed that the phrase “retain sovereignty” in the second sentence should be replaced by the words “have sovereignty”, since “retain” implied that there might be some question or dispute about sovereignty.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft article 3 as a whole, as amended, was adopted.

Commentary to draft article 4 (Equitable and reasonable utilization)

Paragraph (1)

4. Mr. PELLET said that a footnote was needed after the words “As noted previously” in the penultimate sentence to indicate where the information in question had been noted.

5. Mr. McRAE proposed that the words “a new technique is experimented to utilize an aquifer” in the same sentence should be replaced by the phrase “a new experimental technique to utilize aquifers”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

6. Mr. PELLET objected to the phrase “In plain language” at the start of the fifth sentence, which implied that the Commission did not always speak plainly, and questioned the meaning of the seventh sentence, which read: “Therefore, sustainable utilization fully applies.”

7. Mr. YAMADA (Special Rapporteur) recalled that sustainable utilization was the main principle in the 1997 Watercourses Convention and concerned the need to keep watercourses flowing and usable indefinitely.

8. Ms. ESCARAMEIA (Rapporteur) added that the seventh sentence related to the Commission’s discussion about sustainable as opposed to reasonable utilization. It had been decided that “sustainability” was a concept that could not be applied to the use of non-renewable resources, and that “reasonable use” was preferable.

9. Mr. PELLET suggested that the sentence should be amended to read: “The principle of sustainable utilization can therefore be brought into play”, perhaps even adding the phrase “as opposed to the principle of equitable use”.

10. Mr. CANDIOTI suggested that the sentence should be combined with the previous one, thereby making it clear that the concept of sustainable utilization applied specifically to renewable waters which received substantial recharge. The end of the seventh sentence would then read: “and in that context, sustainable utilization fully applied”.

11. Mr. CAFLISCH said that a similar approach would be to have the seventh sentence read: “which is why sustainable utilization fully applies”. He could, however, go along with the alternative proposed by Mr. Candiotti.

Paragraph (4), as amended by Mr. Candiotti, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 4 as a whole, as amended, was adopted.

Commentary to draft article 5 (Factors relevant to equitable and reasonable utilization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

12. Mr. GAJA said that in the final sentence, the phrase “the input of dissolved chemicals which can be the principal source to the lake” seemed incomplete: it was not clear what the words “principal source” referred to; was it pollution? He would also like to see the phrase “lake’s water budget” reworded to read “the water budget of the lake”.

13. Ms. ESCARAMEIA (Rapporteur) said that as she understood it, the words “of pollution” had indeed been left out.

14. Mr. YAMADA (Special Rapporteur) said that the sentence was not about pollution but about the fact that reducing groundwater discharge altered the ecosystem of the lake.

15. Mr. HMOUD said that since the term “source” meant the constituents of the lake, perhaps “constituents” might be a better term.

16. Mr. McRAE suggested that the phrase “which can be the principal source” should simply be deleted, so that the phrase would then read: “the input of dissolved chemicals to the lake”.

Paragraph (4), as amended by Mr. McRae, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 5 as a whole, as amended, was adopted.

Commentary to draft article 6 (Obligation not to cause significant harm)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 6 was adopted.

Commentary to draft article 7 (General obligation to cooperate)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 7 was adopted.

Commentary to draft article 8 (Regular exchange of data and information)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

17. Mr. PELLET proposed the replacement, in the fifth sentence, of the conditional phrase “would depend” by “depends”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

18. Mr. GAJA proposed that, in the sixth sentence, the words “water retained by” should be inserted before the word “vegetation”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to draft article 8 was as a whole, as amended, was adopted.

Commentary to draft article 9 (Bilateral and regional agreements and arrangements)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 9 was adopted.

PART THREE. PROTECTION, PRESERVATION AND MANAGEMENT

Commentary to draft article 10 (Protection and preservation of ecosystems)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 10 was adopted.

Commentary to draft article 11 (Recharge and discharge zones)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 11 was adopted.

Commentary to draft article 12 (Prevention, reduction and control of pollution)

Paragraph (1)

19. Mr. McRAE suggested that the first phrase in the second sentence, “The harm is that caused to other aquifer States”, should be deleted and that the remainder of the second sentence should be combined with the first sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

20. Ms. JACOBSSON drew attention to the second sentence and said that references to specific articles of the two Conventions cited should be inserted for the sake of consistency and clarity.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

21. Mr. McRAE drew attention to the fourth sentence and said that there was a difference between saying that the concepts of precautionary principle and precautionary approach were “practically the same when applied in good faith” and saying that they were “the same in practice when applied in good faith”. Since it was his understanding that the second of the two formulations more closely expressed the meaning that the Commission wished to convey, he suggested that the word “practically” should be deleted and that the words “in practice” should be inserted after the word “same”.

22. Mr. CAFLISCH said that it was not necessary to insert the words “in practice” after “same”, since the sentence referred to the application of the concepts, and the term “application” connoted application in practice.

23. Ms. JACOBSSON said that she supported Mr. McRae’s proposal.

24. Mr. WAKO said that he could agree with either of the formulations proposed by Mr. McRae and Mr. Caflisch, but he preferred that of Mr. Caflisch, since there was no other way to apply something than to apply it in practice, which rendered the phrase “in practice” redundant.

25. Mr. KOLODKIN said that there was indeed a difference between “practically the same” and “the same”. He wondered whether, if the term “practically” was deleted, readers would understand why the Commission had preferred the term “precautionary approach” to that of “precautionary principle”. The current wording indicated that the Commission drew a slight distinction between the two concepts, and if it deleted the word “practically” there would no longer be any indication of that distinction.

26. Mr. McRAE said that he had started from the assumption that the two concepts were different in some respects, which explained why there had been a divergence of opinions as to which one to adopt in draft article 12. In his view, the Commission was not focusing on their distinctiveness but rather on the idea that if, in practice, one applied either of those concepts, the end result would be the same. To say that the concepts were practically the same meant that the concepts were similar, whereas to say that the concepts were the same in practice when applied in good faith meant that their results were similar.

27. Ms. ESCARAMEIA (Rapporteur) said that if the Commission wished to convey that the two concepts were slightly different, then it should retain the original wording, but if it wanted to convey that although they were different they nevertheless produced the same results when applied to specific cases, then it should opt for the wording proposed by Mr. McRae. In her view, the phrase “in practice” should be retained, even though it might seem redundant, because it emphasized the fact that, when applied to a specific case, the two concepts led to the same result. In that case, the Commission might say that although the two concepts were interchangeable, it

had opted for the term “precautionary approach” simply because that was the more commonly used term. Her own preference would have been to use the term “precautionary principle”.

28. Mr. CAFLISCH said that he wished to withdraw his proposed amendment.

29. Mr. SABOIA said that Mr. Kolodkin had just revealed the logic behind the Commission’s choice of the term “precautionary approach”. In his own view, the fact that there was a slight difference between the two concepts made it necessary to retain the term “practically”. If there was no difference between the two terms, then the Commission would not have felt the need to explain its choice.

30. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. McRae’s proposal.

31. Mr. FOMBA said that the problem lay in the fact that the Commission had not wished to take a position on the legal status of the precautionary principle. Therefore, as Ms. Escameia had pointed out, it was the practical effect that the Commission wished to emphasize in the fourth sentence. Consequently, while he would be content to retain the current wording, he also found Mr. McRae’s proposal acceptable.

32. Mr. PELLET said that the problem facing the Commission could not be dismissed as merely a drafting problem; it was a substantive problem, and the Commission would surely be called to task if it failed to address it. In such cases, the easiest solution would be to take an indicative vote: either the Commission was of the view that the concepts differed but produced the same results when applied, or else it considered the concepts to be very similar, so that no question arose. The problem could not be swept under the carpet simply by accepting Mr. McRae’s proposal.

33. He himself was convinced that the concepts were different, and he had favoured the notion of the precautionary principle. Unfortunately, the Commission had not opted to include that principle in draft article 12, and so it must now take responsibility for its decision. An indicative vote would reveal whether the Commission was ready to take a step forward on the matter or not; he did not think that it was, but only a vote would tell.

34. Mr. GAJA suggested that in order to allay the concerns of those who thought that the two concepts were not the same—a view that he shared, since, if they were the same, members would not be arguing about the distinction between them—the Commission might wish to consider a formulation that indicated that the two concepts led to similar results in practice when applied in good faith.

35. Mr. CAFLISCH said that he could go along with Mr. Gaja’s proposal, since it reflected the point he believed the Commission wished to make.

36. Mr. YAMADA (Special Rapporteur) recalled that for the past several years, the Commission had been debating whether to employ the term “precautionary principle” or

“precautionary approach” in draft article 12. Since it had opted for the term “precautionary approach”, it should explain in the commentary its reasons for doing so. The explanation was that the concepts were different, but when they were applied in good faith, their results were nearly the same. Judging from the debate in the Sixth Committee and the Commission, the term “precautionary approach” was less contentious than “precautionary principle”. In his view, the current wording of the sentence accurately conveyed what had transpired during the debate; however, he could also accept Mr. Gaja’s proposal.

37. Ms. JACOBSSON said she agreed with Mr. Yamada: the current text was an accurate reflection of what had transpired in the Working Group and the Drafting Committee. She was also among those who had advocated the adoption of the term “precautionary principle”; surprisingly, though, she had arrived at a different conclusion than Mr. Pellet. In her view, both the current wording and the wording proposed by Mr. McRae indicated that the Commission had taken the two concepts into account. Most members seemed to believe that there was a substantive difference between the two terms, but in the present situation, she felt that the Commission was, in effect, faced with a drafting problem. She therefore suggested that the Commission should either retain the original wording or adopt Mr. McRae’s proposal.

38. Mr. CANDIOTI endorsed Mr. Gaja’s proposal and suggested that the clause in question might be reworded to read something along the lines of “on the understanding that the two concepts lead to similar results in practice when applied in good faith”. He did not wish to pass judgement on whether the term “precautionary approach” was “the less disputed formulation”.

39. Ms. ESCARAMEIA (Rapporteur) said that she had some reservations about deleting the reference to the notion that the precautionary approach had been the “less disputed formulation”, as that would leave unanswered the question of why the Commission had chosen one concept over the other. The fact that it was the less disputed formulation was the very reason that the term “precautionary approach” had been preferred over “precautionary principle” in the first place. She therefore proposed an alternative formulation for the fourth sentence, which would read: “It decided to opt for the term ‘precautionary approach’ on the understanding that, although the two concepts are different, they lead to similar results when applied in good faith, and the former was the less disputed formulation.” That wording clearly conveyed that the Commission considered the two concepts to be different, that they led in practice to the same results, but that the Commission had opted for the first concept because it was the less disputed formulation.

40. Mr. McRAE said that he was satisfied with Mr. Gaja’s proposal but disagreed with Mr. Candiotti about deleting the reference to the phrase “less disputed formulation”. He agreed with Ms. Escarameia that that had been the main reason for choosing one term over the other, but he preferred not to indicate that the terms conveyed different meanings. There was no reason for the Commission to have to take a position on that question. The advantage of Mr. Gaja’s formulation was that it fully

explained the Commission’s reasoning without taking a position on the extent to which the concepts were or were not similar. His original objection to that sentence had been that the Commission seemed to be claiming that the terms were almost identical, whereas, in his view, it was merely indicating that, in practice, they produced the same result.

41. Mr. VALENCIA-OSPINA said that it was not necessary to include the phrase “when applied in good faith” as a condition for the similarity of the two concepts. Their similarity or dissimilarity was intrinsic and did not depend on whether they were applied in good faith. Such a condition did not belong in the commentary.

42. Mr. SABOIA said that Mr. Gaja’s proposal, with the addition of the reference to “less disputed formulation” was balanced and reflected the essence of the debate on the issue. He concurred with Mr. Valencia-Ospina that the reference to good faith was unnecessary.

43. Mr. VALENCIA-OSPINA said that he could accept Mr. Gaja’s proposal if the reference to “good faith” was deleted; if not, he would request that the amendment should be put to a vote.

44. Mr. GAJA said that he could agree to the deletion of the phrase “when applied in good faith”.

45. Mr. PETRIĆ said that the phrase “when applied in practice” was vague and could be interpreted in many different ways. Something that was applied in practice but in bad faith could lead to entirely different results than something applied in good faith. In his view, the question should be put to a vote.

46. Ms. ARSANJANI (Secretary to the Commission) said that Mr. Gaja’s proposal, as it currently stood, read: “It decided to opt for the term ‘precautionary approach’ on the understanding that the two concepts lead to similar results when applied in practice in good faith.”

47. Mr. SABOIA said that, in order to avoid confusion, the Commission should first vote on whether to accept Mr. Valencia-Ospina’s proposal to delete the phrase “when applied in good faith” before voting on Mr. Gaja’s proposal, which had been made along the same lines as that of Mr. McRae and seemed to have the general support of members. Furthermore, it was his understanding that Mr. Gaja had not proposed deleting the phrase “and that it is the less disputed formulation”.

48. Mr. VALENCIA-OSPINA said that he had merely sought to provide wording that all members could agree on constituting the best possible explanation for what had been a difficult decision. In his opinion, the words “when applied in good faith” only created confusion.

49. Mr. YAMADA (Special Rapporteur) said that there was a fundamental difference between the terms “precautionary principle” and “precautionary approach”. Unlike the precautionary approach, the precautionary principle was a legal norm. Opinions within the Commission had been divided on which term to use in draft article 12. The Commission had ultimately opted for the term

“precautionary approach” because those who favoured the use of the term “precautionary approach” objected to the use of “precautionary principle”, whereas those who favoured the term “precautionary principle” did not necessarily object to the use of the term “precautionary approach”—hence the reason for saying it was the “less disputed formulation”. Had the Commission adopted the term “precautionary principle”, States would have been bound by that legal norm. If, on the other hand, States implemented the precautionary approach in good faith, then their results would be practically the same as those achieved on the basis of the precautionary principle. That was what the original wording of the fourth sentence had intended to convey.

50. Mr. PELLET said that, as far as substance was concerned, he agreed with Mr. Yamada’s assessment of the situation; however, he and certain other members considered that overcautious approach to be regrettable. Although the decision to endorse the precautionary approach had already been taken, he and no doubt other members had sought to prevent States from emphasizing the non-binding nature of the precautionary approach instead of its similarity in practice to the precautionary principle. For that reason, he was very much in favour of retaining the expression “when applied in good faith”. The question was fraught with consequences, and he therefore urged the Commission to reject Mr. Valencia-Ospina’s proposal.

51. Mr. HASSOUNA said that after hearing the Special Rapporteur’s explanation of the Commission’s rationale for including the phrase “when applied in good faith”, he hoped that Mr. Valencia-Ospina might reconsider his proposal to delete that phrase, as it appeared that all members were now aware of its importance. He urged members to support Mr. Gaja’s proposal in order to settle the issue.

52. Ms. ESCARAMEIA (Rapporteur) said that she was willing to go along with a vote on Mr. Gaja’s proposal, with the addition of the phrase “and that it is the less disputed formulation” at the end of the sentence. However, she was concerned that readers might not understand what was meant by the phrase “the less disputed formulation”, which gave the impression that most legal instruments used the precautionary approach. Moreover, the inclusion of the phrase “when applied in good faith” did not seem to concur with the explanation provided by Mr. Yamada. In her view, the Commission did not wish to convey the idea that States could construe the precautionary approach as not legally binding and thus use it as an excuse for not acting in good faith. She shared the view that the phrase “when applied in good faith” did not belong in the commentary.

53. Mr. VALENCIA-OSPINA said that the last two speakers had confirmed his doubts. As Ms. Escarameia had pointed out, the Special Rapporteur had said in essence that when confronted with a choice between the legally binding precautionary principle and the precautionary approach, a choice which implied that one needed to be implemented in good faith but that the other did not, the Commission had chosen the one that did not have to be applied in good faith. That was precisely what the Commission seemed to be asserting in the fourth sentence of the commentary to draft article 12.

54. Mr. GAJA said that he was prepared to revise his proposal slightly and to include the “good faith” clause, since a majority of members were apparently in favour of it. Personally, he did not think that the phrase added much, but he had nothing against good faith. The recast sentence would then read: “It decided to opt for the term ‘precautionary approach’ because it is the less disputed formulation, on the understanding that the two concepts lead to similar results in practice when applied in good faith.”

55. Mr. VALENCIA-OSPINA said that perhaps he was too attached to the principle of good faith, which had been included in the Charter of the United Nations in San Francisco on the basis of a Colombian proposal, but he would not hold up the discussion any longer and would bow to members’ judgement. If the Commission felt that the wording proposed by Mr. Gaja reflected the correct understanding of the matter, then at least his own understanding would be reflected in the record.

56. The CHAIRPERSON said he took it that members agreed to accept the amended version of the fourth sentence of paragraph (5) just proposed by Mr. Gaja.

It was so decided.

Paragraph (5), as amended, was adopted.

The commentary to draft article 12 as a whole, as amended, was adopted.

Commentary to draft article 13 (Monitoring)

Paragraph (1)

57. Mr. GAJA proposed that the last sentence should be amended to read: “Where it is not feasible for the aquifer States to act jointly, it is important that they share data on their monitoring activities.”

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

58. Mr. YAMADA (Special Rapporteur) said that the Terms of Reference for Monitoring and Data Sharing mentioned in the third sentence had not yet entered into force. He therefore proposed that a footnote should be inserted to clarify the situation.

Paragraph (3), as amended, was adopted.

Paragraph (4)

59. Mr. WAKO proposed that the words “As far as” in the first sentence should be replaced by the word “Where”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

60. Mr. GAJA drew attention to the phrase in the tenth sentence that read “the two sides started with each other’s data standard and, with time and practice, reached the level of harmonized data which are comparable” and proposed that the words “each other’s data standards” should be replaced by the words “their own data standards”.

61. Mr. CAFLISCH endorsed that proposal.

62. Mr. McRAE, while agreeing with Mr. Gaja, pointed out that the words “which are comparable” should also be deleted, since data that were harmonized could not be comparable. He further proposed deletion of the word “what” from the eighth sentence.

Paragraph (5), as amended by Mr. Gaja and Mr. McRae, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

63. Mr. GAJA said that the last sentence introduced a restriction that was not contained in the text of the draft article and ought perhaps to be deleted.

64. Mr. YAMADA (Special Rapporteur) said that the sentence could be deleted: the issue at stake was monitoring, and if an aquifer was not utilized it could not be monitored.

65. Mr. VALENCIA-OSPINA drew Mr. Gaja’s attention to the last sentence of draft article 13, paragraph 2, which implied that the monitoring of aquifers was conditional upon their utilization.

66. Mr. GAJA said that if an aquifer was not utilized, its monitoring was less important, but might still be useful in the event the aquifer was utilized in the future.

67. Mr. VALENCIA-OSPINA said that he now understood Mr. Gaja’s concern.

68. Mr. HASSOUNA said that he agreed with Mr. Gaja and wished to hear his specific proposal.

69. Mr. GAJA proposed that the last sentence should be redrafted to read: “Monitoring would generally be less important when the aquifer (system) is not utilized.”

Paragraph (7), as amended, was adopted.

The commentary to draft article 13 as a whole, as amended, was adopted.

Commentary to draft article 14 (Management)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft article 14 as a whole was adopted.

Commentary to draft article 15 (Planned activities)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

70. Mr. GAJA questioned the appropriateness of the term “subsidiary organs” in the first sentence. Since the activities to be regulated in the draft article were carried out by States, he saw no reason why the Commission should not follow the approach adopted in the draft articles on State responsibility for internationally wrongful acts³⁰⁵ by simply referring to “States” and “private enterprises”; the words “subsidiary organs” could therefore be deleted.

71. Mr. SABOIA said that the reference to subsidiary organs made more sense in the context of federations, where the State was responsible for international obligations, but the federative entities carried out activities. He nonetheless proposed that “subsidiary organs” should be replaced by “organs of the State”.

72. Mr. CAFLISCH said that he, too, preferred the phrase “organs of the State”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

73. Ms. JACOBSSON said that a good example of a treaty that established an obligation to undertake environmental impact assessments was the Protocol on Environmental Protection to the Antarctic Treaty. She therefore proposed that a sentence making reference to that Protocol should be added between the second and third sentences. The new sentence would read: “The Protocol on Environmental Protection to the Antarctic Treaty, in particular annex 1, also contains obligations to undertake environmental impact assessments.”

74. Mr. HASSOUNA said that, for the sake of consistency with the references to other treaties made in the paragraph, the proposed new text should cite the obligation in question.

75. Ms. JACOBSSON said that she would need more time to redraft her proposal along those lines and requested that consideration of the paragraph should be deferred.

It was so decided.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

76. Mr. GAJA proposed that the words “original State” should be replaced by the words “State of origin”.

Paragraph (5), as amended, was adopted.

³⁰⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., para. 76.

Paragraph (6)

77. Mr. YAMADA (Special Rapporteur) said that, as currently worded, the last sentence was slightly one-sided. For a more balanced text, he proposed that it should be reworded: "For instance, the States could, in principle, refrain, upon request, from implementing or permitting the implementation of the planned activity during the course of the consultation or negotiation, which must be amicably completed within a reasonable time period."

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editorial amendment to the French text.

PART FOUR. MISCELLANEOUS PROVISIONS

Commentary to draft article 16 (Technical cooperation with developing States)

Paragraph (1)

78. Mr. PETRIČ questioned the need for the last part of the second sentence, since the fostering of sustainable growth in developing States was unrelated to the protection and proper management of aquifers.

79. Ms. ESCARAMEIA (Rapporteur) said that the phrase was necessary to make it clear in that sentence why the Commission had chosen to use the word "cooperation" rather than "assistance". She wondered whether the phrase "to foster sustainable growth in developing States" might be replaced with "to protect aquifers in developing States".

80. Mr. PETRIČ proposed the phrase "to properly manage and protect aquifers in the interests of developing States".

81. Mr. WAKO, recalling the discussions that had taken place on the topic, said that the reference to sustainable growth in developing States was correct and should be retained; the term "cooperation" was more appropriate than "assistance" in the context of technical cooperation, and the general purpose of such cooperation was indeed to foster sustainable growth in developing countries. He therefore suggested that the reference should be supplemented with the wording proposed by Mr. Petrič.

82. Mr. PERERA proposed a modified version of the amended phrase, which would read "to foster sustainable growth through the protection and management of transboundary aquifers or aquifer systems".

Paragraph (1), as amended, was adopted.

Paragraph (2)

83. Mr. PELLET said that he was puzzled by the wording of the penultimate sentence of the paragraph and wondered whether it would not be better to say: "It would be appropriate to require the aquifer States to provide for the obligation to promote scientific and technical cooperation"; otherwise, the meaning of the sentence was unclear.

84. Mr. SABOIA said that when the Drafting Committee had discussed draft article 16, the point had been made that all States were under an obligation to promote scientific and technical cooperation and that developed States had a general obligation in that respect towards developing States.

85. Mr. McRAE proposed the deletion of the sentence, as it was inconsistent with the mandatory wording of the article, which read "States shall ... promote scientific, educational, technical, legal and other cooperation with developing States ...".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

86. Mr. GALICKI said that, in the third sentence, rather than repeating the full title of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes to which reference had already been made in the second sentence, it might be preferable, from a drafting standpoint, to say "the Protocol on Water and Health to that Convention".

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to draft article 16 as a whole, as amended, was adopted.

Commentary to draft article 17 (Emergency situations)

Paragraph (1)

87. Mr. PELLET said that, in the third sentence of the French version, the words "*il serait souhaitable*" should be replaced with "*il a paru nécessaire*".

Paragraph (1) was adopted with that drafting amendment to the French version.

Paragraph (2)

88. Mr. PELLET said that, in the French version, the sixth sentence was meaningless and should be replaced either with "*mais il couvre aussi les cas auxquels les prévisions météorologiques permettent de s'attendre*" or with "*mais il couvre aussi les cas que les prévisions météorologiques permettent de prévoir*". In the last sentence in the French version the words "*plus grave*" should be replaced with "*plus important*".

Paragraph (2), as amended in the French text and with a minor editorial amendment to the English text, was adopted.

Paragraph (3)

89. Ms. JACOBSSON welcomed the reference to the 1986 Convention on early notification of a nuclear

accident and the 1982 United Nations Convention on the Law of the Sea, but said that it was too vague. For the sake of consistency with earlier commentaries which had quoted specific articles of the Conventions they mentioned, she requested the Secretariat to specify the articles of those Conventions which established an obligation of speedy notification.

Paragraph (3) was adopted on the understanding that the Secretariat would insert a reference to the relevant articles.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

90. Mr. GAJA said that, according to the first sentence, paragraph 2 (b) of draft article 17 “anticipates a corollary obligation of assistance by all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency”, yet paragraph 2 dealt only with the obligation of the State in whose territory the emergency arose. The sentence should therefore be deleted, especially as the need for States to cooperate was mentioned later in the commentary. Moreover, as there was no commentary on paragraph 4 of the draft article, and since some reference needed to be made to it, he proposed that paragraph (5) of the commentary should be moved to the end of the commentary and amended to read: “Paragraph 4 states an obligation of assistance by all the States ...”.

91. Mr. McRAE said that while he agreed with moving paragraph (5), paragraphs (6) and (7) really related to the obligation of notification. It would therefore be illogical to move paragraph (5) and to leave paragraphs (6) and (7) standing alone without any link.

92. Mr. GAJA said that paragraphs (6), (7) and (8) of the commentary all dealt with notification, which was the subject of paragraph 2 (a) of draft guideline 17. The position of the paragraphs of the commentary was therefore logical.

93. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to move paragraph (5) to the end of the commentary to draft article 17.

It was so decided.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

The commentary to draft article 17 as a whole, as amended, was adopted.

Commentary to draft article 18 (Protection in time of armed conflict)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 18, as a whole was adopted.

Commentary to draft article 19 (Data and information vital to national defence or security)

Paragraph (1)

Paragraph (1) was adopted with a minor editorial amendment to the English text.

Paragraph (2)

94. Mr. GAJA said that, for the sake of greater consistency with the text of the draft article itself, the last sentence of paragraph (2) should be amended to read: “The exception created by draft article 19 does not affect obligations that do not relate to the transmission of data and information.”

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with minor editorial amendments to the English text.

The commentary to draft article 19 as a whole, as amended, was adopted.

The meeting rose at 6 p.m.

2991st MEETING

Tuesday, 5 August 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (continued)

CHAPTER IV. *Shared natural resources (concluded)* (A/CN.4/L.731 and Add.1–2)

E. *Draft articles on the law of transboundary aquifers* (A/CN.4/L.731/Add.2)

PART THREE. PROTECTION, PRESERVATION AND MANAGEMENT (concluded)

Commentary to draft article 15 (Planned activities) (concluded)

Paragraph (3) (concluded)

1. The CHAIRPERSON invited Ms. Jacobsson to read out the sentence she was proposing for inclusion at the end of paragraph (3) of the commentary to article 15 of the draft articles on transboundary aquifers.

2. Ms. JACOBSSON said that the sentence read: “Furthermore, article 8 of the Protocol on Environmental Protection to the Antarctic Treaty provides that all activities in the Antarctic Treaty area shall be subject to environmental impact assessment procedures.”

Paragraph (3), as amended, was adopted.

The commentary to draft article 15, as amended, was adopted.

C. Recommendation of the Commission

3. The CHAIRPERSON said that the text prepared by the Special Rapporteur following consultations with the members of the Commission on the Commission’s recommendation to the General Assembly read:

“At its 2991st meeting, on 5 August 2008, the Commission decided, in accordance with Article 23 of its Statute, to recommend to the General Assembly:

“(a) to take note of the draft articles on the law of transboundary aquifers in a resolution, and to annex these articles to the resolution;

“(b) to recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles;

“(c) to also consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.”

The draft recommendation was adopted.

Section C was adopted.

4. Mr. PELLET said that he would have liked the words “and its technicality” to be added after the words “the importance of the topic” in subparagraph (c) of the recommendation.

E. Draft articles on the law of transboundary aquifers (concluded) (A/CN.4/L.731/Add.2)

*General commentary (concluded)**

*Paragraph (3) (concluded)**

5. The CHAIRPERSON said that, now that the draft recommendation to the General Assembly had been adopted, the members of the Commission should consider paragraph (3) of the general commentary, which had been left pending.

6. Mr. YAMADA (Special Rapporteur) said that the end of the fourth sentence, starting with the words “and (b)”, and the beginning of the fifth sentence should be amended to read: “considering, at a later stage, the elaboration of a convention on the basis of the draft articles. Since there would be some time before a decision is made on the second step, the Commission decided to refrain from...”.

7. Mr. WAKO said that he agreed with the Special Rapporteur’s proposal, but, in his view, subparagraph (a) of the fourth sentence should also be amended, by using the terms contained in subparagraph (b) of the recommendation the Commission had just adopted, to read: “to take note of the draft articles, which would be annexed to its resolution, and to recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles”.

8. After a discussion in which Mr. YAMADA (Special Rapporteur), Mr. SABOIA, Mr. WISNUMURTI and Mr. VALENCIA-OSPINA took part, the CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt Mr. Wako’s proposal.

It was so decided.

The general commentary, as a whole, as amended, was adopted.

Section E, as a whole, as amended, was adopted.

D. Tribute to the Special Rapporteur

9. The CHAIRPERSON invited the members of the Commission to adopt a resolution paying tribute to the Special Rapporteur, Mr. Chusei Yamada, the text of which would read:

“At its 2991st meeting, on 5 August 2008, the International Law Commission, having adopted the draft articles on the law of transboundary aquifers, adopted the following resolution by acclamation:

“The International Law Commission,

“Having adopted the draft articles on the law of transboundary aquifers,

“Expresses to the Special Rapporteur, Mr. Chusei Yamada, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on the law of transboundary aquifers. The Commission also acknowledges the untiring efforts of the Special Rapporteur during the development of the topic in organizing various briefings by experts on groundwaters from the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization, the Economic Commission for Europe and the International Association of Hydrogeologists. In this connection, the Commission also notes that the International Association of Hydrogeologists honoured the Special Rapporteur with a distinguished associate membership award for his outstanding contribution to the field.”

The resolution was adopted by acclamation.

10. Ms. ESCARAMEIA, supported by Mr. HASSOUNA and Mr. GALICKI, proposed that the following sentence should be added to the resolution: “The Commission also expressed its deep appreciation to Mr. Enrique Candiotti

* Resumed from the 2989th meeting.

as Chairperson for several years of the Working Group on shared natural resources for his significant contribution to the work on the topic.”

The proposed text was adopted by acclamation.

Chapter IV of the draft report, as a whole, as amended, was adopted.

CHAPTER VI. Reservations to treaties (A/CN.4/L.733 and Corr.1 and Add. 1–5)

11. The CHAIRPERSON invited the members of the Commission to consider chapter VI, section A of the draft report on reservations to treaties.

A. Introduction (A/CN.4/L.733 and Corr.1)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

12. Mr. PELLET (Special Rapporteur) proposed that the words “31 July 2003” in footnote 6 should be replaced by the words “31 July 2008”.

Paragraph 2, as amended, was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Section A, as amended, was adopted.

13. The CHAIRPERSON invited the members of the Commission to consider the text of the draft guidelines and commentaries thereto, as adopted by the Commission at its sixtieth session.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.733/Add.2–5)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTIETH SESSION (A/CN.4/L.733/Add.3)

Commentary to draft guideline 2.1.6 (Procedure for communication of reservations)

14. Mr. PELLET (Special Rapporteur) said he did not think that it was really necessary to indicate the number of the corresponding preliminary draft guideline in square brackets after the number of the draft guideline under consideration. That practice, which was helpful during the year when the draft guidelines were being discussed, did not serve much purpose once they had been adopted. He therefore proposed that the numbering in square brackets in document A/CN.4/L.733/Add.3 should be deleted.

15. Ms. ARSANJANI (Secretary to the Commission) said that the purpose of the numbering in square brackets was to refer to the draft guidelines initially proposed by the special rapporteurs. That procedure was used only for texts adopted on first reading and, if the numbering in square brackets was deleted in the chapter on reservations to treaties, the same would have to be done for the other chapters of the report, especially the chapter on responsibility of international organizations.

16. Ms. JACOBSSON said that she could understand the Special Rapporteur’s proposal, but the numbering in square brackets was particularly helpful for practitioners.

17. Mr. PELLET (Special Rapporteur) said that his proposal was not designed to change practice with regard to the current year’s reports, which would continue to indicate in square brackets the numbering he had proposed so that the reader could refer to his views. The numbering in square brackets should, however, be deleted in the recapitulative chapters.

18. The CHAIRPERSON suggested that the question should be left pending and that the Commission should come back to it at a later meeting.

It was so decided.

Paragraphs (1) to (23)

Paragraphs (1) to (23) were adopted.

The commentary to draft guideline 2.1.6 was adopted.

Commentary to draft guideline 2.1.9 (Statement of reasons)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

19. Mr. McRAE, supported by Mr. PELLET, proposed that, in the last sentence, the word “However” should be deleted, because it introduced an unnecessary shade of meaning.

Paragraph (3), as amended, was adopted.

20. Mr. PELLET (Special Rapporteur), referring to the case where the Commission had adopted a draft guideline in the context of draft articles, said that he would like it to indicate whether the word “draft” should continue to be used or whether the guideline was now part of a more general set of draft articles. In his opinion, it would be better to refer to “articles” and “guidelines”. The Commission seemed to be in the habit of keeping the word “draft”, but that was unnecessary because what was being discussed could only be draft articles and guidelines. It should clear up that point once and for all.

21. Mr. SABOIA said that he agreed with the Special Rapporteur. The Commission might restrict the use of the word “draft” to the title of the topic and the introductory chapter and then simply use the words “article” and “guideline”. That would be more practical and prevent repetition in the text of the commentaries.

22. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission never submitted anything but “draft” provisions to the General Assembly, which was, ultimately, the only body competent to adopt them.

23. Mr. HASSOUNA proposed that, in order to meet the Special Rapporteur’s concern, the Commission should recall in a footnote that, from a legal and technical point of view, it was dealing with “draft” guidelines and that it was using the word “guidelines” only to avoid repetition.

24. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Saboia and Mr. Hassouna. Since the texts prepared by the Commission were drafts, it would be reasonable to say that they contained guidelines or articles.

25. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Saboia and Mr. Hassouna.

It was so decided.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

26. Mr. PELLET (Special Rapporteur) proposed that the word “très” in the French text of the sentence preceding the quotation should be deleted.

Paragraph (7), as amended, was adopted.

Paragraph (8)

27. Mr. PELLET (Special Rapporteur) said that the words “draft guideline 2.1.6” should be amended to read “draft guideline 2.1.9”.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

The commentary to draft guideline 2.1.9, as amended, was adopted.

2.6 Formulation of objections

Commentary to draft guideline 2.6.5 (Author)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

28. Mr. NOLTE said that the term “declarations”, as explained in the penultimate sentence, was not sufficiently clear. He proposed that the words “, which do not produce the same legal effects as an objection made by a contracting State or a contracting international organization,” should be replaced by the words “that are so far merely entitled to become parties to the treaty”.

29. Mr. PELLET (Special Rapporteur) said that the end of the last sentence should be amended to read: “in the case of an open treaty, the parties to such a treaty might not have been aware of certain objections”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

30. Mr. PELLET (Special Rapporteur) proposed that the words “and organizations” should be added after the word “States” in the fourth and fifth sentences.

Paragraph (4), as amended, was adopted.

Paragraph (5)

31. Mr. HMOUD proposed that the following sentence should be added at the end of paragraph (5): “However, it is noted that this language was left out in the 1969 Vienna Convention on the Law of Treaties in relation to objections.”

32. Mr. PELLET (Special Rapporteur) said that, in order to ensure the consistency of paragraph (5), the sentence proposed by Mr. Hmoud should be added in a footnote or at the end of paragraph (3).

33. Mr. GAJA suggested that the last two sentences and the sentence proposed by Mr. Hmoud should be included in a footnote.

34. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission adopted Mr. Gaja’s proposal.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

The commentary to draft guideline 2.6.5, as amended, was adopted.

Commentary to draft guideline 2.6.6 (Joint formulation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

35. Mr. PELLET (Special Rapporteur) said that, in the first line, the words “draft guideline 2.6.1” should be replaced by the words “draft guideline 2.6.6”.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 2.6.6, as amended, was adopted.

Commentary to draft guideline 2.6.7 (Written form)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

36. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the words “which dealt entirely with objections to reservations” should be deleted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2.6.7, as amended, was adopted.

Commentary to draft guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty)

Paragraph (1)

37. Mr. PELLET (Special Rapporteur) said that, at the end of the first sentence, the words “or organization” should be added after the words “reserving State”, since a reservation could also be formulated by an international organization.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft guideline 2.6.8, as amended, was adopted.

Commentary to draft guideline 2.6.9 (Procedure for the formulation of objections)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft guideline 2.6.9 was adopted.

Commentary to draft guideline 2.6.10 (Statement of reasons)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

38. Mr. GAJA proposed that the beginning of the second sentence, up to the word “nevertheless”, should be deleted because the State whose opinion was cited in the footnote did not consider that such a legal obligation existed, and it would also be rather strange to raise such a question without replying to it somewhere in the commentary to the draft guidelines. Secondly, in the French text of the footnote, the words “*avec l’objet et le but du traité*” should be added after the word “*incompatibles*”. The end of the paragraph was not very clear and he wondered whether the penultimate sentence might not be deleted. He also proposed that the words “even necessary” in the last sentence should be deleted.

39. Mr. NOLTE, supported by Ms. ESCARAMEIA, said that he took the opinion of the Netherlands, as described in the footnote, to mean that that country considered a legal obligation to be possible. In any event, if the Commission had decided to refer to a question raised by a State, there was no reason to delete the beginning of the second sentence, as Mr. Gaja had proposed.

40. Mr. McRAE said that, in the footnote, the words “this is also the Commission’s position” were ambiguous; it was not clear to which position they referred.

41. Mr. SABOIA said that he agreed with the comments by Mr. Nolte and Ms. Escarameia. The proposal in question was important and the paragraph’s logic required it to be retained.

42. Mr. PELLET (Special Rapporteur) said that, in view of Mr. Gaja’s concern, the proposal under consideration should be retained, but the beginning should be amended to read: “Leaving aside the question whether there might be a legal obligation for States”. That issue would be dealt with somewhere in the 1,000 or so pages that would make up the commentary to the draft guidelines. In the French text of the footnote, the words “*avec l’objet et le but du traité*” could be added after the word “*incompatibles*”. With regard to Mr. McRae’s comment, the proposal in question was indeed ambiguous and it could be deleted without any problem because he would come back to the matter later. Mr. Gaja’s concern could be met by reversing the order of the last two sentences and deleting the words “even necessary” in the last sentence, as suggested.

43. Mr. WAKO pointed out that the words “the question” at the beginning of the first and second sentences did not refer to the same question. He therefore proposed that, in the first sentence, they should be replaced by the words “the problem”.

Paragraph (3), as amended by the Special Rapporteur and Mr. Wako, was adopted.

Paragraph (4)

44. Mr. GAJA proposed that, for the sake of clarity, the words “the reservation of Turkey” in the second sentence should be replaced by the words “the reservation of Turkey to its declaration of acceptance of the Court’s jurisdiction”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to draft guideline 2.6.10, as amended, was adopted.

Draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation)

45. Mr. PELLET (Special Rapporteur), referring to the French text of the title, recalled that the Drafting Committee had decided on the words “*Non-exigence de la confirmation*”.

46. Mr. CAFLISCH, supported by Mr. HASSOUNA, said that the words “*Absence d’exigence de la confirmation*” would be more elegant. He would nevertheless go along with the majority opinion.

47. Mr. PELLET (Special Rapporteur) said that the adoption of Mr. Caflisch’s proposal would require far too many changes in the rest of the text and he strongly recommended that the Commission bring the French text into line with the English text, which referred to “Non-requirement”. He assured Mr. Caflisch that his position would be duly reflected.

The title of draft guideline 2.6.11, as amended by the Special Rapporteur, was adopted.

Commentary to draft guideline 2.6.11

Paragraph (1)

48. Mr. GAJA proposed that the first sentence should be simplified by beginning it with the words “Whereas article 23, paragraph 2, ...” and amending the rest accordingly.

49. The CHAIRPERSON requested Mr. Gaja to submit his proposal in writing before the beginning of the next meeting and suggested that the consideration of paragraph (1) should be left pending.

It was so decided.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

50. Mr. NOLTE proposed that, since the distinction between the different groups of members whose positions were referred to was confusing, the text of paragraph (5) should be redrafted.

51. The CHAIRPERSON requested Mr. Nolte to submit his proposal in writing before the beginning of the next meeting and suggested that the consideration of paragraph (5) should be left pending.

It was so decided.

Draft guideline 2.6.12 (Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty)

52. Mr. PELLET (Special Rapporteur) recalled that, in the text of the draft guideline itself, it had been decided that the words “an objection made” should be replaced by the words “an objection formulated”.

The title of draft guideline 2.6.12, as amended by the Special Rapporteur, was adopted.

Commentary to draft guideline 2.6.12

Paragraph (1)

53. Mr. PELLET (Special Rapporteur) said that the comment he had just made also applied to the beginning of the first sentence, which should read: “Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question whether an objection formulated by a State or an international organization that, when formulating it, ...”, not “Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question whether an objection made by a State or an international organization that, when making it, ...”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

54. Mr. PELLET (Special Rapporteur) said that, for the sake of clarity, the word “1951” should be added

before the words “advisory opinion of the International Court of Justice”.

55. Mr. McRAE said that the word “only” should be deleted the first time it occurred because it was superfluous.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. McRAE said that he did not understand the words “traditional relations” after the words “an objection modifies”.

57. Mr. PELLET (Special Rapporteur) said that the word “traditional” was a mistranslation. The French words “*relations conventionnelles*” should be translated as “treaty relations”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft guideline 2.6.12, as amended, was adopted.

The meeting rose at 1 p.m.

2992nd MEETING

Tuesday, 5 August 2008, at 3 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER VI. *Reservations to treaties (continued)* (A/CN.4/L.733 and Corr.1 and Add.1–5)

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)* (A/CN.4/L.733/Add.2–5)

2. *TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTIETH SESSION (continued)* (A/CN.4/L.733/Add.3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the text of the draft guidelines and the commentary thereto contained in document A/CN.4/L.733/Add.3.

Commentary to draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation) (*concluded*)

Paragraph (1) (*concluded*)

2. Mr. GAJA proposed that the beginning of paragraph (1) should be amended to read: “While article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty, objections do not need confirmation. Article 23, paragraph 2 of the Vienna Conventions provides:”. The remainder of the paragraph would remain unchanged.

Paragraph (1), as amended, was adopted.

Paragraph (5) (*concluded*)

3. Mr. NOLTE proposed that, in order to clarify its contents, paragraph (5) should be divided into two parts. The first sentence should be moved to the end of paragraph (4), while the remainder would be unchanged, except for the phrase “for the reasons given in the commentary to draft guideline 2.6.5”, which should be deleted. A general reference to draft guideline 2.6.5 should simply be included in a footnote.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 2.6.11 as a whole, as amended, was adopted.

Commentary to draft guideline 2.6.13 (Time period for formulating an objection)

Paragraph (1)

Paragraph (1) was adopted with a minor editorial amendment to the French text of the footnote.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

4. Mr. McRAE queried the use of the adjective “inhomogeneous” and asked why the phrase containing that word had been placed between dashes.

5. Mr. BROWNLIE proposed that the adjective should be replaced with the phrase “not completely homogeneous”.

6. After a brief discussion in which Mr. SABOIA, Ms. ESCARAMEIA and Mr. NOLTE took part, the CHAIRPERSON suggested that the Secretariat should be entrusted with the task of ensuring that the wording of the French and English texts was a perfect match, taking into account the proposals which had been made, especially that of Mr. Brownlie.

It was so decided.

On that understanding, paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

7. Mr. PELLET (Special Rapporteur) said that the word “*récemment*” should be deleted from the seventh sentence of the French text and from any of the other language versions in which it appeared.

Paragraph (6), as amended, was adopted.

Paragraph (7)

8. Mr. GAJA said that the words “this wording in” should be inserted after the words “to retain” in the first sentence.

9. Mr. NOLTE challenged the statement in the first sentence that all the provisions of the 1969 and 1986 Vienna Conventions were of a residuary, voluntary nature and applied only if the treaty did not otherwise provide. The provisions concerning, *jus cogens*, for example, were not residuary or voluntary. He proposed that the statement should be reworded to read: “given that, in general, the provisions of the Vienna Conventions are of a residuary and voluntary nature”.

10. Mr. PELLET (Special Rapporteur) said that the Commission should exercise caution before accepting Mr. Nolte’s proposal. He was not certain that the rules pertaining to *jus cogens* were not residuary and voluntary. It would therefore be inadvisable to take such a rigid position. Accordingly, he proposed that the first part of the sentence should read: “For the same reason, while the expression ‘[u]nless the treaty otherwise provides’ is self-evident, since all the rules concerning reservations set forth in the Vienna Conventions are of a residuary, voluntary nature ...”. After all, the only aspect of the Conventions that was of interest to the Commission in that context was the provisions concerning reservations. However, he did not agree with being made to say, by means of a drafting amendment, that some provisions of the Vienna Conventions might not be of a residuary, voluntary nature.

11. Mr. NOLTE said that while the Special Rapporteur’s proposal constituted an important qualification of the sentence, he nevertheless wondered whether a reservation that ran counter to the object and purpose of a treaty could be considered acceptable if the treaty so provided. While that was, of course, a hypothetical situation, he was not certain that it was possible to make a categorical statement about all the rules concerning reservations to treaties. He would therefore be wary about making such a general statement regarding the residual nature of the provisions of the Vienna Conventions.

12. Mr. KOLODKIN questioned the need for the phrase regarding the residuary, voluntary nature of the provisions of the Vienna Conventions and proposed its deletion.

13. Mr. PELLET (Special Rapporteur) said that he was not in favour of Mr. Nolte’s proposal because he thought that the provisions of the Vienna Conventions concerning reservations were in fact of a residuary, voluntary nature, since States could always agree to formulate reservations to provisions of a treaty even if the reservations were contrary to what some law professors

considered to be the object and purpose of that treaty. He was not very keen on Mr. Kolodkin's proposal either, as it would deprive readers of the explanation of the Commission's decision. At least it should be indicated that, since the Guide to Practice was not binding, the Commission had felt that draft guideline 2.6.13 would be useful. Mr. Kolodkin's proposal would be tantamount to saying that the Commission had reached a decision, but would not say why it had done so. That would not be a wise course of action; a brief statement of the rationale ought to be given because the Commission always had a reason for its findings.

14. The CHAIRPERSON suggested that since the text of paragraph (7) was important and obviously required further careful thought, Mr. Nolte, Mr. Kolodkin and the Special Rapporteur should confer with a view to proposing satisfactory wording.

15. Mr. NOLTE said that, following consultations, he, Mr. Kolodkin and the Special Rapporteur had agreed that, in the first sentence, the word "all" should be deleted and the word "relevant" should be inserted before "provisions".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

16. Mr. BROWNLIE said that, for the sake of consistency, either the title "Sir" should be inserted before the names of Hersch Lauterpacht and Gerald Fitzmaurice, or all the persons mentioned in that paragraph should be referred to simply by their initials and surnames.

17. After a brief discussion in which Mr. PELLET (Special Rapporteur), Mr. BROWNLIE and Mr. CAFLISCH took part, the CHAIRPERSON suggested that the Commission should delete the title "Sir" before Humphrey Waldock's name and refer to all persons mentioned in that paragraph by their initials and surnames.

It was so decided.

18. Mr. HASSOUNA asked what was "curious" about the Commission's decision not to take up the solution of drawing a distinction between contracting States and those that had not yet acquired that status *vis-à-vis* the treaty.

19. Mr. PELLET (Special Rapporteur) said that the distinction seemed to be so self-evident that it was strange that neither the three eminent gentlemen mentioned in that paragraph nor the Commission had considered it necessary to retain it. That was why he had used the word "curiously".

20. The CHAIRPERSON suggested that the word "curiously" should be deleted.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft guideline 2.6.13 as a whole, as amended, was adopted.

Commentary to draft guideline 2.6.14 (Conditional objections)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

21. Mr. GALICKI asked whether the reservations in question had been formulated to the 1961 Vienna Convention on Diplomatic Relations or to the 1963 Vienna Convention on Consular Relations, as the date and instrument given in paragraph (3) did not match.

22. Mr. PELLET (Special Rapporteur) said that the correct reference should be to the 1961 Vienna Convention on Diplomatic Relations.

Paragraph (3), as amended, was adopted.

Paragraph (4)

23. Mr. PELLET (Special Rapporteur) said that the word "made" in the fourth sentence should be amended to "formulated".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

24. Mr. GAJA said that there was some inconsistency between paragraphs (6) and (8), which dealt with pre-emptive objections in a case where the objection had been made before the reservation, but the reservation which the pre-emptive objection was supposed to address had then come into being. It was unclear whether it was then necessary to confirm the objection. Paragraph (6) gave the reader the impression that in such cases a pre-emptive objection automatically became a real objection, yet paragraph (8) seemed to say the opposite. The Commission should take one position or the other, or else say plainly that it did not wish to deal with the issue.

25. Mr. PELLET (Special Rapporteur) said that he saw no incompatibility or inconsistency between the two paragraphs.

26. The CHAIRPERSON requested Mr. Gaja to propose an alternative text.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Commentary to draft guideline 2.6.15 (Late objections)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

27. Mr. GALICKI said that the last sentence referred first to categories of treaties and then to the titles of two specific conventions, which seemed stylistically inconsistent. He therefore proposed that the two halves of the sentence should be linked by a phrase such as “or some particular conventions like ...”.

28. Mr. HMOUD said that the reference in footnote 154 [388]³⁰⁶ to a reservation by Jordan was incorrect; Jordan had made a declaration on the 1999 International Convention for the Suppression of the Financing of Terrorism.

Paragraph (2), as amended, was adopted.

Paragraph (3)

29. Mr. NOLTE proposed that in the final sentence, the words “or contribute to” should be inserted between “may lead to” and “a reservations dialogue”. Late objections did not usually initiate a dialogue but were part of an ongoing one, and his proposal would make that clear.

Paragraph (3), as amended, was adopted.

Paragraph (4)

30. Mr. GAJA said he had serious problems with the final two sentences of the paragraph, which read: “The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, not as objections but as ‘communications.’” That was not true: footnote 158 [391] gave some indications to the contrary, as did his own recent research, particularly in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two sentences should therefore be deleted.

31. Mr. PELLET (Special Rapporteur) said that it was important for the Commission to note that the Secretary-General communicated late objections not as objections but as communications. However, it was true that the footnote indicated that certain late objections were indeed listed as objections in the compendium of treaties deposited with the Secretary-General (*Multilateral Treaties Deposited with the Secretary-General*). He therefore suggested that in the second sentence referred to by Mr. Gaja, the words “not as objections but as ‘communications’” should be deleted.

32. Mr. NOLTE said that the issue had been debated intensively: it was not a small matter. It was true that the footnote did not confirm that the Secretary-General had the practice of calling late objections “communications”, but that information was important and must appear in the report. The commentary could still state the view that late objections were objections according to the definition preferred by the Special Rapporteur and the majority

of members of the Commission. However, not mentioning the fact that the Secretary-General called them communications might influence a future debate in the Sixth Committee when the draft guidelines were considered on second reading.

33. Mr. PETRIČ endorsed that viewpoint: the explanation given concerning the practice of the Secretary-General on a fairly complicated issue was particularly important for countries that did not have large legal departments. The substance of the second sentence should therefore be retained, either in a footnote or in the text itself.

34. Mr. PELLET (Special Rapporteur) acknowledged that there was some lack of coherence in the text, as Mr. Gaja had pointed out, but Mr. Nolte and Mr. Petrič were right in not wanting the information to be deleted altogether, as it was important. The text in question might be better placed before the final sentence of paragraph 3, which argued that the late formulation of objections was in some ways useful for determining the validity of the reservation. The text might then read: “Moreover, it is the practice of the Secretary-General, as the depositary of multilateral treaties, when he receives late objections to communicate them to the other States and organizations concerned.” In the corresponding footnote it could be stated that the information was generally transmitted in the form of a communication, although in some cases it was called an objection, and in that connection the examples of the objections to the reservations by Bahrain and Qatar could be given.

35. Mr. GAJA said that he could accept most of that proposal, except for the description of the practice of the Secretary-General. He had recently done research on that very subject and did not entirely agree with the way that practice was portrayed. There might be cases in which the Secretary-General had used the word “communications”, but on the whole, late objections were treated in the same way as all other objections.

36. Mr. PELLET (Special Rapporteur) said that the instrument of communication, as he understood it, was in fact called a communication; it was the object of the communication that was called an objection.

37. THE CHAIRPERSON invited Commission members to consult briefly on the wording of paragraph (4).

38. Mr. GAJA said that, following consultations, agreement had been reached on moving the last two sentences of paragraph (4) to paragraph (3). Doing so would require some slight editorial adjustments, which might best be left to the Special Rapporteur. The problem lay with the last sentence. He admitted that, not being very familiar with the practice of the Secretary-General, he was somewhat at a loss as to how to deal with it. It might be possible to say that the Secretary-General sometimes renamed late objections “communications”. However, he was not actually aware of any instances in which that had been done and therefore hesitated to say that. What he did know was that the Secretary-General did what was expected of a depositary and did not rename what was submitted to him, regardless of whether it was a reservation, a declaration or an objection. He simply transmitted what he received

³⁰⁶ The number in square brackets refer to the number of the footnote in the final version of the draft commentary as adopted in the report of the Commission on the work of its sixtieth session, *Yearbook ... 2008*, vol. II (Part Two), document A/63/10.

and did not pass judgement on it. If, on the basis of his research, the Special Rapporteur had learned of a different practice, perhaps the last sentence might be reformulated to read: “Sometimes the Secretary-General, when receiving late objections, communicates them to the other States and organizations concerned as ‘communications’.”

39. Mr. PELLET (Special Rapporteur) said that, short of spending an inordinate amount of time studying the practice of the Secretary-General, he would rely on what was stated in paragraph 213 of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*,³⁰⁷ which read: “... the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it a ‘communication’ when informing the parties concerned of the deposit of the objection”. In his own opinion, the contents of the footnote should be retained and should reproduce that quotation in its entirety. Given that the Secretary-General’s practice was not the absolute last word on the subject, the footnote could then go on to list the examples of late objections that were referred to as such which currently appeared in the footnote.

40. He wished to point out that the principle reflected in the last sentence of paragraph (4), to which the footnote corresponded, was nevertheless accurate: the Secretary-General was in fact cautious and preferred not to state his position with respect to the nature of objections and referred to them as “communications”. There were, however, instances in which the Secretary-General did refer explicitly to such communications as objections. Thus, to recapitulate, his proposal was to move the last two sentences of paragraph (4) to the end of paragraph (3), generally retaining the current wording of the last sentence, and to include the quotation from paragraph 213 of the *Summary of Practice* in the footnote to the last sentence, while also listing the examples of late objections as they currently appeared in footnote 158 [391].

Paragraph (4), as amended was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

41. Mr. PETRIČ proposed that the word “important”, used to describe the word “element”, should be deleted, as it exaggerated the weight of a late objection in determining the validity of a reservation and did not accurately reflect the Commission’s discussions on the subject.

Paragraph (7), as amended, was adopted.

Paragraph (8)

42. Mr. NOLTE suggested the inclusion, in the second sentence, of a reference to the term “objecting communication”, which he had proposed and which had been extensively discussed.

Paragraph (8), as amended, was adopted.

³⁰⁷ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, United Nations publication (Sales. No. E.94.V.15), document ST/LEG/7/Rev.1.

Paragraph (9)

43. Mr. NOLTE said that the final phrase (“it spells out in the clearest of terms that they do not produce the effects that their authors generally expect them to”) was imprecise and could lend itself to numerous interpretations. He suggested that it should be replaced by “it spells out explicitly that they do not produce the legal effects of an objection”.

44. Mr. GAJA objected to that proposal, as it was not consistent with the wording of the draft guideline. To solve the problem, the words “made within that time period” should be appended at the end of the phrase proposed by Mr. Nolte.

Paragraph (9), as amended by Mr. Nolte and Mr. Gaja, was adopted.

The commentary to draft guideline 2.6.15 as a whole, as amended, was adopted.

45. The CHAIRPERSON invited the Commission to continue the consideration of the text of the draft guidelines and commentaries thereto contained in document A/CN.4/L.733/Add.4.

Commentary to draft guideline 2.7 (Withdrawal and modification of objections to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

46. Mr. NOLTE said that the description of the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions as being “succinct” on the withdrawal of objections did not convey the idea that they contained very little information on the withdrawal of objections, which he believed was the intended meaning of the first sentence. He suggested that alternative wording should be found.

47. Mr. BROWNLIE proposed that the word “succinct” should be replaced by “inconclusive”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

48. The CHAIRPERSON noted that the incorrect numbering in the English version of paragraph (6) as paragraph (9) would be corrected by the Secretariat.

49. Mr. GAJA said that in the penultimate sentence the phrase “the life of the treaty” seemed unduly dramatic: it should be replaced by “treaty relations”.

50. Mr. SABOIA said that the word “revive” in the third sentence was a bit strong and proposed that it should be replaced by the word “reinforce”.

51. Mr. PELLET (Special Rapporteur) proposed that the French translation of the word proposed by Mr. Saboia should be “*mettre en oeuvre*”.

Paragraph (6), as amended by Mr. Gaja and Mr. Saboia, was adopted, subject to editorial corrections to be made by the Secretariat.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft guideline 2.7 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.1 (Withdrawal of objections to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft guideline 2.7.1, as a whole, was adopted.

Commentary to draft guideline 2.7.2 (Form of withdrawal)

Paragraph (1)

52. Mr. NOLTE suggested that, in the second sentence, the word “absolute” should be deleted and the word “rule” should be replaced by “theory”.

53. Mr. PETRIČ said that while he endorsed Mr. Nolte’s idea, it sounded rather awkward to state that the theory was not a principle.

54. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Petrič, but also with the substance of Mr. Nolte’s comment. Perhaps the easiest solution would be to include a phrase along the lines of “while the theory of parallel forms is not established in international law”. That would avoid having to specify whether it was a principle or a rule and would perhaps address the concerns expressed.

55. Mr. CANDIOTI suggested that, given the proliferation of theories in international law, the theory referred to in the second sentence and the one referred to in paragraph (6) of the commentary to draft guideline 2.7 should be worded identically.

56. Mr. McRAE said that there was indeed an inconsistency between the third sentence of paragraph (6) of the commentary to draft guideline 2.7, which referred to “the theory of parallelism of forms”, and the second sentence of paragraph (1) of the commentary to draft guideline 2.7.2, which referred to the “rule of parallel forms”. He agreed that the two references to parallelism of forms should be brought into line.

57. Mr. PELLET (Special Rapporteur) said that he saw no contradiction between the two. Personally, he did not think that parallelism of forms existed. It was not an absolute rule of international law, though it was true that in drafting texts on reservations and objections, some formalism was necessary. The only difference between

paragraph (6) of the commentary to draft guideline 2.7 and paragraph (1) of the commentary to draft guideline 2.7.2 was that the latter simply referred to “rules”, while the former spoke of a “theory”. Perhaps the word “principle” could be used in both instances.

58. Mr. NOLTE said it was true that there was no rule in international law about parallelism of forms, although there was, perhaps, a theory. Similarly, one could not speak of such a rule or theory as being “absolute”. He therefore proposed that in paragraph (1) of the commentary to draft guideline 2.7.2 the phrase “while the rule of parallel forms is not an absolute principle in international law” should be replaced by “while the theory of parallel forms is not a principle of international law”. That would establish consistency with the formulation in the commentary to draft guideline 2.7 and avoid making any assertions about a rule of international law on parallelism of forms.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to draft guideline 2.7.2 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.3 (Formulation and communication of the withdrawal of objections to reservations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

59. Mr. GAJA drew attention to the third sentence and suggested that, in order to make the text more readable, the phrase “by merely replacing the word ‘reservation’ with the word ‘objection’ in the text” should be moved to the beginning of the sentence and inserted after the word “reproduce”, where it would be set off by commas.

Paragraph (2), as amended, was adopted.

The commentary to draft guideline 2.7.3 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.4 (Effect on reservation of withdrawal of an objection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

60. Mr. PELLET (Special Rapporteur) apologized for raising a question of form but said that it was important for the Commission to be as coherent as possible. In order to make the reader’s life easier, whenever he had referred the reader in a footnote to a publication that had been cited previously, he had taken the trouble to include the number of the footnote in which the publication had been cited the first time. To his dismay, those footnote numbers had not been reproduced in the English translation.

The use of the formula “*op. cit.*” was not as practical because it sometimes left the reader leafing through voluminous reports while trying desperately to find the original citation. He thus requested that, if the Commission agreed, the Secretariat should reinstate the references to the footnote numbers in question.

Paragraph (3), as amended, was adopted.

Paragraph (4)

61. Mr. GAJA suggested that, in the last sentence, the words “are felt” should be replaced by “occur”, which would be closer to the meaning intended by the Commission. In addition, he questioned whether, in the penultimate sentence, the French word “*consistance*” had been correctly translated in the English version as “consistency”. In any case, he did not think “consistency” was the right word and requested the French-speaking members of the Commission to help find a better translation.

Paragraph (4), as amended, was adopted, subject to editorial changes.

The commentary to draft guideline 2.7.4 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.5 (Effective date of withdrawal of an objection)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

62. Mr. PELLET (Special Rapporteur) drew attention to the footnote, which related to paragraph (2), and said that the page numbers of the document cited had been omitted in the French version.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to draft guideline 2.7.5 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft guideline 2.7.6 as a whole was adopted.

Commentary to draft guideline 2.7.7 (Partial withdrawal of an objection)

Paragraph (1)

63. Mr. GAJA, drew attention first of all to the phrase “will produce the effects foreseen in article 23, paragraph 3” and said that the correct reference should be to

article 21. Secondly, in the footnote that related to paragraph (1), the words “be associated” should be replaced by “enter into treaty relations”. Lastly, he had a problem with the inclusion of the bracketed phrase “or even ‘super-maximum’”. Aside from the fact that he disliked the expression “super-maximum”, its inclusion gave rise to a whole host of problems, which had not yet been addressed by the Commission. Those problems were related to the fact that when downgrading an objection with super-maximum effect to one with maximum effect, the end result, as explained—not very clearly, he might add—in a later footnote, was that the treaty was no longer in force between the States or international organizations concerned. He therefore suggested the deletion of the bracketed text in question, so that the amended text would refer exclusively to downgrades from objections with maximum effect or intermediate effect to those with normal or simple effect. He would also recommend including a footnote with a general proviso explaining that there were particular problems relating to objections with super-maximum effect which the Commission planned to consider at its sixty-first session, and that it was for that reason that they had not been included in the current text.

64. Mr. PELLET (Special Rapporteur) said that he would prefer *a priori* to retain the bracketed phrase “or even ‘super-maximum’” since it had been the subject of much discussion within the Drafting Committee and had constituted one of the justifications for addressing the issue of the partial withdrawal of an objection. Given that background, he would be interested to learn the position of other members. However, if Mr. Gaja would be satisfied with the inclusion of an explanation of an objection with super-maximum effect in a long footnote, he would not be averse to that modification.

65. Ms. ESCARAMEIA (Rapporteur) said that she had no problem with the text as it currently stood.

66. Mr. GAJA said that he would attempt to rephrase his proposal concerning the issue of objections with super-maximum effect. The problem was that when an objection was downgraded from maximum to intermediate or from intermediate to normal, the effect of the objection was reduced. The point of the guideline was to provide for that possibility at any time, while preventing a situation in which a State or international organization was subjected to the interruption of treaty relations on the part of another State or international organization. While it could be argued that, by definition, a super-maximum objection did not have the effect of interrupting treaty relations, it could also be argued that, when downgrading from super-maximum to maximum, the treaty relations that existed as a result of an objection with super-maximum effect no longer existed as a result of one with maximum effect. If the point of the draft guideline was to allow for the possibility of reducing the effect of an objection and not of increasing its effect, then there should be no reference to the objection with super-maximum effect in the commentary because it raised more complicated questions that might better be addressed in a footnote.

67. Mr. McRAE said that he would be inclined to support Mr. Gaja, since the placement of the text in question after the phrase “an objection with ‘maximum’ effect” suggested

that the consequences of moving down the scale from an objection with maximum or super-maximum effect to one with simple effect were similar, whereas they were not. He agreed with Mr. Gaja that the language gave rise to some confusion and that an explanation was needed to reflect the different nature of objections with super-maximum effect.

68. Mr. PELLET (Special Rapporteur) said that he nevertheless wished to point out that great care had gone into drafting that text. The term “*voire*” in French conveyed the idea that one was not giving one’s opinion on the matter in question. Moreover, footnote 45 [441] was perfectly consistent with what Mr. Gaja had stated. If that did not satisfy members, he would propose, in the first indented subparagraph, to delete the phrase “(or even ‘super-maximum’)” as well as the reference to that term in footnote 42. On the other hand, in order to help the reader, who might not be as adept at interpreting the effects of different types of objections as Mr. Gaja and Mr. McRae, he would propose retaining the current wording of footnote 45 [441] but adding at the end of it the current text of footnote 42, which explained what was meant by an objection with “super-maximum” effect.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to draft guideline 2.7.7 as a whole, as amended, was adopted.

Commentary to draft guideline 2.7.8 (Effect of a partial withdrawal of an objection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

69. Mr. GAJA said that the first sentence seemed to suggest that States were not allowed to react to the partial withdrawal of an objection, which was not the case. He therefore proposed that the sentence should be deleted.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 2.7.8, as amended, was adopted.

Draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation)

70. Mr. PETRIČ drew attention to a discrepancy between the English and French versions of the title of the draft guideline.

71. Mr. PELLET said that the English text should be aligned with the French original, which now read “*Aggravation d’une objection à une réserve*”. Thus, in the English text, the words “prohibition against the” should be deleted.

The title of the draft guideline was thus amended.

Commentary to draft guideline 2.7.9 (Widening of the scope of an objection to a reservation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

72. Mr. NOLTE drew attention to discrepancies between the English and the French versions of the second sentence.

73. Ms. ESCARAMEIA (Rapporteur) proposed that the second sentence of the English text should be aligned with the French to read: “The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the author of the reservation and the author of the objection.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft guideline 2.7.9 as a whole, as amended, was adopted.

74. The CHAIRPERSON drew attention to the portion of chapter VI contained in document A/CN.4/L.733/Add.5.

Draft guideline 2.8 (Form of acceptances of reservation)

75. Mr. McRAE drew attention to a discrepancy between the English and French versions of the title of the draft guideline.

76. Mr. PELLET (Special Rapporteur) said that the English text should be aligned with the original French, which had been amended in the Drafting Committee to read “Forms of acceptance of reservations”.

The title of the draft guideline was thus amended.

Commentary to draft guideline 2.8 (Forms of acceptance of reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

77. Mr. PELLET (Special Rapporteur) said that the first sentence of the English text should be aligned with the original French to read: “Guideline 2.8, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance: ...”.

Paragraph 3, as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

78. Mr. PELLET (Special Rapporteur) proposed the deletion of the words “*et celles*” in the second sentence of the French text.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

The commentary to draft guideline 2.8 as a whole, as amended, was adopted.

Section C as a whole, as amended, was adopted.

CHAPTER VII. Responsibility of international organizations (A/CN.4/L.734/Rev.1 and Add.1–2)

79. The CHAIRPERSON invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.734/Rev.1.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

80. Mr. VALENCIA-OSPINA said that it was customary to include the names of the chairpersons of working groups established during the session, and proposed that Mr. Candioti's name should be inserted in the second sentence.

81. The CHAIRPERSON suggested that the words "and appointed Mr. Candioti as its Chairperson" should be inserted after the phrase "the Commission established a Working Group".

Paragraph 4, as amended, was adopted.

Paragraphs 5 to 10

Paragraphs 5 to 10 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SIXTH REPORT

Paragraphs 11 to 20

Paragraphs 11 to 20 were adopted.

2. SUMMARY OF THE DEBATE

Paragraph 21

82. Mr. PELLET proposed the addition of the phrase "since the second reading of the draft articles provided an opportunity for taking due consideration of the positions of States" at the end of the paragraph.

83. Mr. VALENCIA-OSPINA wondered whether the words "and international organizations" should also be added to the text proposed by Mr. Pellet, for the sake of consistency with the first part of the paragraph.

84. Mr. PELLET said that, first, it was not a foregone conclusion that the Commission would seek the views of international organizations. What he had had in mind, and wished to have reflected in the text of the summary, was the Commission's established procedure of undertaking a first reading, which was followed by its own research and then a second reading, at which time it usually took account of the views of States. Moreover, the Commission intended to invite the legal advisers of international organizations to its sixty-first session, at which juncture it would presumably take their views into account.

Paragraph 21, as amended by Mr. Pellet, was adopted.

Paragraph 22

Paragraph 22 was adopted.

85. Mr. PELLET proposed that the following text should be added to the commentary as paragraph 22 *bis*: "It was highly unfortunate that the question of the implementation of State responsibility by injured organizations was not dealt with in the draft articles presented by the Special Rapporteur, which left a regrettable lacuna in the international law of responsibility as codified by the Commission." That had been the *leitmotif* of his statements and a point with he had argued at some length during the debate. Although it had not been followed up on, he still wished it to be reflected in the summary.

86. Mr. GAJA (Special Rapporteur) said that all members should be allowed to have their views reflected in the report. Nevertheless, he would like to hear Mr. Pellet's proposal again, in case some minor amendment was necessary. The question raised was a delicate one, since the implication was that the Commission might have to review various provisions of the draft articles on State responsibility for internationally wrongful acts.³⁰⁸

87. The CHAIRPERSON suggested that consideration of the new paragraph should be deferred until the next meeting so as to give Mr. Pellet time to draft a suitable text.

It was so decided.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

88. Mr. PELLET said that he was perplexed by the statement in the last sentence, in particular the reference to "contractual obligations", which seemed out of place. The point he had made, which he wished to be reflected in the summary, was that countermeasures were a means of ensuring that organizations were held responsible for internationally wrongful acts. If the sentence was intended to reflect his views, it should be redrafted along those lines, although perhaps it reflected someone else's views. If that was not the case, it should be deleted.

³⁰⁸ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

89. Mr. GAJA (Special Rapporteur) said that he could not recall whose views the sentence was intended to reflect. If Mr. Pellet considered that his views had not been adequately reflected, he had only to submit an appropriate text.

90. Mr. McRAE said that the reference to contractual obligations might be attributed to him. He had advocated a cautious approach to countermeasures and had suggested that, as a point of departure, the Commission might wish to consider countermeasures in the context of contractual relations, where there was a stronger argument in favour of such measures than in other areas. If necessary, he could redraft the sentence to reflect his views more clearly for the next meeting.

91. The CHAIRPERSON suggested that, given the importance of the issues at stake, further discussion of the paragraph should be deferred until the next meeting.

It was so decided.

The meeting rose at 6 p.m.

2993rd MEETING

Wednesday, 6 August 2008, at 10.20 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER VI. *Reservations to treaties (concluded)* (A/CN.4/L.733 and Corr.1 and Add.1–5)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter VI of the Commission's draft report.

B. *Consideration of the topic at the present session* (A/CN.4/L.733/Add.1)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

2. Mr. PELLET (Special Rapporteur) proposed replacing the word “*désapprobation*” in the French version with the word “*opposition*”.

Paragraph 11, as amended in the French version, was adopted.

Paragraph 12

3. Mr. PELLET (Special Rapporteur) proposed replacing the words “the reserving and the accepting State” in the second sentence with “the author of the reservation and the author of the acceptance”.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

4. Mr. PELLET (Special Rapporteur) proposed replacing “the nexus” at the end of the first sentence with “the establishment”.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 24

Paragraphs 15 to 24 were adopted.

Paragraph 25

5. Mr. GAJA proposed replacing the word “emphasized” in the last sentence with “noted” and inserting the words “also conditional interpretative” before the word “declarations”. The sentence, thus amended, should be moved to the end of paragraph 37.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 31

Paragraphs 26 to 31 were adopted.

Paragraph 32

6. Mr. McRAE proposed replacing “betoken” in the second sentence with “constitute”.

7. Mr. PERERA proposed replacing “far-ranging” in the first sentence with “wide-ranging”.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

8. Mr. McRAE proposed replacing “betokened” in the first sentence with “amounted to” and “betoken” in the third sentence with “constitute”.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

Paragraph 39

9. Mr. PELLET (Special Rapporteur) proposed replacing the words “*ne visant*” in the French version of the third

sentence with “*car elles ne visent*”. He further proposed deleting the following phrase at the end of the paragraph: “which it might later replace with a single guideline acknowledging that they and reservations came under a single legal regime”.

Paragraph 39, as amended, was adopted.

Paragraph 40

10. Mr. PELLET (Special Rapporteur) proposed inserting the words “in the report” between “clearly” and “between” in the last sentence.

Paragraph 40, as amended, was adopted.

Paragraphs 41 and 42

Paragraphs 41 and 42 were adopted.

Paragraph 43

11. Mr. PELLET (Special Rapporteur) proposed replacing the words “of course” with “consequently”.

Paragraph 43, as amended, was adopted.

Paragraphs 44 to 47

Paragraphs 44 to 47 were adopted.

Paragraph 48

12. Mr. GAJA proposed inserting the words “what applies with regard to” after “in contrast to”.

Paragraph 48, as amended, was adopted.

Paragraph 49

13. Mr. PELLET (Special Rapporteur) requested the Secretariat to indicate in a footnote the document symbol of the study referred to in the last line.

Paragraph 49, as amended, was adopted.

Paragraph 50

Paragraph 50 was adopted with minor editorial amendments proposed by Mr. Pellet.

Paragraph 51

Paragraph 51 was adopted.

Section B as a whole, as amended, was adopted.

The whole of chapter VI of the Commission's draft report, as amended, was adopted.

CHAPTER VII. Responsibilities of international organizations (concluded) (A/CN.4/L.734/Rev.1 and Add.1–2 and Add.2/Corr.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.734/Rev.1)

Paragraph 22

14. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter VII

of the Commission's report, reminding them that they had adopted section A and the beginning of section B, up to and including paragraph 23, at the previous meeting. However, after the debate that followed the adoption of paragraph 22, Mr. Pellet had expressed his intention to propose the following new paragraph 22 *bis*:

“According to a view, it was regrettable that the draft articles submitted by the Special Rapporteur did not deal with the question of implementation by an injured international organization of the responsibility of the wrongdoing State, which meant that the Commission was leaving an unwelcome lacuna in the law of international responsibility.”

Paragraph 22 bis was adopted.

Paragraph 24 (concluded)

15. Mr. PELLET proposed adding the following sentence to paragraph 24: “It was also observed that countermeasures were only a means to ensure respect of the obligations incumbent upon the organization in the field of responsibility.”

16. Mr. GAJA (Special Rapporteur) suggested that the most logical place to insert the new text was after the second sentence rather than at the end of the paragraph.

It was so decided.

17. Mr. McRAE proposed rewording the last sentence of paragraph 24 to read: “It was also suggested that any discussion of the possibility for an international organization to resort to countermeasures should be limited to withholding the performance of contractual obligations under treaty relationships involving that organization.”

It was so decided.

Paragraph 24, as orally amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

18. Ms. JACOBSSON said that the reference to the “peculiar nature of the European Union” in the second sentence of the paragraph was somewhat infelicitous. The sentence was, in any case, unclear.

19. Mr. KOLODKIN said that the sentence reflected a reference that he had made to the special character of the European Union.

20. Mr. PERERA said that he had drawn attention to the high degree of economic integration in the European Union.

21. Mr. NOLTE, after consulting Ms. Jacobsson, Mr. Kolodkin and Mr. Perera, proposed that the second and third sentences of paragraph 26 should be amended to read: “In the case of the European Union, some members

thought that this was due to the special nature of the European Union as a highly economically integrated entity while other members emphasized the fact that the European Union member States had lost the capacity to impose countermeasures in the economic field. In the case of WTO, some members expressed the view that retaliations within the WTO system ...”. The end of the paragraph would remain unchanged.

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 37

Paragraphs 27 to 37 were adopted.

Paragraph 38

22. Mr. NOLTE drew attention to a contradiction between the last sentence of paragraph 38 and the penultimate sentence. Moreover, he felt it was risky to claim that such a general declaration was “nowhere explicitly spelled out”.

23. Mr. GAJA (Special Rapporteur), noting that it was his own words that were reflected in paragraph 38, proposed the following amended version of the last sentence of the paragraph to meet Mr. Nolte’s concern: “Such a statement, the aim of which was to curb countermeasures, was generally not spelled out in practice or in the literature.”

Paragraph 38, as amended by the Special Rapporteur, was adopted.

Section B, as a whole, as amended, was adopted.

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.734/Add.1–2)

1. TEXT OF THE DRAFT ARTICLES

Paragraph 1

Paragraph 1 was adopted.

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

Paragraph 2

Paragraph 2 was adopted.

PART THREE

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

CHAPTER I

Commentary to article 46 (Invocation of responsibility by an injured State or international organization)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 46 was adopted.

Commentary to article 47 (Notice of claim by an injured State or international organization)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 47 was adopted.

Commentary to article 48 (Admissibility of claims)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

24. Mr. McRAE, noting that it was unclear whether the claim referred to at the end of the paragraph was addressed only to member States of the European Union, proposed amending the last sentence to read: “This practice suggests that whether a claim is addressed to the member States of the European Union, or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.”

25. Mr. GAJA (Special Rapporteur) said that the claim was indeed addressed to the member States of the European Union since the European Union as such was not a member of the organization in question. However, he was willing to accept Mr. McRae’s proposal.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

The commentary to article 48 was adopted.

Commentary to article 49 [48] (Loss of the right to invoke responsibility)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 49 [48] was adopted.

Commentary to article 50 [49] (Plurality of injured States or international organizations)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 50 [49] was adopted.

Commentary to article 51 [50] (Plurality of responsible States or international organizations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 51 [50] was adopted.

Commentary to article 52 [51] (Invocation of responsibility by a State or an international organization other than an injured State or international organization)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

26. Mr. PELLET, supported by Mr. CAFLISCH, proposed replacing the word “functions” in the last sentence with “competences”.

27. Mr. GAJA (Special Rapporteur) pointed out that “functions” was the word used in paragraph 3 of article 52.

28. Mr. PELLET, conceding that there was no question of amending the text of the article, proposed the following wording in order to keep the reference to “functions”: “However, regional organizations would then act only in the exercise of functions that have been attributed to them...”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

29. Mr. PELLET said that the word “*partie*” at the end of the French version of the paragraph should be replaced with “*chapitre*”.

Paragraph (9), as amended in the French version, was adopted.

Paragraph (10)

30. Mr. NOLTE said that the last sentence should be clarified and state explicitly: “There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.”

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

The commentary to article 52 [51] was adopted.

Commentary to article 53 (Scope of this Chapter)

31. Mr. GAJA (Special Rapporteur) said that the word “Chapter” in the English version of the heading should be replaced by “Part”.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Section C, as amended, was adopted.

Chapter VII of the Commission’s draft report, as a whole, as amended, was adopted.

CHAPTER V. Effects of armed conflicts on treaties (A/CN.4/L.732 and Add.1–2 and Add.2/Corr.1)

32. The CHAIRPERSON invited the members of the Commission to adopt chapter V of the Commission’s draft report (A/CN.4/L.732 and Add.1–2 and Add.2/Corr.1).

A. Introduction (A/CN.4/L.732)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 9

Paragraphs 4 to 9 were adopted.

Paragraph 10

33. The CHAIRPERSON said that the following sentence should be added at the end of the paragraph: “It also acknowledged the untiring efforts and contribution of the Working Group on effects of armed conflicts on treaties under the chairpersonship of Mr. Lucius Caflisch.”

Paragraph 10, as amended, was adopted.

Section B, as amended, was adopted.

C. Text of the draft articles on the effects of armed conflicts on treaties adopted by the Commission on first reading

1. TEXT OF THE DRAFT ARTICLES

Paragraph 11

Paragraph 11 was adopted.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (A/CN.4/L.732/Add.2 and Corr.1)

Commentary to article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

34. Mr. GAJA said that the words “apply to articles” in the first sentence should be replaced with “apply also to a treaty or a part of a treaty”, which was the wording of article 25 of the 1969 Vienna Convention.

35. Mr. CAFLISCH proposed bringing the English version into line with the French version. It would then read: “should apply to treaties which were being provisionally applied”.

36. Ms. ESCARAMEIA (Rapporteur) expressed a preference for Mr. Gaja’s proposal, which was more explicit.

37. Mr. McRAE proposed deleting the last sentence of paragraph (3).

38. Mr. BROWNLIE (Special Rapporteur) said that he accepted the proposals by Mr. Gaja and Mr. McRae.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to article 1, as amended, was adopted.

Commentary to article 2 (Use of terms)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to article 2 was adopted.

Commentary to article 3 (Non-automatic termination or suspension)

Paragraph (1)

39. Mr. NOLTE proposed deleting “in practice” in the last sentence and adding “under certain circumstances” after “may”.

40. Mr. BROWNLIE (Special Rapporteur) said that he agreed to the deletion of “in practice” but not to the insertion of “under certain circumstances”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

41. Mr. GAJA proposed replacing the phrase “which the Special Rapporteur had used in his initial proposal, on the basis of articles 2 and 5” with the following phrase: “which was frequently used in this context as in articles 2 and 5”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to article 3, as amended, was adopted.

Commentary to article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

42. Mr. McRAE proposed deleting the words “in the chapeau” in the first sentence of paragraph 2.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The meeting rose at 1 p.m.

2994th MEETING

Wednesday, 6 August 2008, at 3.05 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER V. Effects of armed conflicts on treaties (*concluded*) (A/CN.4/L.732 and Add.1–2 and Add.2/Corr.1)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter V, of the draft report (A/CN.4/L.732/Add.2 and Corr.1).

C. Text of the draft articles on effects of armed conflicts on treaties adopted by the Commission on first reading (*concluded*)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*concluded*)

Commentary to draft article 5 (Operation of treaties on the basis of implication from their subject matter)

Paragraph (1)

2. Mr. GAJA observed that it was not the Commission’s practice to include so much background information in the commentary. He therefore proposed that the first sentence only should be retained in the commentary and that the remaining text in the paragraph should be placed in a footnote.

3. Mr. BROWNLIE (Special Rapporteur) said that, while he endorsed the general thrust of Mr. Gaja’s proposal, it was nonetheless important to retain the second sentence in the commentary, in view of the reference it contained to article 7.

4. The CHAIRPERSON said he would take it that Mr. Gaja’s proposal, as amended by the Special Rapporteur, was acceptable to the Commission.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

5. Ms. JACOBSSON drew attention to the first sentence and questioned the appropriateness of the word “carefully” in the phrase “the object of carefully articulated

comment by the United States”. It seemed to reflect a value judgement and she was not sure whether it was the Commission’s practice to make such judgements. If that was not the case, she proposed that the word “carefully” should be deleted.

6. Mr. BROWNLIE (Special Rapporteur) said that the phrase in question was an objective comment made by him in his capacity as Special Rapporteur, and he saw no reason to change it.

Paragraph (5) was adopted.

Paragraph (6)

7. Mr. NOLTE drew attention to the phrase in the third sentence which read “only the subject matter of particular provisions of the treaty may invoke the necessary implication of continuance” and proposed that the word “their” should be inserted before “continuance” to make it clear that “continuance” referred to particular provisions and not to the treaty. Furthermore, in order to emphasize that the sentence was referring to the phrase “in whole or in part” in article 5, which had been discussed at some length by the Commission, he proposed that a new sentence should be added immediately afterwards, which would read: “This consideration is reflected in the words ‘in whole or in part’.”

8. Mr. BROWNLIE (Special Rapporteur) expressed support for Mr. Nolte’s first proposal. He pointed out that the word “invoke” should be replaced by “carry”, as indicated in the corrigendum (A/CN.4/L.732/Add.2/Corr.1). However, he was not in favour of the second proposal: an additional sentence seemed superfluous. The point had already been made in the third sentence; moreover, the phrase “in whole or in part” already appeared in the second sentence.

9. The CHAIRPERSON said he would take it that the Committee wished to adopt the paragraph with the amendments to the third sentence proposed by Mr. Nolte and the Special Rapporteur.

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

Paragraph (10) was adopted with a minor editorial amendment.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

10. Mr. NOLTE proposed that the first sentence should be aligned with paragraph (b) of the indicative list of categories of treaty to read: “The doctrine ranging over several generations recognizes that treaties declaring, creating, or regulating a permanent regime or status or related permanent rights, are not suspended in case of an armed conflict.”

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

11. Mr. BROWNLIE (Special Rapporteur) drew attention to the footnote citing Guggenheim and said that the words “2nd edition” should be inserted before the word “Genève”. He drew attention also to the correct name of the last of the writers listed in the paragraph, which was given in the corrigendum (A/CN.4/L.732/Add.2/Corr.1).

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (19)

Paragraphs (17) to (19) were adopted.

Paragraph (20)

12. Mr. BROWNLIE (Special Rapporteur) drew attention to the last sentence and proposed that the words “special category attached to such regime” should be replaced by the phrase “special status attached to these types of regime”.

Paragraph (20), as amended, was adopted.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were adopted.

Paragraph (23)

13. Mr. NOLTE said that the argument put forward in the second sentence could apply to almost any treaty. He suggested that it might be strengthened if the phrase “dislodge the mutually beneficial status quo” was replaced by the phrase “impair the rights and interests of private individuals”.

14. Mr. BROWNLIE (Special Rapporteur) said that much of the case law on the subject highlighted the importance of reciprocity, a well-known motivation in international relations. He had no strong objection to Mr. Nolte’s proposal but considered that it would detract from the arguments put forward in the paragraph.

15. Mr. NOLTE said that he recognized the important role played by reciprocity; nevertheless, he believed that the second sentence ought to be either reworded along the lines he had proposed or else deleted.

16. Mr. BROWNLIE (Special Rapporteur) said that he would prefer its deletion.

It was so decided.

Paragraph (23), as amended, was adopted.

Paragraph (24)

17. Mr. CAFLISCH said that the title of the Swiss authority mentioned in the first sentence should be correctly rendered “the Swiss Federal Department of Justice and Police”.

Paragraph (24), as amended, was adopted.

Paragraphs (25) to (27)

Paragraphs (25) to (27) were adopted.

Paragraph (28)

Paragraph (28) was adopted with a minor editorial amendment.

Paragraphs (29) to (32)

Paragraphs (29) to (32) were adopted.

Paragraph (33)

18. Mr. NOLTE expressed concern about a statement which seemed completely out of place in the penultimate sentence, namely that “the appropriate criterion was the intention of the parties”. If there was no compelling reason to retain it, he proposed that it should be deleted.

19. Mr. BROWNLIE (Special Rapporteur) observed that the text of the commentary had already existed for some considerable time and questioned why it should now be changed.

20. Ms. ESCARAMEIA (Rapporteur) said that she shared Mr. Nolte’s concern. Such a statement had not been made in the commentary relating to other categories of treaties, and it would seem that in the case of human rights treaties—the most likely category to remain in force in a situation of armed conflict—a criterion was being established which had not existed previously. As currently worded, the sentence would cause confusion and should therefore be deleted.

21. Mr. SABOIA said that he, too, shared Mr. Nolte’s concern and endorsed the arguments put forward by Ms. Escarameia.

22. Mr. BROWNLIE (Special Rapporteur) proposed that the words “intention of the parties” should be replaced by “subject matter of the treaty”. That would be in line with the terminology used in other contexts when members of the Commission had rejected the idea of the object and purpose of the treaty as the appropriate criterion.

23. Mr. McRAE said that the appropriate criteria had already been established in draft article 4 and consisted of the subject matter of the treaty. He therefore proposed that the penultimate sentence should be amended to read: “At the end of the day, the appropriate criteria were those set out in article 4.”

Paragraph (33), as amended by Mr. McRae, was adopted.

Paragraphs (34) to (43)

Paragraphs (34) to (43) were adopted.

Paragraph (44)

24. Mr. BROWNLIE (Special Rapporteur) said that he was not satisfied with the paragraph as it stood and that it should be redrafted. He would welcome suggestions to that end. The point he sought to convey was that the

indicative list of treaties should be neither too restrictive nor too extensive, and that there were some categories that only just qualified for inclusion.

25. Mr. CAFLISCH proposed the more neutral wording: “There is, therefore, a case for including the present category in the indicative list.”

Paragraph (44), as amended, was adopted.

Paragraph (45)

26. Mr. NOLTE proposed that the phrase “achievable in its area” in the penultimate sentence should be amended to read “achievable in this area”, and that a footnote referring to the draft articles on the law of transboundary aquifers should be added.

Paragraph (45), as amended, was adopted.

Paragraphs (46) to (48)

Paragraphs (46) to (48) were adopted.

Paragraph (49)

27. Mr. BROWNLIE (Special Rapporteur) drew attention to the correction to the paragraph contained in document A/CN.4/L.732/Add.2/Corr.1.

Paragraph (49), was adopted.

Paragraphs (50) to (53)

Paragraphs (50) to (53) were adopted.

Paragraph (54)

28. Mr. NOLTE said that he found the whole paragraph problematical, since he disagreed with the sweeping statement that the decisions of municipal courts must be regarded as a problematical source. In some countries, municipal courts did depend on explicit guidance from the executive, but he did not believe that this was true in most continental European States. Municipal courts sometimes relied on policy elements not directly related to the principles of international law in areas other than the effects of conflicts on multipartite law-making treaties. Moreover, he found it somewhat contradictory that the Special Rapporteur should go on to say that a decision of a national court had supported one of those principles. He therefore proposed the deletion of the paragraph, which was unnecessary in that it concerned the more general question of the Commission’s evaluation of the position of national courts with respect to international law.

29. Mr. BROWNLIE (Special Rapporteur) remarked that he was not being asked simply to delete a sentence, but to excise a whole area in which he had done an enormous amount of research based on the plentiful material supplied to him by the Secretariat. That paragraph summarized his findings, which were set out in greater detail in his second report.³⁰⁹ In the English language, “problematical” did not mean wholly negative, but simply that something presented a problem. At the end of the day,

³⁰⁹ Yearbook ... 2006, vol. II (Part One), document A/CN.4/570.

English municipal law had been applied in the *Pinochet* case, but that did not mean that the *Pinochet* case should be ignored. In fact, the number of cases in which the reasoning of a municipal court's judgement was based directly on the relevant international law was very limited. The Scottish court's decision in *Masinimport v. Scottish Mechanical Light Industries Ltd.* happened to be one of them. He had consulted an extensive range of literature, including Rank³¹⁰ and Verzijl,³¹¹ which were major sources. The deletion of paragraph (54) would mean that a significant element of his own work had been vetoed by one member of the Commission.

30. Mr. CAFLISCH said that paragraph (54) must stand, but suggested that it could be recast to read: "The decisions of municipal courts may be regarded as a problematical source. In the first place, such courts often depend upon the explicit guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the municipal jurisprudence is not inimical to the principle of survival. The general principle was supported in the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976)."

31. Mr. KOLODKIN said that, even granting that the Special Rapporteur's analysis of a large number of cases heard by municipal courts had formed a significant part of his work, he was still puzzled by the fact that a whole paragraph had been devoted to an assessment of national court decisions in the section of the commentary dealing with multilateral law-making treaties, rather than in the part dealing with international treaties concerning private rights, where decisions by national courts were likewise of great importance. Like Mr. Nolte, he wondered why a general assessment of national court practice was being made in that context, given that there were a number of other topics on the Commission's programme of work which drew heavily on the practice of national courts.

32. Mr. BROWNLIE (Special Rapporteur) said that the decisions of municipal courts were of substantial importance in the area in question and that was why he had included paragraph (54) in the commentary. It was unprecedented that a Special Rapporteur should be invited to disregard a source of law. Most of the commentaries had been taken verbatim from his first report.³¹² When that report had been considered, one member had taken issue with a statement in the report concerning the unreliability of municipal cases in that area. In response to that criticism, he had sifted through the wealth of material provided by the Secretariat on municipal court decisions which related in particular to the issue of multilateral law-making treaties.³¹³ The decision by the Scottish Court of Session—in other words, by the supreme civil court of

Scotland—was highly relevant, and the suggestion that the paragraph should be deleted was therefore extremely inappropriate.

33. Mr. CAFLISCH said that the whole section on multilateral law-making treaties was set out in a very logical manner. It started with doctrine, then went on to consider the attitude of Governments and ended with the decisions of courts. The position of the paragraph in the report could therefore be defended.

34. Mr. NOLTE said that he was not suggesting that the Special Rapporteur should delete all reference to national courts. His objection concerned the sweeping statement regarding the manner in which national courts' decisions should be interpreted. He could support the wording proposed by Mr. Caflisch if the paragraph began with the phrase "In this particular context".

35. Mr. KOLODKIN said that while he was still uneasy with Mr. Caflisch's proposal insofar as it contained an evaluation of national court practice, he would not hinder consensus on the paragraph.

36. Mr. BROWNLIE (Special Rapporteur) said that he agreed with the wording proposed by Mr. Caflisch, as supplemented with the phrase proposed by Mr. Nolte.

Paragraph (54), as amended, was adopted.

Paragraph (55)

Paragraph (55) was adopted.

Paragraph (56)

37. Mr. GAJA said that the term "validity" in the third line was incorrect since the validity of a treaty in full depended on whether there was a defect in the process of concluding that treaty. "[O]peration" would be more apt.

Paragraph (56), as amended, was adopted.

Paragraph (57)

38. Mr. GAJA said that the decision of the Italian Court of Cassation had concerned the 1923 Geneva Protocol on Arbitration Clauses, which, the Court had held, had not been terminated in spite of the Italian declaration of war on France. He suggested that the fifth sentence should be amended to reflect that.

Paragraph (57), as amended, was adopted.

Paragraphs (58) to (66)

Paragraphs (58) to (66) were adopted.

The commentary to draft article 5, as amended, was adopted.

Commentary to draft article 6 (Conclusion of treaties during armed conflict)

The commentary to draft article 6 was adopted.

³¹⁰ R. Rank, "Modern war and validity of treaties: a comparative study", *Cornell Law Quarterly*, vol. 38 (1952–1953).

³¹¹ J.H.W. Verzijl (ed.), *International Law in Historical Perspective*, Leiden, Sijthof, 1973.

³¹² *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

³¹³ "The effect of armed conflict on treaties: an examination of practice and doctrine", document A/CN.4/550 and Corr.1–2 (mimeographed; available on the Commission's website, documents of the fifty-seventh session).

Commentary to draft article 7 (Express provisions on the operation of treaties)

Paragraph (1)

39. Mr. GAJA said that the last sentence, which concerned the making of lawful agreements, was in fact related to the previous article and should therefore be deleted.

40. Mr. BROWNLIE (Special Rapporteur) agreed with Mr. Gaja.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Notification of termination, withdrawal or suspension)

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Obligations imposed by international law independently of a treaty)

The commentary to draft article 9 was adopted.

Commentary to draft article 10 (Separability of treaty provisions)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

41. Mr. NOLTE said that the commentary should contain a reference to draft article 5, because the question of whether the whole treaty was suspended was also dealt with in that article. He therefore suggested the insertion before the last sentence of a new sentence that read: "Article 5 therefore recognizes that the subject matter of a treaty may involve the implication that it continues in operation only in part during armed conflict." If that sentence was not included, the reader might gain the mistaken impression that draft articles 5 and 10 were unrelated.

42. Mr. BROWNLIE (Special Rapporteur) said that he would be happy to include Mr. Nolte's proposal. In fact, all the draft articles interacted, so draft article 5 was naturally related to draft article 10. The text was a single instrument consisting of a composite draft of a set of articles.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Loss of the right to terminate, withdraw from or suspend the operation of a treaty)

The commentary to draft article 11 was adopted.

Commentary to draft article 12 (Resumption of suspended treaties).

The commentary to draft article 12 was adopted.

Commentary to draft article 13 [10] (Effect of the exercise of the right to individual or collective self-defence on a treaty)

Paragraph (1)

43. Mr. NOLTE observed that the final sentence stated that draft article 13 was a modified version of article 7 of the resolution of the Institute of International Law, which was reproduced in the footnote to this paragraph.³¹⁴ The only difference was that the reference in the Institute's article 7 to the determination by the Security Council that a State was an aggressor had deliberately been dropped in the Commission's draft article 13. The decision to do so had been taken after intense discussion. However, the final sentence of paragraph (1) might be construed as reopening that debate.

44. Mr. BROWNLIE (Special Rapporteur) said that it would not be desirable to reopen the debate. He accordingly proposed that the sentence, together with the footnote, should be deleted.

45. Mr. CAFLISCH said that the Commission had relied heavily on article 7 as the main source for draft article 13, and it was only appropriate to pay proper tribute to the Institute's work. Perhaps paragraph (1) might say that the draft article had been inspired by article 7.

46. Mr. VALENCIA-OSPINA pointed out that the first sentence of paragraph (1) specified that draft article 13 was the first of three draft articles based on the relevant resolution of the Institute, and that statement ought to address the concern raised by Mr. Caflisch. On the other hand, the Commission had made a significant change to the Institute's text, and he saw no reason to keep silent about it. Anyone comparing the two would see the discrepancy and wonder why it was not explained.

47. Mr. McRAE said that the text of draft article 13 should be described as an adaptation of article 7; that would indicate that the Commission had changed it significantly.

48. Mr. BROWNLIE (Special Rapporteur) said that the problem was merely one of semantics; there seemed to be agreement on the substance. Perhaps the final sentence could be deleted and the footnote placed at the end of the preceding sentence; the text of the footnote could be reworded to indicate that draft article 13 was a new version of article 7, and the final phrase—"subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor"—could be deleted.

49. Mr. NOLTE said it was true that the work done by the Institute ought to be acknowledged; however, saying that one text was a version of the other implied strong similarities between the two which did not exist. He would prefer to delete the final sentence and to retain the footnote, which would then apply to the preceding sentence, as currently drafted.

50. Mr. CANDIOTI endorsed that proposal; the Commission should neither ignore article 7 of the Institute's text nor delete the footnote. The final sentence, however, could be deleted.

³¹⁴ Institute of International Law, *Yearbook*, vol. 61, part II (session of Helsinki 1985), Paris, Pedone, 1986, pp. 278–282.

51. After the suggestion of additional drafting changes by Mr. WAKO and Ms. ESCARAMEIA (Rapporteur), Mr. VALENCIA-OSPINA proposed that the words “In particular” should be inserted at the beginning of the footnote and that the text of the amended footnote should be placed after the first sentence of paragraph (1). In addition, the final sentence of the paragraph should be deleted.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to draft article 13, as amended, was adopted.

Commentary to draft article 14 (Decisions of the Security Council)

The commentary to draft article 14 was adopted.

Commentary to draft article 15 (Prohibition of benefit to an aggressor State)

The commentary to draft article 15 was adopted.

Commentary to draft article 16 (Rights and duties arising from the laws of neutrality)

The commentary to draft article 16 was adopted.

Commentary to draft article 17 (Other cases of termination, withdrawal or suspension)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. GAJA proposed that a new sentence be added to the paragraph. The new sentence would read: “It intends to avoid the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension.” The word “other” referred back to the title of the draft article and the text of paragraph (1) of the commentary.

Paragraph (2), as amended, was adopted.

The commentary to draft article 17, as amended, was adopted.

Commentary to draft article 18 (Revival of treaty relations subsequent to an armed conflict)

The commentary to draft article 18 was adopted.

Section C of chapter V, as amended, was adopted.

Chapter V of the draft report as a whole, as amended, was adopted.

53. The CHAIRPERSON paid a tribute to the Special Rapporteur, Mr. Brownlie, who had done commendable work on the topic.

CHAPTER VIII. *Expulsion of aliens* (A/CN.4/L.735 and Add.1)

54. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.735, which contained most of chapter VIII of the draft report, and document A/CN.4/L.735/Add.1, which contained paragraph 5 *bis* of that chapter.

A. Introduction (A/CN.4/L.735)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.735 and Add.1)

Paragraph 5

Paragraph 5 was adopted.

Paragraph 5 *bis*

Paragraph 5 bis was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPOURTEUR OF HIS FOURTH REPORT

Paragraphs 6 to 17

Paragraphs 6 to 17 were adopted.

2. SUMMARY OF THE DEBATE

Paragraphs 18 to 23

Paragraphs 18 to 23 were adopted.

Paragraphs 24 to 28

Paragraphs 24 to 28 were adopted.

Paragraph 29

55. Ms. ESCARAMEIA (Rapporteur) said that since the paragraph dealt mainly with questions of denationalization, it should be transposed to section 2 (c), entitled “Loss of nationality, denationalization and expulsion”.

It was so decided.

Paragraph 29 was adopted.

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

Paragraph 35

56. Ms. ESCARAMEIA (Rapporteur) drew attention to the second sentence and proposed that the phrase “non-democratic regimes or in” should be inserted after the words “most often in”. She further proposed that the words “in any circumstance” should be added at the end of the final sentence.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 38

Paragraphs 36 to 38 were adopted.

Paragraph 39

57. Mr. GAJA proposed that the word “sentence” in the first sentence should be replaced by the words “partial award” and that the word “sentence” in the second sentence should be replaced by “award”.

58. Mr. BROWNLIE endorsed that amendment.

59. Mr. CAFLISCH said that the word used in the French text, “*sentence*”, should remain unchanged.

60. Ms. ESCARAMEIA (Rapporteur) drew attention to the second sentence and said that the word “Claims” should be inserted before the word “Commission” in order to avoid any confusion with the International Law Commission. In the same sentence, the word “individual” should be inserted between “various” and “cases”.

Paragraph 39, as amended, was adopted.

C. Concluding remarks of the Special Rapporteur (A/CN.4/L.735)

Paragraphs 40 to 45

Paragraphs 40 to 45 were adopted.

Paragraph 46

61. Mr. GAJA drew attention to the final sentence and suggested that, as in paragraph 39, the word “Claims” should be inserted before the word “Commission”.

62. Mr. VALENCIA-OSPINA proposed that the word “sentence” in the first sentence should be replaced by “partial award”.

Paragraph 46, as amended, was adopted.

Chapter VIII of the draft report as a whole, as amended, was adopted.

The meeting rose at 5.35 p.m.

2995th MEETING

Thursday, 7 August 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escrameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER IX. *Protection of persons in the event of disasters* (A/CN.4/L.736)

1. The CHAIRPERSON invited the members of the Commission to adopt chapter IX of the Commission's draft report on the work of its sixtieth session.

A. Introduction

B. Consideration of the topic at the present session

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Paragraph 12

2. Mr. GAJA proposed deleting the word “uniquely” in the first sentence of the paragraph.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

3. Mr. GAJA said that the beginning of the third sentence of the paragraph was phrased somewhat awkwardly. He proposed deleting the words “solidly grounded in positive law”.

4. Ms. ESCARAMEIA (Rapporteur) proposed amending the beginning of the third sentence to read: “Such an approach, solidly grounded in positive law, would draw upon, in particular, international humanitarian law”. The rest of the sentence would remain unchanged.

Paragraph 14, as amended by Ms. Escrameia, was adopted.

Paragraph 15

5. Mr. NOLTE said that the wording of the last sentence of the paragraph implied that the view it reported was incompatible with the view reported in the preceding sentence, which was not the case. He therefore proposed replacing “Some other members” at the beginning of the sentence with “Some members”.

It was so decided.

6. Mr. PERERA said that the discussion that had taken place in the General Assembly had focused on the principle of subsidiarity, mentioned in the penultimate sentence of the paragraph, with States emphasizing the paramount role of the affected State. He therefore proposed adding at the end of the sentence the words “which should not be taken unilaterally”.

It was so decided.

Paragraph 15, as amended, was adopted.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

7. Mr. PERERA said that he had emphasized in his statement the key role of affected States and the complementary role of other actors. He therefore proposed inserting the following sentence before the last sentence of paragraph 18: "Some members emphasized the necessity to underline the primary role of the affected State as a general principle and the contributory and subsidiary role of other actors as part of an overarching umbrella of international cooperation and solidarity."

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

8. Mr. NOLTE said that the first sentence reflected a view that he had expressed. He proposed deleting the word "full" before "effects as a natural disaster".

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 27

Paragraphs 22 to 27 were adopted.

Paragraph 28

9. Mr. NOLTE said that there was no reason why the principles of sovereignty and territorial integrity should apply only to the coordination of emergency humanitarian assistance. He therefore proposed amending the third sentence to read: "Moreover, sovereignty and territorial integrity were guiding principles."

Paragraph 28, as amended, was adopted.

Paragraph 29

10. Mr. NOLTE said that paragraph 29 reflected the doubts expressed by certain members regarding a right to humanitarian assistance. Some considered that there was no such right and others, including himself, considered that a right existed provided that it was not imposed by force. The two separate opinions were not clearly discernible in paragraph 29. He therefore proposed splitting the paragraph in two. Paragraph 29 and paragraph 29 *bis* would then read:

"29. In relation specifically to the right to humanitarian assistance, some members doubted its existence and urged the Special Rapporteur to proceed on the assumption that there was no such right. Such a right would be in conflict..." [the remainder of the paragraph would remain unchanged]

"29 *bis*. Some other members, while expressing the view that a right to humanitarian assistance should be recognized as being implicit in certain human rights as well as in international human rights and

international humanitarian law in general, nevertheless maintained that such a right could not be seen as implying a right to impose assistance on a State that did not want it."

11. Furthermore, paragraph 30 would begin with the words "Some members noted". The rest of the paragraph would remain unchanged.

It was so decided.

Paragraph 29, as amended, and paragraph 29 bis were adopted.

Paragraph 30

12. Mr. GAJA proposed, for logical reasons, splitting paragraph 30 into two paragraphs. New paragraph 30 would consist of the last two sentences of current paragraph 30, with the words "it being perceived as" being replaced with "considering", the word "construe" with "envisage" and the word "interpretation" with "approach". The beginning of current paragraph 30 would become paragraph 30 *bis*, with the words "to humanitarian assistance" being inserted after the word "right" in the first sentence. Again for logical reasons, current paragraph 33 should be inserted immediately after paragraph 30 *bis*.

It was so decided.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

13. Ms. ARSANJANI (Secretary of the Commission) drew attention to a typographical error in the paragraph. "Chapters VI and VIII of the Charter" should read "Chapters VI and VII of the Charter of the United Nations".

14. Mr. PETRIČ proposed adding the words "to protect" after "responsibility" in the last sentence of the paragraph.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

15. Mr. PERERA said that as one of the "other members" referred to at the beginning of the third sentence, he would like the position of those members to be reflected in greater detail. He therefore proposed inserting the following phrase after the words "a political and a moral concept": "the legal parameters of which were yet to be developed".

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

16. Ms. JACOBSSON proposed replacing the words “it was not necessary to” with “it was important not to”. She further proposed making the reference to the work done by the Red Cross and the Red Crescent more explicit by inserting “in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted”³¹⁵ before “by the International Conference of the Red Cross and Red Crescent” and by adding a footnote concerning the guidelines in question at the end of the sentence.

17. The CHAIRPERSON said he took it that the members of the Commission approved those proposals and suggested, in order to respond more rationally to Ms. Jacobsson’s second concern, that the footnote to paragraph 38 should refer the reader to paragraph 11 and the footnote on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.

Paragraph 38, as amended, was adopted.

Paragraph 39

18. Mr. NOLTE proposed inserting the words “in detail” after “avoid reproducing such rules” in order to clarify the last sentence.

Paragraph 39, as amended, was adopted.

Paragraphs 40 to 49

Paragraphs 40 to 49 were adopted.

Section A and, as amended, Section B were adopted.

The whole of chapter IX of the Commission’s draft report, as amended, was adopted.

CHAPTER XI. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.738 and Add.1)

19. The CHAIRPERSON invited the members of the Commission to adopt chapter XI of the Commission’s draft report.

A. Introduction (A/CN.4/L.738)

B. Consideration of the topic at the present session

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Sections A and B.1 contained in document A/CN.4/L.738 were adopted.

³¹⁵ Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008, p. 8. Available at: www.ifrc.org/ (see footnote 183 above).

2. SUMMARY OF THE DEBATE (A/CN.4/L.738/Add.1)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

20. Mr. GAJA proposed replacing “Members abstained from commenting” with “Some members said that they abstained from commenting” in order to reflect more accurately what had actually occurred.

21. Ms. JACOBSSON proposed adding the following sentence: “Some other members indicated their wish to comment on the report next year.”

Paragraph 2, as amended, was adopted.

Paragraph 3

22. Mr. GAJA proposed replacing “needed to be further motivated” in the last sentence with “needed to be further elaborated”.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

23. Mr. GAJA proposed inserting the words “to prosecute” after “obligation” in the second and third sentences. He further proposed inserting the words “that had been rejected” after “a request for extradition” in the second sentence and replacing “the obligation” with “that obligation” in the third sentence.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

24. Mr. GALICKI (Special Rapporteur) proposed adding the following sentence at the end of the paragraph: “The Special Rapporteur agreed with a suggestion, supported by some members, that a working group could be established next year in order to ascertain the effective scope to which the obligation should be extended and to provide answers to the fundamental issues that arise from the topic.”

25. Following a discussion, in which Mr. CANDIOTI, Mr. NOLTE, Mr. McRAE, Mr. GAJA, Mr. WISNUMURTI, the CHAIRPERSON and Ms. ESCARAMEIA took part, and in which some members claimed that the establishment of the working group had been decided upon at the current session, while others asserted that its establishment had been deferred until the following session, the Special Rapporteur’s initial proposal was rejected in favour of a new paragraph 3 *bis*, which would read: “The Commission, at its 2988th meeting on 31 July 2008, decided to establish a working group on the topic under the chairpersonship of Mr. Alain Pellet.”

26. Mr. GALICKI (Special Rapporteur) reaffirmed his support for the establishment of a working group either at the current session or at the following session. However, he considered that any decision on its mandate should be deferred, since it could only be determined after he presented his report to the following session.

27. Mr. GAJA proposed amending paragraph 3 *bis* to read: “The Commission, at its 2988th meeting on 31 July 2008, decided that a working group on the topic would be established at the next session under the chairpersonship of Mr. Alain Pellet.”

28. Mr. BROWNLIE expressed support for Mr. Gaja’s proposal, given that the membership and mandate of the working group would be decided upon at the following session.

Paragraph 3 bis, as amended, was adopted.

Section B.2, as amended, was adopted.

The whole of chapter XI of the Commission’s draft report, as amended, was adopted.

CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.737 and Add.1)

29. The CHAIRPERSON invited the members of the Commission to adopt chapter X of the Commission’s draft report.

A. Introduction (A/CN.4/L.737)

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.737 and Add.1)

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS PRELIMINARY REPORT

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

30. Mr. McRAE proposed amending the first sentence to read: “According to the Special Rapporteur, the very title of the topic gave guidance to determining its boundaries.”

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

31. Mr. GAJA proposed deleting the phrase “the concepts of immunity and criminal jurisdiction, while interrelated, should be clearly distinguished” in the first sentence and amalgamating the first two sentences.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

32. Mr. KOLODKIN (Special Rapporteur) said that the word “concept” in the first sentence should be replaced with “notion”, since he had not used the word “concept” during the debate.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

33. Mr. KOLODKIN (Special Rapporteur) said that the words “general concept” in the third sentence should be replaced with “notion”.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

2. SUMMARY OF THE DEBATE (A/CN.4/L.737/Add.1)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

34. Ms. JACOBSSON said that the first sentence, as currently worded, implied that the Special Rapporteur had almost been surprised to learn that the right to immunity was also of customary origin. That impression could be avoided by replacing “and not simply on international comity” with “and that this source of law was distinct from international comity”.

35. Mr. KOLODKIN (Special Rapporteur) said that he was unable to accept the proposal. The fact that international customary law was distinct from international comity was a truism. Although the text as it stood was also a truism, it better reflected the substance of the debate and should therefore be maintained.

36. Mr. NOLTE said that the problem did not stem from the idea underlying Ms. Jacobsson’s proposal but from the unduly general form in which it was expressed. To emphasize that the source of the rules governing immunity lay not only in international comity, and that the latter did not carry the same weight as rules of customary international law, the word “simply” in the first sentence could be replaced with “merely”.

37. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission endorsed Mr. Nolte’s proposal.

It was so decided.

38. Mr. WAKO proposed adding the following sentence at the end of the paragraph: “In the view of some members, there was also room for progressive development of international law in this field.”

39. Mr. NOLTE said that, while he supported the proposal, he was unsure whether the progressive development of international law should be mentioned in the section of the chapter dealing with sources.

40. Mr. PETRIČ said that he fully supported Mr. Wako’s proposal. He thought that the question of progressive development should be addressed at the very beginning of the chapter.

41. Mr. SABOIA noted that the distinction between codification and progressive development was not so clear-cut. When rules were stated more explicitly, codification came close to progressive development. As both raised the question of sources of law, they should be dealt with in that section of the chapter.

42. Ms. ESCARAMEIA (Rapporteur) expressed support for Mr. Wako’s proposal and its inclusion in the “Sources” section of the chapter. She also concurred with the point made by Mr. Saboia. As consideration of the sources of law was a prerequisite for codification, it was appropriate to mention the question of progressive development at the outset, in the “Sources” section of the report.

43. Mr. HASSOUNA expressed support for Mr. Wako’s proposal and agreed that progressive development should be mentioned at the very beginning of chapter X. He thought that it should be inserted after the second sentence, which referred to codification.

44. Mr. NOLTE, quoting Mr. Brownlie, said that if one wished to engage in progressive development, one must know from where to jump. In the interests of clarity, a clear distinction must be made between the question of sources of law and that of the rule to be stated. The sentence proposed by Mr. Wako should therefore be included in the “General comments” section.

45. Mr. PERERA expressed support for Mr. Nolte’s proposal.

46. Mr. KOLODKIN (Special Rapporteur) said that the sentence proposed by Mr. Wako should be inserted at the end of paragraph 4 so as not to disrupt the sequence of thought.

47. Mr. GAJA proposed deleting the “Sources” heading to meet Mr. Nolte’s concerns.

48. Mr. McRAE said that he saw no reason why the sentence proposed by Mr. Wako should not be inserted at the end of the paragraph. He also had no objection to Mr. Gaja’s proposal to delete the “Sources” heading.

49. Ms. ESCARAMEIA (Rapporteur) said that she would prefer the structure of the report to be maintained since it was user-friendly. Progressive development was related to the question of sources of law and was therefore correctly placed in the paragraph under “Sources”.

If the members of the Commission had no objection, she thought that the sentence proposed by Mr. Wako should be inserted at the end of the paragraph in the interests of readability.

50. Mr. FOMBA said that he fully agreed with Ms. Escameia. It was unnecessary to place undue emphasis on the distinction between sources of law and codification. Mr. Wako’s proposed sentence was not at all out of place in the “Sources” section.

51. Mr. NOLTE said that he was prepared to join the consensus.

52. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to adopt Mr. Wako’s proposal. He suggested that the Special Rapporteur and Mr. Wako should confer on the precise wording.

It was so decided.

Paragraph 4 was adopted on that understanding.

The meeting rose at 1 p.m.

2996th MEETING

Thursday, 7 August 2008, at 3.00 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/L.737 and Add.1)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.737 and Add.1)

2. SUMMARY OF THE DEBATE (*concluded*) (A/CN.4/L.737/Add.1)

Paragraph 4 (*concluded*)

1. The CHAIRPERSON suggested that in the light of consultations between Mr. Kolodkin and Mr. Wako, a new sentence should be added to the end of paragraph 4.

2. Mr. KOLODKIN (Special Rapporteur) proposed that the new sentence should read: “In the view of some members, there was also room for progressive development of international law in this field.”

Paragraph 4, as amended, was adopted.

Paragraph 5

3. Mr. WAKO said that the word “rallied” in the second sentence gave the impression that the Special Rapporteur was under siege. He therefore proposed that the word “rallied” should be replaced by a more neutral term, such as “supported” or “agreed with”.

4. On another matter, he noted that the report as currently drafted did not reflect what had been discussed in the debate on the question of the adoption by national courts of the principle of universal jurisdiction, a question that deserved to be given greater prominence. The reference to that issue in a single sentence at the end of the paragraph came across as almost an afterthought.

5. He therefore suggested that the last sentence should be incorporated into a new paragraph that would read:

“Some members suggested that the Commission should consider the implications on immunity of the principle of universal jurisdiction in the light of the developments in the international systems and, in particular, the setting up of ad hoc international criminal tribunals and the establishment of the permanent International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction had led to misunderstandings, escalation of State tensions, accusations of double standards and given rise to perceptions of abuse on political or other grounds.”

6. In addition, a footnote containing the recent decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction adopted by the Assembly of Heads of State and Government of the African Union at its eleventh ordinary session, held in Sharm El-Sheikh, Egypt, from 30 June to 1 July 2008³¹⁶ should be placed at the end of the new paragraph. That decision would have an impact on the implementation of the principle of universal jurisdiction and ought to be taken into account when the topic was considered at future sessions of the Commission.

7. Mr. PETRIČ said that the reference to the international courts cited by Mr. Wako in his proposed text was not really relevant to the principle of universal jurisdiction, as those courts dealt with cases in which international jurisdiction had been established as a form of *lex specialis*.

8. Ms. ESCARAMEIA (Rapporteur) said that she was inclined to agree with Mr. Wako that greater prominence should be given in the report to the question of universal jurisdiction, and she had no problem with his suggestion to add a new paragraph. However, she did have a problem with the fact that, in the debate, members who had spoken about the principle of universal jurisdiction had linked it not only to the development of international criminal courts but also to the development of the principle in national courts. She therefore suggested that Mr. Wako’s proposal should be reformulated to indicate clearly the two positions that had been expressed by members.

9. Mr. OJO supported Mr. Wako’s proposal and suggested that Mr. Wako and Ms. Escameia should consult with a view to formulating a joint proposal.

10. Mr. VALENCIA-OSPINA said that he was perturbed by the fact that at the previous meeting the Special Rapporteur had changed the word “concept” to “notion” in some, although not all, instances. For the sake of consistency, he suggested that the title “Basic concepts” should be reworded to read “Basic notions”.

11. Mr. KOLODKIN (Special Rapporteur) said that he had proposed changing the word “concept” to “notion” in those cases where the Commission was considering the definition of a term. As he understood it, when a precise definition was sought, the word “notion” ought to be used, whereas when a broader term was intended, the word “concept” should be used. Unless others disagreed, he would prefer to retain the current wording.

12. Mr. NOLTE said that he shared Mr. Kolodkin’s understanding, surmising that the Special Rapporteur had probably wished to draw a distinction, well known in continental law, between the term “notion”, which had a normative connotation, and the term “concept”, which was used for analytical purposes at a higher level of abstraction. He wondered whether that conformed to the usual understanding of the terms in English.

13. Mr. BROWNLIE said that the term “notion” conveyed a certain element of provisionality and pragmatism, and was sometimes used to refer to an idea that one held but might or might not eventually adopt. He was not sure whether that was the distinction Mr. Kolodkin was trying to establish. The term “concept” was more definitive in nature. In his opinion, the term “basic notions” was somewhat awkward, since notions tended not to be basic. Unless there was a compelling reason for doing so, using the word “notion” instead of “concept” would create confusion.

14. Mr. KOLODKIN (Special Rapporteur) said that he was in favour of retaining the words “basic concepts”.

15. Mr. WAKO said that, on the basis of consultations with Ms. Escameia, he wished to propose a revised version of the text he had suggested earlier. The last sentence of paragraph 5 should be deleted and a new paragraph should be inserted, which would read:

“Some members suggested that the Commission consider the implications on immunity of the principle of universal jurisdiction taking into account the developments in national legislation and national case law and in the light of the developments in the international system, in particular the establishment of the International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction has led to misunderstandings, escalation of State tensions, accusations of double standards and given rise to perceptions of abuse on political or other grounds.”

He further proposed that the new paragraph should be accompanied by a footnote reading: “See, for

³¹⁶ Assembly of the African Union, eleventh ordinary session (see footnote 276 above).

example, the decision of the Assembly of Heads of State and Government of the African Union on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec.199(XI) of 1 July 2008).”

16. Mr. BROWNLIE said that, in the first line, “on immunity” should be revised to read “for immunity”. In addition, the reference to double standards and abuse on political grounds at the end of the paragraph seemed tautological, since the idea of double standards was covered by the notion of abuse on political or other grounds.

17. Mr. PERERA asked if the words “State tensions” meant inter-State tensions.

18. Mr. NOLTE said that double standards in the context of universal jurisdiction meant the prosecution of certain people but not of others who equally deserved to be brought before a court. That was not political abuse but a violation of the principle of equality, whereas political abuse meant carrying out an action without having the right to do so.

19. Mr. WAKO agreed that the term “State tensions” should be corrected to “inter-State tensions”. He could also see the logic of Mr. Nolte’s argument, and he noted that it was Mr. Brownlie and Mr. Vasciannie who had referred to double standards during the debate.

20. Mr. BROWNLIE said that double standards constituted an abuse on political grounds, as when the leaders of one country were dealt with in a particular way while the leaders of another country were given different treatment for the same offence. In fact, it might be more effective to end the sentence at the words “double standards”.

21. Mr. WAKO said that, having heard all the arguments, he would prefer to delete the reference to “double standards”.

22. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to insert the text proposed by Mr. Wako as a new paragraph after paragraph 5.

It was so decided.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 9

Paragraphs 6 to 9 were adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

23. Mr. GAJA drew attention to the penultimate sentence and proposed that the phrase “for instance, because they may be considered on a special mission” should be placed at the end of it, after a comma, in order to reflect views he had expressed during the debate.

24. Mr. NOLTE objected, saying that as he understood it, the “other senior officials” referred to in that sentence were the minister of defence and the minister for international trade. What was at issue was the fact that they were outside the “so-called ‘troika’”, and not the fact that they had been assigned a special mission. It might therefore be somewhat misleading to modify the sentence in the manner suggested by Mr. Gaja.

25. Mr. GAJA said that the last part of the paragraph reflected the views of members expressed during the discussion, including a proposal by some members not to add any other officials, such as ministers of defence or deputy ministers, to the list of those who enjoyed immunity *ratione personae* but who might nevertheless be considered to enjoy it in specific circumstances. It was at that point in the debate that he had tried to explain that one such circumstance was considering those other officials as being on special mission when abroad, and according them personal immunity solely for the purposes of their mission. Whether such immunity would be accorded on the basis of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, as had been suggested by the ICJ, or on the basis of general international law, remained to be seen. The point was simply that it was not necessary to consider such officials as generally enjoying personal immunity and including them in the same category as the “troika”. That was precisely the point he wished to have reflected in the report.

26. Mr. KOLODKIN (Special Rapporteur) said that the sentence which Mr. Gaja was proposing to amend was the one that reflected Mr. Nolte’s intervention on that issue and concerned only immunity *ratione personae*. Subject to Mr. Gaja’s agreement, he suggested that the penultimate sentence should be retained as it currently stood and that Mr. Gaja should formulate an additional sentence that reflected his intervention on that issue during the debate.

27. Mr. BROWNLIE said that the word “contention” in the second sentence was somewhat dismissive and should be replaced by “finding”. It was undignified to use such dismissive language in describing the work of other tribunals, especially those with which the Commission wished to maintain normal relations. He further suggested that the phrase “find grounds on” in the same sentence should be replaced by “have a firm basis in”.

28. The CHAIRPERSON endorsed Mr. Brownlie’s suggestion.

29. Mr. NOLTE said that, as he recalled the debate, most members had supported the view that the troika enjoyed immunity *ratione personae*. He therefore suggested that the word “Some” in the first sentence should be replaced by the word “Most”.

30. Ms. JACOBSSON said that, in principle, she had nothing against that amendment if it was consistent with Commission practice. However, she wondered what criteria had traditionally been used in the Commission to determine when to use the phrase “some members” as opposed to “most members”.

31. Mr. KOLODKIN (Special Rapporteur) said that, judging from the debate in the Commission on that question, he had had the same impression as Mr. Nolte. That impression was reflected in his concluding remarks, which had been summarized in paragraph 28.

32. Mr. PERERA suggested that a new sentence should be added after the end of the second sentence that would read: "Others, however, pointed to the pre-eminent role of the Minister for Foreign Affairs in the conduct of international relations and also his representative character as justification for the treatment of the Minister for Foreign Affairs on the same footing as a Head of State for purposes of according immunity."

33. Ms. ESCARAMEIA (Rapporteur) said that if detailed viewpoints were going to be included in the report, she would like for her position to be reflected as well. During the debate, she had argued that the Minister for Foreign Affairs did not have any representative character. Her primary inclination, though, was to leave the paragraph as it currently stood.

34. Mr. PERERA said that his suggestion was intended to ensure balance in the report, based on the fact that members, himself included, had discussed at some length the position and role of the Minister for Foreign Affairs, who was part of the so-called troika. In all fairness, that was an important point that must be reflected in the report. Moreover, the issue had also been discussed at considerable length in the majority judgment of the ICJ in the *Arrest Warrant* case and in the joint separate opinion relating to that case, as noted in paragraph 12.

35. Mr. NOLTE endorsed Mr. Perera's suggestion and pointed out that Ms. Escarameia's position was reflected in the second sentence. If she wished for it to be emphasized further, then perhaps she could propose an addition to the paragraph.

36. Ms. ESCARAMEIA (Rapporteur) said that she did not feel that her position had been reflected in the second sentence, which contained only a mild argument against the enjoyment of immunity by Ministers for Foreign Affairs. With the incorporation of Mr. Brownlie's amendment to the effect that such immunity "did not have firm basis in customary law", the sentence even gave the impression that there might be some justification for such immunity in customary law, albeit not a sufficiently strong one. That was definitely not what she thought. What was more, she could find no reference in the report to the dissenting opinion mentioned by Mr. Perera. If Mr. Perera wished to include his proposal, then it should also be stated that some members felt that the Minister for Foreign Affairs did not have a representative character and thus should not enjoy immunity *ratione personae*. That could be accomplished with the simple addition of one sentence.

37. Mr. SABOIA said that he supported Mr. Perera's viewpoint. He recalled that members had emphasized the special nature of the role of Ministers for Foreign Affairs as one of the three categories of officials who had the capacity to commit their States internationally without the need for special powers, as opposed to other officials who

had to be granted plenipotentiary powers in order to take such action as signing a convention, for example.

38. Mr. SINGH endorsed Mr. Perera's proposal. If Ms. Escarameia wished to elaborate her views further in an additional sentence, that sentence should be added to the end of the second sentence, followed by Mr. Perera's proposed additional sentence.

39. Mr. PETRIČ supported the additional sentence proposed by Mr. Perera because it reflected the Commission's actual discussion. He agreed with Mr. Singh that there was no reason not to add a sentence that would reflect Ms. Escarameia's position. At the risk of reopening the discussion, he wished to emphasize that the representative character of the Minister for Foreign Affairs was quite different than the representative character of the Head of State.

40. Ms. ESCARAMEIA (Rapporteur) proposed that the phrase "as was explained in the dissenting opinions in the case" should be inserted at the end of the second sentence.

41. Mr. GAJA proposed that a sentence should be added before the last sentence of the paragraph. The new sentence would read "According to one view, certain State officials enjoy immunity *ratione personae* when exercising official functions abroad because they would have to be considered as being on a special mission."

Paragraph 12, as amended by Mr. Brownlie, Ms. Escarameia and Mr. Gaja, was adopted.

Paragraph 13

42. Mr. BROWNLIE proposed that the phrase "which was often covered under multilateral and bilateral agreements" should be amended to read "which was often the subject of multilateral and bilateral agreements".

43. Mr. GAJA expressed support for Mr. Brownlie's proposal. He proposed that the words "devote more careful analysis" should be replaced by "also analyse", since the question of immunity of military personnel deployed abroad in times of peace had not been analysed at all. He further proposed the deletion of the text placed between brackets: problems arising from the obligations of third States should be dealt with more fully at a later stage.

Paragraph 13, as amended by Mr. Brownlie and Mr. Gaja, was adopted.

Paragraph 14

44. Mr. HMOUD proposed the deletion of the word "finally" from the last sentence.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

45. Ms. JACOBSSON said that the paragraph reflected only two different views held by members on the judgment in the *Arrest Warrant* case, yet there was a third, more neutral view that she herself held and had expressed during the debate, which she wished to be recorded. She therefore proposed that a sentence should be added to the end of the paragraph that would read: “Other members considered that the contents and the implications of the judgment merit further consideration by the Commission.”

46. Mr. BROWNLIE drew attention to the phrase in the penultimate sentence which read “and that the Commission should not hesitate to depart from that precedent, if necessary as a matter of progressive development” and said that it was possible to depart from the precedent without following the course of progressive development. He would prefer the two elements to be presented as alternatives and therefore proposed that the phrase should be reworded to read “either to depart from that precedent or to pursue the matter as one of progressive development”.

Paragraph 17, as amended, was adopted.

Paragraph 18

47. Mr. NOLTE drew attention to the first sentence and proposed that the adjective “possible” should be inserted before the phrase “exceptions to immunity” in order to align it with the title of the subsection and to make it clear that such exceptions should not be assumed to exist. He further proposed that the phrase “these exceptions” in the second sentence should read “such exceptions” and that the words “this exception” in the fourth sentence should be amended to read “such an exception”.

48. Ms. ESCARAMEIA (Rapporteur) said that the first sentence reflected her position and possibly that of other members as well. She therefore proposed that the beginning of the sentence should be redrafted to make that quite clear. Furthermore, she would prefer that the adjective “possible” should be retained, since she had indeed been referring to possible exceptions to immunity.

49. Mr. BROWNLIE noted that the words “possible explanations to” should correctly read “possible explanations of”.

50. Mr. NOLTE proposed that, in order to meet Ms. Escameia’s concern and to avoid any confusion, the article “the” before the words “possible exceptions to immunity” should be deleted.

51. Mr. KOLODKIN (Special Rapporteur) endorsed Mr. Nolte’s proposal and proposed that the paragraph should begin with the words “Some members mentioned”.

52. Mr. CANDIOTI questioned the appropriateness of the words “were mentioned” in the light of the amendment proposed by the Special Rapporteur.

53. The CHAIRPERSON said he would take it that the Commission was in favour of the general thrust of the amendments proposed, and suggested that the Secretary

of the Commission should find a suitable formulation to take them all into account.

Paragraph 18 was adopted on that understanding.

Paragraph 19

54. Mr. GAJA said that, logically, paragraph 19 followed on from paragraph 20. He therefore proposed that the order of the two paragraphs should be inverted.

55. Ms. JACOBSSON endorsed Mr. Gaja’s proposal. Furthermore, since the problem of maritime intrusion had also been raised during the debate, she proposed that the phrase “aerial intrusion” should be amended to read “aerial and maritime intrusion”.

Paragraph 19, as amended, was adopted.

Paragraph 20

56. Mr. NOLTE said that the debate on possible exceptions to immunity had been one of the most extensive and interesting of the current session, but it had not been accurately reflected in a balanced fashion in the chapter of the report under consideration. The views of those who were in favour of a further or broader exception to immunity had been diligently and empathetically reflected, yet the views of those who had been somewhat sceptical had been described in a very summary fashion. He therefore proposed that paragraph 20 should be replaced by the following text:

“Some other members maintained, on the contrary, that there were good reasons for the Commission to hesitate before recognizing possible new exceptions to immunity. In their opinion, the *Arrest Warrant* judgment reflected the current state of international law. In their opinion, developments after this judgment in international and national jurisprudence, as well as in national legislation, confirmed this state of affairs rather than called it into question. It could therefore not be said that the *Arrest Warrant* judgment went against a general trend. The absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary. The *Prosecutor v. Tihomir Blaškić* judgement of the International Criminal Tribunal for the Former Yugoslavia was therefore not pertinent. In the opinion of those members, important legal principles, as well as policy reasons, spoke in favour of maintaining the state of international law, as it is expressed, for example, in the *Arrest Warrant* judgment. According to them, the principles of sovereign equality and of stability of international relations were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules on the use of force. Those members maintained that, while the Commission should, as always, consider the possibility of making proposals *de lege ferenda*, it should do so on the basis of a careful and full analysis of the

lex lata and of the policy reasons which underpin this *lex lata*. It was only on this basis that a balancing of interests between the principles of immunity and the fight against impunity could be fruitfully undertaken. In the opinion of those members, the *jus cogens* character of certain international crimes did not necessarily affect the principle of immunity of State officials before national criminal jurisdictions.”

57. Mr. GAJA expressed concern about the phrase in the first sentence of the text proposed by Mr. Nolte, “before recognizing possible new exceptions to immunity”, which implied that some exceptions had already been identified. He proposed that the phrase should be replaced by the words “before restricting immunity”.

58. Ms. ESCARAMEIA (Rapporteur) said that she shared Mr. Gaja’s concern and found his proposal acceptable, although another solution would be simply to delete the word “new”.

59. Mr. NOLTE said that he had qualified exceptions with the adjective “new” in order to distinguish them from “old” exceptions such as the *acta jure gestionis*. Nevertheless, he could agree to Mr. Gaja’s proposal.

60. Mr. McRAE said that since paragraphs 19 and 20 were to be inverted, the phrase “on the contrary” in the first sentence of paragraph 20 no longer seemed necessary and should be deleted. He also proposed the deletion of the fourth sentence of Mr. Nolte’s text, which seemed to be a repetition of the third sentence.

61. Mr. NOLTE said that even if paragraphs 19 and 20 were inverted, they still reflected different positions; thus the words “on the contrary” should be retained. As to the fourth sentence, while both Mr. Pellet and Mr. Dugard had clearly stated that the *Arrest Warrant* case went against the general trend, he had responded forcefully that it did not do so, arguing that another trend might exist or that the judgment reflected a trend that had been misinterpreted. In his view, then, the sentence was not superfluous. How the Commission evaluated developments subsequent to the judgment was crucial to the debate on the topic, and he believed that the Special Rapporteur had also made that point in his concluding remarks.

62. Ms. ESCARAMEIA (Rapporteur) proposed that the second and third sentences of the text proposed by Mr. Nolte should be merged by deleting the phrase “In their opinion” from the beginning of the third sentence and replacing it with the word “and”. She agreed with Mr. McRae that there was some repetition in the third and fourth sentences, although she also understood Mr. Nolte’s concern.

63. Nevertheless, she took issue with Mr. Nolte’s statement that the judgement in the *Prosecutor v. Blaškić* case was not pertinent. The preceding sentence stated that “[t]he absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary”. While it was true that the fact that a person enjoyed immunity before an international court did not automatically mean that he or she was entitled to immunity before national

courts, the *Prosecutor v. Blaškić* judgement, which had been mentioned in passing but had not been quoted in full, indicated that immunity should not apply before either national or international courts for certain crimes. The *Prosecutor v. Blaškić* judgement therefore said the opposite of what had been stated in the previous sentence and was thus pertinent. Accordingly, she therefore suggested that the quotation from paragraph 41 of the Appeals Chamber’s judgement of 18 July 1997 in *Prosecutor v. Blaškić*, which she had read out in the plenary debate, should be included in full in chapter X of the Commission’s report.

64. Mr. NOLTE said that the position of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case was covered adequately in paragraph 17. Moreover, he disagreed with Ms. Escameia as to the pertinence of the judgement in that case. That judgement had concerned immunity in a case entailing cooperation between national courts and an international court. The position regarding a person’s immunity before a national court might therefore differ depending on whether an international court was involved. If one held that in the *Prosecutor v. Blaškić* case the Tribunal had made a general statement about the international law of immunity in situations where international courts were not concerned, that statement would have been an *obiter dictum* and thus would not constitute a very strong argument in the context at hand. He therefore deduced from the judgement in the *Prosecutor v. Blaškić* case that the lack of immunity before international courts had no bearing on immunity before national courts.

65. Mr. GAJA said that the phrase “on the contrary” would make sense only if paragraph 19 was moved to the end of the section.

66. Mr. WAKO said that the phrase “on the contrary” would not be needed if paragraph 19 was moved to the end of the section. He supported Mr. Nolte’s proposal for a modified paragraph 20, subject to the minor amendments already agreed. The sentence “In their opinion, the *Arrest Warrant* judgment reflected the current state of international law” should be retained in any event. The report itself did tilt in favour of one point of view expressed in the Commission, and the amended text would restore a balance by reflecting that there were two possible interpretations of the judgement in the *Prosecutor v. Blaškić* case.

67. The quotation mentioned by Ms. Escameia could be placed in a footnote, as she had proposed. However, that did not mean that no reference should be made to those two interpretations in paragraph 20, because opinions were divided on the question whether the removal of immunity at the international level before the International Tribunal for the Former Yugoslavia had an impact on immunity before national courts.

68. Ms. ESCARAMEIA (Rapporteur) suggested that, as the paragraph proposed by Mr. Nolte was rather long, it would be better to split it in two, with the second paragraph starting with the words “Those members maintained that ...” and the word “Those” amended to read “These”.

69. Mr. NOLTE, supported by Mr. BROWNLIE, said that it appeared that a consensus had been reached on the amended version of the replacement for paragraph 20.

Paragraph 20, as amended, was adopted.

The order of paragraphs 19 and 20 was inverted.

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS (A/CN.4/L.737/Add.1)

Paragraphs 21 to 24

Paragraphs 21 to 24 were adopted.

Paragraph 25

70. Mr. KOLODKIN (Special Rapporteur) said that the end of the paragraph should read "he intended to consider the issue of international criminal jurisdiction when dealing with possible exceptions to immunity".

Paragraph 25, as amended, was adopted.

Paragraphs 26 and 27

Paragraphs 26 and 27 were adopted.

Paragraph 28

71. Mr. KOLODKIN (Special Rapporteur) said that the phrase "the so-called 'troika'", which appeared in brackets, should be deleted.

Paragraph 28, as amended, was adopted.

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

Paragraph 31

72. Mr. KOLODKIN (Special Rapporteur) said that the phrase "in the territory of a foreign State" at the end of the second sentence should read "in the territory of a State exercising jurisdiction".

Paragraph 31, as amended, was adopted.

Paragraph 32

73. Mr. NOLTE said that the word "totally" should be deleted before the word "correct".

74. Mr. BROWNLIE suggested that the phrase in question should read "was both a correct and also a landmark decision".

Paragraph 32, as amended, was adopted.

Section B, as amended, was adopted.

Chapter X of the draft report of the Commission as a whole, as amended, was adopted.

CHAPTER I. Introduction (A/CN.4/L.728)

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Officers and the Enlarged Bureau

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

C. Drafting Committee

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. Working Groups

Paragraph 8

75. Mr. VALENCIA-OSPINA recalled that the Commission had decided to include in chapter XI, on the obligation to extradite or prosecute (*aut dedere aut judicare*), a short reference to the establishment at the current session of a working group whose membership and mandate would be determined at the sixty-first session. Paragraph 8 of chapter I, which listed the Commission's working groups, should reflect that fact.

76. Mr. GAJA pointed out that, according to the sentence that had been included in chapter XI, the working group was to be established at the next session and thus did not yet exist.

77. Mr. VALENCIA-OSPINA said that certain decisions taken at the current session would become operational at the next. Since the decision had actually been adopted at the current session, that fact should be reflected in paragraph 8, even though the working group would be convened only at the next session.

78. The CHAIRPERSON recalled that the working group had been established on 31 July 2008 by a decision taken in plenary. It was true, however, that the group's mandate and membership were to be determined at the sixty-first session.

79. Mr. GALICKI said that in chapter I, working groups were listed together with their membership. The inclusion of the title of the newly established working group by itself without listing of its membership would look strange.

80. Ms. ARSANJANI (Secretary to the Commission) said that open-ended working groups, which by definition had no members, had in the past been listed in the relevant chapter of the Commission's report. There was also justification, however, for not including a reference to the new working group in chapter I, and instead leaving the reference in the substantive chapter alone.

81. Mr. BROWNLIE said that the decision taken had been to establish the working group at the next session, and its membership and mandate had not yet been determined. It would therefore be premature to list it in that part of the report.

82. Mr. VALENCIA-OSPINA, supported by Ms. ESCARAMEIA, pointed out that chapter I did not specify a mandate for any of the working groups listed and, as the Secretary had noted, open-ended working groups which had no membership had in the past been included in such lists.

83. The CHAIRPERSON suggested that, in view of the lack of consensus, the Commission should proceed to vote on whether to include a reference to the new working group in paragraph 8.

It was so decided.

The Chairperson's suggestion was adopted by 11 votes to 6, with 4 abstentions.

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

E. Secretariat

Paragraph 10

Paragraph 10 was adopted.

F. Agenda

Paragraph 11

Paragraph 11 was adopted.

Chapter I of the report as a whole, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixtieth session (A/CN.4/L.729)

84. Mr. GAJA said that, insofar as the form and content of the draft report as a whole were concerned, the Rapporteur was to be commended for her efforts in streamlining the material, introducing clarity and following the same pattern for all topics. With specific reference to chapter II, however, he suggested that the information with regard to each topic should be presented in chronological order to make it easier to follow.

Paragraph 1

85. In response to a question by Mr. SABOIA, the CHAIRPERSON said that a portion of the text had been bracketed pending the adoption of a decision by the Commission; now that a decision had been taken, the brackets could be removed. In response to a comment by Mr. GAJA, he said that the text would be aligned with the relevant text in chapter IV.

With those clarifications, paragraph 1 was adopted.

Paragraphs 2 to 14

Paragraphs 2 to 14 were adopted.

Chapter II of the report, as a whole, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.730)

A. Reservations to treaties

Paragraphs 1 and 2

86. Ms. ESCARAMEIA (Rapporteur) thanked Mr. Gaja for his general comments on the draft report and said that a particular effort to achieve clarity had been made in the drafting of chapter III. As Mr. Candioti had often pointed out in the past, States should be given clear explanations as to why the Commission wished to receive certain information from them.

87. She wished to announce a number of revisions to paragraphs 1 and 2, on reservations to treaties that had been agreed with the Special Rapporteur for that topic. In paragraph 1, the words "and the different opinions of members of the Commission" should be inserted between "to interpretative declarations" and "the Commission would be", and the words "taking into account their concrete practice" should be appended after the words "the questions below". In paragraph 2, the words "Taking into account that next year's report will deal, *inter alia*, with consequences of interpretative declarations" should be inserted at the beginning of the question.

Paragraphs 1 and 2, as orally revised, were adopted.

Paragraph 3

88. Mr. NOLTE suggested that a sentence be added requesting States to supply examples from their practice in their answers to the questions. As currently worded, the questions invited somewhat abstract answers. The phrase "Specific examples would be very welcome", taken from paragraph 1 (b), might serve that purpose, and he suggested that the phrase should be inserted at the end of paragraph 3.

89. Ms. ESCARAMEIA (Rapporteur) strongly endorsed that proposal.

90. Mr. HASSOUNA endorsed the proposal but suggested the replacement of the words "very welcome" by "appreciated".

Paragraph 3, as amended by Mr. Nolte and Mr. Hassouna, was adopted.

B. Responsibility of international organizations

Paragraph 4

91. Ms. ESCARAMEIA (Rapporteur) proposed that each of the two sentences comprising the paragraph should constitute a separate paragraph.

It was so decided.

Paragraph 4, as orally revised, was adopted.

C. Protection of persons in the event of disasters

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

92. Mr. GAJA said that he had no objection to the contents but thought the paragraph seemed out of place, since it did not ask for views or information on issues of specific interest to the Commission.

93. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the paragraph referred to his intention to solicit replies from the United Nations and IFRC to the following question, which he proposed should be included in paragraph 6: “How has the United Nations system institutionalized roles and responsibilities at the global and country levels with regard to assistance to affected populations and States in the event of disasters, in the disaster response phase but also in the pre- and post-disaster phases, and how does it relate in each of these phases with actors such as States, other international organizations, the Red Cross Movement, NGOs, specialized national response teams, national disaster management authorities and other relevant actors?”.

94. The question had been drafted in response to the comments by members of the Commission concerning the need for clear information as to how the main non-State actors went about providing assistance in the event of disaster. He had consulted with OCHA and IFRC, and both had expressed readiness to provide answers to that question.

95. Following a procedural discussion in which Mr. GAJA, Mr. NOLTE and Ms. ESCARAMEIA (Rapporteur) took part, Mr. McRAE proposed that the text read out by the Special Rapporteur should be substituted for the current text of paragraph 6.

Paragraph 6, as amended, was adopted.

Chapter III as a whole, as amended, was adopted.

The meeting rose at 5.55 p.m.

2997th MEETING

Friday, 8 August 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Filling of casual vacancies in the Commission (A/CN.4/602 and Add.1)

1. The CHAIRPERSON announced that the Commission was required to fill the seat left vacant by the resignation of Mr. Ian Brownlie. The candidate's curriculum vitae

had been communicated to the members. The election would take place, as was customary, in a private meeting.

The meeting was suspended at 10.15 a.m. and resumed at 10.30 a.m.

2. The CHAIRPERSON announced that the Commission had elected Sir Michael Wood to fill the seat vacated by Mr. Brownlie.

3. Mr. YAMADA, while welcoming the designation of a successor to Mr. Brownlie, expressed disagreement with the election procedure. Unlike elections of Bureau members, special rapporteurs or chairs of working groups, which were held in secret and in private as strictly internal matters and the results of which were announced at a public meeting without disclosure of the details of the votes cast, the election of members of the Commission, which was not an internal matter, was held at a public meeting of the General Assembly. As eligible candidates were nominated by Member States, in accordance with article 3 of the Statute of the Commission, details of the votes cast were disclosed in accordance with the principles of fairness and transparency. In the case of casual vacancies, the Commission was mandated by its Statute to fill the vacancy itself. In doing so, it had a duty to demonstrate the same transparency, but at previous elections casual vacancies had sometimes been filled by acclamation or by recognizing a candidate nominated by a member, or else the result of the vote had not been announced at a public meeting. Although he bore his share of responsibility in some of those cases, he hoped that the Commission would reconsider its practice in future elections.

4. Ms. ESCARAMEIA expressed strong support for Mr. Yamada's statement. She wished to place on record that she had not taken part in the election because she had serious doubts about the legality of the procedure followed. She hoped that in future the Commission would apply rule 140 of the rules of procedure of the General Assembly in such circumstances.

Draft report of the Commission on the work of its sixtieth session (concluded)

CHAPTER XII. Other decisions and conclusions of the Commission (A/CN.4/741)

A. Programme, procedures and working methods of the Commission and its documentation

5. The CHAIRPERSON invited the members of the Commission to adopt paragraphs 1 to 3 (which had already been adopted (2988th meeting, paras. 16–30) in the form of the report of the Planning Group (A/CN.4/L.742)).

Paragraphs 1 to 3 were adopted.

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

6. Mr. BROWNLIE said that it was customary to refer to “the Chatham House rules” rather than “the Chatham House rule”.

Paragraph 5, as amended, was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

7. Ms. ESCARAMEIA (Rapporteur) proposed inserting the phrase “to which all members of the Commission were invited” after the reference to the Munich colloquy in the footnote.

Paragraph 8, as amended, was adopted.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

8. Mr. VALENCIA-OSPINA proposed replacing “the idea that” in the last sentence with “the recognition that”.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

9. Mr. BROWNLIE, supported by Mr. NOLTE, said that it would be preferable, in order to avoid confusion, to delete the words “either as binding instruments in themselves or” in the fifth sentence.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

10. Mr. HASSOUNA deplored the fact that Mr. Vasciannie’s document on the rule of law had not yet been translated into Arabic. He requested the Secretariat to provide the Arabic-speaking members of the Commission with the translation as soon as it became available, so that they could make any necessary corrections before the document was submitted to the General Assembly.

Paragraphs 15 to 20

Paragraphs 15 to 20 were adopted.

Paragraphs 21 and 22

11. The CHAIRPERSON noted that the Commission as a whole had not yet adopted the two decisions mentioned in paragraphs 21 and 22, which had only been adopted by the Planning Group. If he heard no objection, he would take it that the members wished to confirm the decisions in question.

It was so decided.

Paragraphs 21 and 22 were adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

12. Mr. GAJA proposed inserting the words “who attended the meeting” after “members” at the beginning of the footnote and deleting from the following list the names of the members who had not attended.

Paragraph 24, as amended, was adopted.

Paragraphs 25 to 27

Paragraphs 25 to 27 were adopted.

Paragraph 28

13. Mr. GAJA proposed replacing “all” in the last sentence of the footnote with “any of”.

Paragraph 28, as amended, was adopted.

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

B. Date and place of the sixty-first session of the Commission

Paragraph 31

Paragraph 31 was adopted.

C. Cooperation with other bodies

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

14. Ms. ESCARAMEIA (Rapporteur) proposed deleting the comma after “by” in the first sentence and the words “addressed the Commission” after “Mr. Antonio Fidel Pérez”.

Paragraph 34, as amended, was adopted.

Paragraph 35

15. Ms. ESCARAMEIA (Rapporteur) proposed adding “(CAHDI)” after the name of the second committee and replacing “Chairperson of the Committee” with “Chair of CAHDI”.

Paragraph 35, as amended, was adopted.

Paragraph 36

16. The CHAIRPERSON, speaking as a member of the Commission, expressed regret that there had been no time for an exchange of views on such an important subject as cooperation with AALCO.

17. Mr. CANDIOTI said that the same problem had occurred, *inter alia*, during the visit by the President of the International Court of Justice. He proposed as a remedial measure that in future representatives of bodies with which the Commission cooperated should take the floor at the beginning of the meeting concerned instead of one hour before it rose.

18. Mr. SABOIA said that “31 August 2008” should be replaced by “31 July 2008” in paragraph 36.

Paragraph 36, as amended, was adopted.

Paragraph 37

19. Mr. VALENCIA-OSPINA said that “President of the Court” should be replaced with “President of the Tribunal”.

Paragraph 37, as amended, was adopted.

Paragraph 38

20. Ms. ESCARAMEIA (Rapporteur) said that, although it was customary to refer readers to the summary records, such a referral was unhelpful in the case of the meeting on cooperation with ICRC. One might at least mention the topics covered by the exchange of views, such as the responsibility of international organizations and the definition of an armed conflict.

21. Mr. CANDIOTI said that the same applied to the Commission’s exchanges of views with representatives of all the other bodies with which it cooperated, especially since the summary records in question would not be published until the Greek calends.

22. Mr. BROWNLIE expressed support for Ms. Escarameia’s proposal. The meeting with the ICRC representatives had been very useful and he felt that the substance at least should be reported.

23. Mr. NOLTE concurred with the views just expressed. He proposed that the records of the meetings should be posted on the Commission’s website after any necessary corrections had been made.

24. Ms. ESCARAMEIA proposed that the written statements made by representatives of bodies with which the Commission cooperated should also be published on the Commission’s website unless they were of a confidential nature.

Paragraph 38, as amended, was adopted.

Paragraph 39

25. Mr. McRAE proposed replacing “optimize on” in the first sentence with “ensure” and “of enhancing” with “for enhancing”.

26. Ms. ESCARAMEIA (Rapporteur) proposed amending the end of the paragraph to read: “paying particular attention to the relationship between the work of the Commission and of the body concerned”.

Paragraph 39, as amended, was adopted.

D. Representation at the sixty-third session of the General Assembly

Paragraph 40

Paragraph 40 was adopted.

27. The CHAIRPERSON proposed inserting the following article 40 *bis*: “At its 2997th meeting, on 8 August 2008, the Commission requested Mr. Giorgio Gaja, Special Rapporteur on the topic of ‘Responsibility of international organizations’, to attend the sixty-third session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.”

Paragraph 40 bis was adopted.

E. International Law Seminar

Paragraphs 41 to 43

Paragraphs 41 to 43 were adopted.

Paragraph 44

28. Ms. JACOBSSON said that the title of the lecture she had given was not “The protection of historic wrecks” but “The legal regime of historic wrecks and of maritime graves”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 54

Paragraphs 45 to 54 were adopted.

Chapter XII as a whole, as amended, was adopted.

29. Mr. CANDIOTI, reverting to section C (Cooperation with other bodies) and referring to the oral invitation issued by the President of the International Tribunal for the Law of the Sea, Mr. Wolfrum, to the Commission, asked the Chairperson whether he intended to visit the Tribunal himself or whether he had contemplated delegating that prerogative to one or more other members of the Commission.

30. The CHAIRPERSON said that it was a controversial matter that should be discussed in the Commission. When he had mentioned the possibility in the Bureau, some members had been in favour of such a visit and others against. Personally, he thought that the Commission would do well to enhance its profile *vis-à-vis* other bodies, especially the International Tribunal for the Law of the Sea. As he was unable to visit the Tribunal himself, he had put forward the names of other members of the Commission, but his proposal had not secured a consensus.

31. Mr. KOLODKIN and Ms. ESCARAMEIA said that they had both supported the idea as members of the Bureau.

32. Mr. GAJA said that he was not the only Bureau member to harbour doubts about the matter. In his view, it was more important to have contacts with bodies entrusted, like the Commission, with the codification and progressive development of international law, which was certainly not the case for the International Tribunal for the Law of the Sea. Moreover, as the Commission had not received a formal invitation from the Tribunal, he requested the Chairperson, as the Bureau had provisionally agreed, to refrain from taking a decision for the time being and to ask the Planning Group to look into the matter at the Commission’s next session.

33. Mr. CANDIOTI, while acknowledging that the International Tribunal for the Law of the Sea had not yet issued a formal invitation to the Commission, drew attention to the need to decide how the Commission would respond if it did receive an invitation in order to avoid embarrassing the Tribunal.

34. Mr. GALICKI said that, as a member of the Bureau, he had also supported the idea of strengthening relations with the Tribunal. Mr. Candioti had made a relevant point. It would be a mistake to reject out of hand the idea of cooperating with judicial bodies whose work might prove to be of importance for the Commission.

35. Mr. NOLTE said that, while he shared Mr. Gaja's view, he felt that if a formal invitation was issued to the Commission, it would be impolite to turn it down or not to reply. The Commission should therefore decide how it would respond in such an event.

36. The CHAIRPERSON said that Mr. Wolfrum had issued his invitation to visit the headquarters of the Tribunal in Hamburg (Germany) during his address to the Commission and had encouraged him to pay a visit in a subsequent private conversation. However, the Commission had not yet received a formal invitation. At all events, he was unable to travel to Hamburg himself and had therefore proposed that one or more Commission members should visit the Tribunal instead, although he had not designated anyone in particular.

37. Ms. JACOBSSON said that, in her view, it was important to discuss the response to Mr. Wolfrum's invitation in plenary since it concerned all members of the Commission. While the invitation was perhaps informal, it could not be ignored: that would be impolite and would reflect very badly on the Commission. Furthermore, there were ample reasons for exchanging views with the President of the International Tribunal on the Law of the Sea, who had raised issues at the current session which had a direct bearing on the Commission's work, such as the fragmentation of international law, diplomatic protection and shared natural resources. More generally, the Commission should not underestimate the importance of its relations with other bodies, especially the special criminal tribunals. It might also consider holding less formal discussions with the representatives of such bodies in the future. On the question of who should represent the President in Hamburg, she assured the members of the Commission that she had no personal interest in visiting the city and that her main concern was to ensure that the Tribunal was treated with the respect it deserved.

38. Mr. SABOIA expressed support for Mr. Candioti's proposal and for the views expressed by Ms. Jacobsson. He was in favour of sending a delegation to Hamburg, which would report to the Commission on its exchange of views. He recognized at the same time that Mr. Gaja's concerns were legitimate and should be considered by the Planning Group. Criteria should be established in order to forestall the proliferation of contacts with other bodies.

39. Mr. PETRIČ urged the Commission to focus on the action to be taken on the invitation issued by the President of the International Tribunal for the Law of the Sea and

to avoid engaging in a general discussion of its relations with other bodies. The points raised by Mr. Gaja certainly merited further discussion, but it would be preferable to wait until the next session. With regard to Mr. Wolfrum's informal invitation, the Chairperson of the Commission should take it that he was the person invited and should designate another Commission member to represent him and report to the Commission on his exchange of views.

40. Mr. HMOUD expressed support for Mr. Gaja's view. As a member of the Bureau, he had refrained from commenting on the invitation because it had not been issued formally. If the Chairperson received a formal invitation that he was unable to accept and designated a member of the Commission to represent him, that decision could be endorsed by the Bureau alone, since the person concerned would only represent the Chairperson. If the Commission as a whole was to be represented, a plenary decision would be necessary.

41. Mr. CANDIOTI noted that there was nothing to prevent the Commission from being represented by a member who was a national of the country in which the headquarters of the body concerned was located. Such action had already been taken on several occasions without any adverse consequences. He also wished to express support for Ms. Jacobsson's statement.

42. Mr. GAJA said that if the Chairperson was unable to take up an invitation for personal or financial reasons, it was for the first Vice-Chairperson or, alternatively, the second Vice-Chairperson or the future Chairperson of the Commission to represent him. That was the simplest way of proceeding. Moreover, there was no need to respond immediately.

43. Mr. KOLODKIN, speaking as the future Chairperson of the Commission, said that he would probably be unable to travel to Hamburg.

44. The CHAIRPERSON suggested that he should write to the President of the International Tribunal for the Law of the Sea informing him that he was unable to accept his invitation for personal reasons and requesting him to receive three members of the Commission—Ms. Jacobsson, Mr. Nolte and Mr. Niehaus—who would subsequently report to the Commission on their exchange of views.

It was so decided.

45. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to adopt the draft report.

It was so decided.

The whole of the draft report of the International Law Commission on the work of its sixtieth session, as amended, was adopted.

Chairperson's concluding remarks

46. The CHAIRPERSON said that the sixtieth session had been particularly productive. The Commission had

adopted on second reading the preamble and a set of draft articles on shared natural resources, and had adopted on first reading its draft articles on the effects of armed conflicts on treaties. It had also made substantial progress in its work on the responsibility of international organizations and on reservations to treaties. The preliminary reports on the protection of persons in the event of disasters and on the immunity of State officials from foreign criminal jurisdiction, two complex and controversial topics, constituted an excellent basis for the Commission's future work on those subjects. As a subsidiary body of the General Assembly, the Commission had a duty to engage in closer dialogue with its parent body, and the

draft instruments that it was currently elaborating were the best means of achieving that aim.

Closure of the session

47. After the traditional exchange of courtesies, during which special tribute was paid to Mr. Brownlie, the CHAIRPERSON declared the sixtieth session of the International Law Commission closed.

The meeting rose at 12.10 p.m.

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